

Domestic Restrictions on Non-Governmental Organizations and Potential Protections through Legal Personality: Time for a Change?

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Abstract

Non-governmental organizations (NGOs) play a vital role in international law and governance by influencing the formation of international law and serving as watchdogs in the execution of international agreements. However, countries around the world are increasingly wielding overly cumbersome and targeted domestic restrictions against NGOs in the form of both formal legislation and executive policy. These restrictions hinder the ability of NGOs to provide services, raise resources, and fulfill their watchdog role. As such, the restrictions threaten the effectiveness and very existence of NGOs, especially in nations where they are most needed. Evidence suggests that these ramifications are the design of such restrictions. NGOs are limited in their ability to combat such domestic regulations, partially because they do not possess legal personality in the international legal system. Legal personality is defined as the possession of rights and duties by an entity that allow it to sue and be sued. While traditionally only states possessed legal personality, international law has granted exceptions to this rule in a few areas of jurisprudence. This Comment explores the rise in domestic restrictions on NGOs, the legal status of NGOs under the current international regime, the influence of NGOs on international law, and possibilities for NGOs to combat domestic regulations through legal personality. It argues, given the rise of domestic restrictions over the past decade, that it is time for the international system to grant NGOs legal personality and allow NGOs to sue nations that restrict their rights contrary to commitments the nation has made in international agreements. While challenges to legal personality persist, this Comment argues that the United Nations (U.N.) and regional courts, such as the African Court of Human and Peoples' Rights, present potential avenues for NGOs to attain and exercise legal personality.

* The author would like to thank all those involved in creating this Comment, especially her faculty advisor, Professor Tom Ginsburg, her editors (Rebecca Ritchie, Trevor Kehrer, and Silver Lin) and the entire CJIL Board. Finally, special thanks to Bradley, Jeanette, Mark, Chelsea, and Kayla for their consistent and uplifting encouragement.

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I. INTRODUCTION

On July 15, 2019, Egypt's parliament approved a draft law outlining new restrictions on civil society organizations or non-governmental organizations (NGOs).¹ The law is an extension of the 2017 "Law 70" regulation which requires registration for NGOs engaging in "civil work" and governmental permission for various civil-society and human-rights-oriented activities.² This draft law threatens the ability of NGOs to serve as government watchdogs, foster a healthy civil society, and protect human rights.³ Similarly stringent regulations have swept across other nations, such as China and Russia, in recent years. For example, China's 2016 "Charity Law and Overseas NGO Law" grants government officials broad discretion to crack down on the activities of international NGOs engaging in civil society and humanitarian work.⁴ Intense documentation requirements accompany this discretion to chill NGO activity.⁵

Regulations in Russia have been regarded as a catalyst and model for the stringent regulations passed in many countries since these regulations went into effect. Even after liberalizing Putin's 2006 law, which gave the government discretion to shut down NGOs for even minor clerical errors in their paperwork, Russia maintains an aggressive approach to regulating NGOs. Further, the Russian government continues to demonstrate significant hostility toward civil society, "[p]articularly toward those [NGOs] perceived to be closely associated with foreign support, expertise, or influence."⁶

Uganda's flavor of NGO regulation allows a regulating body the opportunity to "blacklist" NGOs, but provides little information as to the qualifications for blacklisting an organization or the results of a "blacklist" designation.⁷ Other

¹ Law No. 149 of 2019 (The Law Governing Pursuit of Civil Work), *al-Jaridah al-Rasmīyah*, 19 Aug. 2019 (Egypt).

² Law No. 70 of 2017 (Law Regulating Associations and Other Foundations Working in the Field of Civil Work), *al-Jaridah al-Rasmīyah*, 24 May 2017 (Egypt).

³ *Civic Freedom Monitor: Egypt*, THE INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (July 17, 2019), <http://perma.cc/ARL9-PJDZ>.

⁴ Charity Law of the People's Republic of China, CHAIRMAN'S ORDER 12TH CONGRESS NO. 43, <http://perma.cc/4QDB-N6JH> (official law), <http://perma.cc/D6PF-J28N> (unofficial English translation).

⁵ *Civic Freedom Monitor: China*, THE INTERNATIONAL CENTER FOR NOT-FOR-PROFIT LAW (Mar. 6, 2019), <http://perma.cc/3EFW-VEVP>.

⁶ Gary W. Jenkins, *Nongovernmental Organizations and the Forces Against Them: Lessons of the Anti-Ngo Movement*, 37 BROOKLYN J. INT'L L. 459, 507 (2012).

⁷ Hanibal Goitom, *Uganda: Non-Governmental Organizations Bill Becomes Law*, THE LAW LIBRARY OF CONGRESS (Mar. 17, 2016), <http://perma.cc/7DAX-MDDC>.

nations, such as India, have focused their regulation on cracking down on NGOs accepting aid from foreign individuals, hamstringing the budgets of many NGOs.⁸

Domestic restrictions on NGOs are problematic from an international law perspective because NGOs play a critical role in international governance and have done so for 200 years. This role relies on the ability of NGOs to gather information and carry out the promises of international human rights treaties ratified by national governments.⁹ While pushback against international NGOs is not new,¹⁰ the wave of domestic regulations has only increased over the last two decades and does not show signs of stopping. One element of this pushback is based on concerns about NGO accountability and transparency, especially in light of recent scandals related to international NGOs such as the World Wildlife Fund.¹¹

Article 71 of the U.N. Charter serves as the legal basis for NGO activities in international law and peacemaking. Specifically, Article 71 grants the U.N. Economic and Social Council (ECOSOC) the power to assign NGOs consultative status.¹² This consultative status has elevated the role of NGOs in international policymaking, especially in the realm of soft law, such as non-binding policy declarations. However, scholars agree that NGOs have not been granted legal personality, nor the ability to sue states in international courts.¹³ This has limited the ability of NGOs to fight back against domestic restrictions on their activities. While there is a wealth of research on the historical role NGOs have played in international law,¹⁴ there is little research exploring international legal mechanisms for NGOs to protect themselves against the recent tide of domestic restrictions on activities and funding.

This Comment defines NGOs as private organizations, not established by a government or intergovernmental agreement, that are not profit-seeking and pursue interests across national borders.¹⁵ The Comment considers the reach of

⁸ Lloyd Hitoshi Mayer, *Globalization Without a Safety Net: The Challenge of Protecting Cross-Border Funding of NGOs*, 102 MINN. L. REV. 1205 (2018).

⁹ Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT'L L. 183 (1997).

¹⁰ Jenkins, *supra* note 6, at 494.

¹¹ Lulu Garcia-Navarro, *Buzzfeed News Investigation Finds World Wildlife Fund Backs Paramilitary Abuses*, NPR (Mar. 24, 2019), <http://perma.cc/YF22-HQMP>.

¹² C. Alihusain, *The Influence of NGOs on International Law*, PEACE PALACE LIBRARY (Nov. 9, 2019) (internal citations omitted) <http://perma.cc/JZ7U-9EBP>.

¹³ See Rephael Ben-Ari, *The International Legal Status of International Non-Governmental Organizations: The Century-Long Normative Debate and its Future Prospects*, 23 CARDOZO J. INT'L & COMP. L. 1, 13 (2014).

¹⁴ *Id.* at 5–31.

¹⁵ I derived this definition from multiple sources. See Alihusain, *supra* note 12, (defining NGOs as “groups of persons or of societies, freely created by private initiative, that pursue an interest in

Article 71, the benefits and disadvantages of legal personality in international courts, and the potential for NGOs to find protection from domestic restrictions through a renewed push for legal personality. Although this would be a significant shift in international law, the recent rise in restrictions and the longstanding movement for legal personality combine to create the perfect storm to support greater legal rights for NGOs. Further, technological advances and expanded international accountability mechanisms may mitigate state hesitance in the movement for legal personality.

The Comment begins with a discussion of current domestic regulations on NGOs, particularly as they conflict with binding international commitments states have made regarding civil society and human rights. The Comment then turns to the legal status of NGOs in international law, focusing on the U.N. Charter. However, the bulk of the Comment explores the potential use of legal personality to grant NGOs greater power to protect themselves from stifling regulation that hurts the enforceability and legitimacy of international law as a whole. The Comment also considers the ability of legal personality to increase accountability amongst NGOs. Finally, the Comment examines potential solutions through both the U.N. and regional instruments such as the African Court of Human and Peoples' Rights (ACHPR).

II. LANDSCAPE OF RESTRICTIONS ON NGOS

In the two years preceding 2019 alone, forty pieces of legislation “designed to hamper the work of civil society organizations” have been enacted or debated around the world.¹⁶ Similarly, from 2014 to 2018, over sixty countries passed or drafted laws that hamstringing NGO operations.¹⁷ Ninety-six countries have implemented non-legislative policies in the same vein.¹⁸ The legislation and policies that have swept across nations share common threads: cumbersome

matters that occur or transcend national borders and are not profit seeking”); Charnovitz, *Two Centuries of Participation*, *supra* note 9, at 186 (citing the *International Law Dictionary* in defining an NGO as a “private international organization that serves as a mechanism for cooperation among private national groups in international affairs”); Hermann H.K. Rechenberg, *Non-Governmental Organizations*, in 9 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 276 (1986) (defining NGOs as “private organizations not established by a government or by intergovernmental agreement which are capable of playing a role in international affairs by virtue of their activities”).

¹⁶ *Global Assault on NGOs Reaches Crisis Point as New Laws Curb Vital Human Rights Work*, AMNESTY INTERNATIONAL (Feb. 21, 2019), <http://perma.cc/EE2H-5MN6>.

¹⁷ Jacqueline Van De Velde, *The “Foreign Agent Problem”: An International Legal Solution to Domestic Restrictions on Non-Governmental Organizations*, 40 *CARDOZO L. REV.* 687, 691 (2018).

¹⁸ *Id.*

registration processes, elaborate monitoring schemes, and efforts to shut down NGOs that make even trivial errors in funding requirement compliance.¹⁹

Just as the legislation is similar across nations, so too is the rhetoric used to justify restrictions on NGO activity. Some justifications commonly used include “prevention of foreign interference within domestic politics; protecting national security; increasing accountability; and ensuring states’ sovereign right to pass such legislation.”²⁰ Further, some believe that the rise of restrictions on NGOs has targeted organizations that “defend the rights of marginalized groups,” such as NGOs focused on women’s rights, LGBT rights, immigrant rights, and environmental protection.²¹

A. Regulations in Russia

Restrictions on NGOs by the Russian government have become a model that other countries emulate.²² Since the Russian policies began in the early 2000s, other countries have drafted and passed legislation to stifle NGO activities. For example, “Azerbaijan, Mexico, Pakistan, Sudan, Uzbekistan, and Hungary [] have each created remarkably similar restraints,” and another dozen states hope to implement similar legislation in the coming months and years.²³

It is important to note that NGO restrictions have not eliminated civil society in Russia. In fact, Russia has “an active civil society with more than 220,000 noncommercial organizations and public associations.”²⁴ However, the Russian regulations grant the national government leeway in shaping the makeup of civil society within its borders for various policy reasons, including a desire to limit foreign influence in domestic affairs.

Putin’s 2006 NGO Law introduced “new registration procedures and stricter monitoring of NGO activities, financial contributions, and budgets.”²⁵ One statutory requirement for NGOs found in the 2006 law “required organizations to fill out approximately one hundred pages of documents, listing detailed personal information about each founder and each member. A single mistake or misstep in the paperwork could serve as ‘grounds for denial of registration’”²⁶ As one might imagine, such cumbersome regulations, coupled with the threat of a

¹⁹ Amnesty International, *supra* note 16.

²⁰ Van De Velde, *supra* note 17, at 706.

²¹ Amnesty International, *supra* note 16.

²² *Id.* (arguing that the Russian regulations have led created a “ripple effect”).

²³ Van De Velde, *supra* note 17, at 692.

²⁴ Jenkins, *supra* note 6, at 504.

²⁵ *Id.* at 504 (internal citation omitted).

²⁶ *Id.*

prompt shut down, disincentivizes NGOs from opening Russian offices. In 2009, President Medvedev amended the regulation and removed some of the more “draconian elements.”²⁷ For example, incomplete registrations no longer result in *automatic* denial of the NGO from Russian civil society, although the law still grants the government significant discretion in oversight of NGOs.²⁸ Because of this discretion and the remaining stringent procedural requirements for NGOs, the regulations remain powerful; in 2015, the MacArthur Foundation announced it was closing its Moscow office after twenty-five years due to the rigorous regulations that made its work impossible.²⁹ Because the foundation was “foreign-funded,” it had been formally designated as “undesirable” by the Russian government.³⁰

B. Regulations in China

In 2016, President Xi Jinping passed restrictive legislation curtailing the activities of NGOs in China. Like the Russian laws, the Chinese regulations impose strict monitoring and registration processes. First, under the regulations, NGOs may not fundraise, conduct political activities, or operate without registering with the police.³¹ Second, all foreign NGOs must secure a Chinese sponsor organization.³² Third, law enforcement has the ability to shut down NGO events, examine their offices and finances, and question their staff at any time.³³

The Chinese media justified the stringent regulations in the name of national security and protection from foreign interference within China’s borders.³⁴ When discussing the regulations, U.S. Secretary of State John Kerry noted that they create “a highly uncertain and potentially hostile environment for foreign non-profit, non-governmental organizations and their Chinese partners that will no doubt discourage activities and initiatives.”³⁵ According to the *Civic Freedom Monitor*, the regulations are part of a larger effort to promote “a civil society with Chinese characteristics” in opposition to what the Chinese government sees as

²⁷ *Id.* at 505–06 (“In the spring of 2009, after meeting with NGO leaders and hearing their complaints, President Medvedev promised to review Russia’s NGO law, stating that ‘improvements to NGO legislation were possible and also necessary.’”).

²⁸ *Id.* at 505–06.

²⁹ Hitoshi Mayer, *supra* note 8, at 1205–06.

³⁰ *Id.* at 1205.

³¹ Van De Velde, *supra* note 17, at 689.

³² *Id.*

³³ *Id.* at 689–90.

³⁴ *Id.* at 690.

³⁵ *Id.* (internal citation omitted).

Western values imposed by international NGOs.³⁶ Despite domestic and international outcry regarding the regulations, the Chinese legislature maintained that the law would actually serve to guarantee NGO rights and make their operations more efficient.³⁷

The law itself, however, is only one barrier to NGOs. Delayed and chaotic implementation of the law presents a second challenge. Although the law required NGOs to comply by January 1, 2017, the government did not release the list of acceptable sponsor organizations until December 20, 2016.³⁸ The Chinese officials were clear that, despite the extremely truncated timeline for NGOs to secure a sponsor, there would be no “grace period” for NGOs already operating in the country.³⁹ The delayed implementation of the law, coupled with its strict enforcement, led the American Bar Association (ABA), to shut down its Beijing Office.⁴⁰ The organization operated legal training programs and sought to promote the rule of law in China.⁴¹

C. Regulations in African Nations

While this Comment will not examine in detail the variety of NGO regulations passed in African countries, African countries play an important role in understanding the landscape of domestic restrictions on NGO activities for two key reasons. First, regulations on NGOs have swept across much of Africa. At the same time, NGOs play a prominent role in international lawmaking and enforcement in Africa. Over the last fifteen years, twelve African countries have adopted legislation or policies that constrain NGOs.⁴² These countries consist of: Sudan, Rwanda, Ethiopia, Zambia, Tunisia, Algeria, South Sudan, Uganda, Sierra Leone, Egypt, Burundi, and Tanzania.⁴³ Further, six additional countries had anti-NGO measures pending as of May 2019.⁴⁴ Six other countries have considered regulations, but the legislation was either defeated or abandoned in the legislature, or even rejected by the courts.⁴⁵ Just as many believe nations have learned from

³⁶ *Civic Freedom Monitor: China*, *supra* note 5.

³⁷ Van De Velde, *supra* note 17, at 690.

³⁸ Zheping Huang, *NGOs Are Under Threat in China's Latest Crackdown Against "Foreign Forces,"* QUARTZ (Jan. 4, 2017), <http://perma.cc/VSW7-B42L>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² GODFREY M. MUSILA, FREEDOMS UNDER THREAT: THE SPREAD OF ANTI-NGO MEASURES IN AFRICA 3 (2019).

⁴³ *Id.* at 15.

⁴⁴ *Id.* at 16.

⁴⁵ *Id.* at 16.

the Russian and Chinese restrictions on NGOs, there is also a strong presumption of “cross-border learning” in Africa.⁴⁶

One example of restrictive NGO legislation in an African nation is Uganda’s 2016 Non-Governmental Organizations Bill.⁴⁷ The law creates an NGO regulatory body that maintains a registry and is responsible for renewing or denying renewal of NGO permits. The agency has the power to “blacklist” NGOs, but the legislation fails to provide a comprehensive definition of what “blacklisting” entails or what may lead to a “blacklist” designation.⁴⁸ As such, the regulatory body possesses a worrying amount of discretionary leeway to close down an NGO, thus threatening civil society in Uganda.

Another example of NGO legislation in Africa is Egypt’s ongoing fight against foreign funding. In the years following the Arab Spring in Egypt, the government cracked down on civil society:

A criminal case launched in 2011, focused on Egypt-based international organizations alleged to have received foreign funding without government permission, was reopened and expanded in 2016 to focus on Egyptian organizations. From 2016 through 2019, a number of Egypt’s most prominent civil society leaders have been banned from travel in connection with the case, and several had their personal and organizational assets frozen under court order. Others have been detained and interrogated.⁴⁹

Further, in 2014, the nation amended Article 78 of its criminal code to heighten the penalties for the receipt of foreign funding with intent to harm the national interest or public peace and expand the scope of illegal activity.⁵⁰ In 2017, Egypt’s Law 70 enacted significant restraints on NGO “formation, funding, activities, contact with international entities, and internal governance, and imposed severe criminal penalties on CSOs for violations.”⁵¹ In August of 2019, Egypt published a new law meant to replace and relax Law 70. However, the new law does little to change the overarching regulatory approach to NGOs in Egypt.⁵² It remains to be seen whether the enforcement of the new law may provide NGOs more breathing room.

The second reason that restrictions in African nations are particularly relevant is that the ACHPR provides jurisdiction for NGOs to bring suits against signatory nations.⁵³ While this Comment discusses this grant of legal personality

⁴⁶ *Id.* at 16–17.

⁴⁷ The Non-Governmental Organisations Act (2017), <http://perma.cc/GN98-UAC6>.

⁴⁸ Goitom, *supra* note 7.

⁴⁹ *Civic Freedom Monitor: Egypt*, *supra* note 3.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ Oliver Windridge, *The Importance of ‘Observer Status’ for NGOs*, THE ACHPR MONITOR (Jan. 15, 2014), <http://perma.cc/JSH7-YVFW>.

in greater detail, it is worth noting now that the mechanism of the ACHPR has not yet stymied anti-NGO restrictions. This raises questions for the limits and potential of legal personality as a solution to restrictive domestic regulations on NGOs.

III. THE LEGAL STATUS OF NGOS

This Section will explore the legal status of NGOs under international law, drawing from recent legal literature on the subject. The Section will address the U.N. Charter, the ECOSOC Rules, and the historical movement for legal personality for NGOs over the past 100 years. NGOs are defined as private organizations, not established by a government or intergovernmental agreement, that are not profit-seeking and that pursue interests across national borders.⁵⁴ While there exists a wealth of definitions for NGOs across legal literature and government documents, this definition captures the international focus of NGOs relevant to this Comment as well as the independence inherent in NGOs' status under international law.

A. Basic Legal Status of NGOs in the International Legal System

The Charter of the United Nations was signed on June 26, 1945 at the conclusion of the U.N. Conference on International Organization.⁵⁵ Because there is no black letter "international NGO law," Article 71 of the U.N. Charter is often seen as the basis of NGOs' official activities within the international sphere. Article 71 states that

The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.⁵⁶

This language established the consultative status of NGOs with the ECOSOC. This consultative status is not equivalent to legal personality as it does not grant NGOs standing to bring cases before a court such as the International Court of Justice. However, the consultative status Article 71 articulated remains a fundamental grant of legitimacy to NGOs in the international legal system. The ECOSOC rules shape the nuts and bolts of consultative status.

⁵⁴ I derived this definition from multiple sources. *See* Section I, n.15.

⁵⁵ U.N. Charter.

⁵⁶ *Id.* at art. 71.

There are three categories of consultative NGO status in the U.N. First, “general” status is reserved for NGOs that are “concerned with most of ECOSOC’s activities, that can demonstrate sustained contributions to the achievement of U.N. objectives, and that are broadly representative of major segments of population in a large number of countries.”⁵⁷ Second, “special” status is for those NGOs that are “concerned with a few fields covered by ECOSOC and that are known internationally within these fields.”⁵⁸ Third, “roster” status is reserved for those NGOs that “can make occasional useful contributions to U.N. bodies.”⁵⁹ As one might imagine, NGOs with “general” status have the most comprehensive rights within the U.N. structure and may “propose items for the provisional agenda of ECOSOC, attend public meetings as observers, submit written statements, and request opportunities to make oral presentations.”⁶⁰ As of September 2018, 5,161 NGOs enjoy consultative status within one of these three designations with ECOSOC.⁶¹

Since 1996, *Current Resolution 1996/31* has largely governed the consultative relationship of NGOs with ECOSOC. This resolution requires NGOs to fulfill criteria such as “having an established headquarters, an executive organ and officer, a democratically-adopted constitution (providing for the determination of policy by a representative body), an authority to speak for the members, and financial independence from governmental bodies.”⁶² While the consultative status established by the U.N. Charter did not initially extend to the U.N. Security Council, NGOs were granted access to the Council in 1997, at which point NGOs began holding briefings with council members. In 2004, “the U.N. Security Council engaged in direct consultations with NGOs regarding the role of civil society in post-conflict peacebuilding.”⁶³

In the decades since the signing of the U.N. Charter, ECOSOC has “considerably expanded the scope of Article 71, by adopting authoritative

⁵⁷ Charnovitz, *Two Centuries of Participation*, *supra* note 9, at 267.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* Beyond these three main NGO statuses, “three NGOs have U.N. observer status: the ICRC, the International Federation of the Red Cross and Red Crescent Societies, and the Sovereign Order of Malta.”

⁶¹ *Basic Facts About ECOSOC Status*, UNITED NATIONS NGO BRANCH: DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, <http://perma.cc/8Y48-MTTA>.

⁶² Kerstin Martens, *Examining the (Non-)Status of NGOs in International Law*, 10 *IND. J. GLOBAL LEGAL STUD.* 1, 16–17 (2003) (also noting that NGOs are required to fulfill more vague criteria beyond these more specific qualifications such as “international standing,” “independent governance,” and “geographical affiliation”).

⁶³ Alihusain, *supra* note 12.

interpretations thereof, and by reviewing and modifying its Rules of Procedure.”⁶⁴ Namely, the consultative status has become known to (1) “enable ECOSOC and its bodies to obtain expert information and advice” and (2) “provide a forum for the participation of [international NGOs], which represent important elements of public opinion in a large number of countries.”⁶⁵ Despite this expanded scope, consultative status remains fundamentally limited by the fact that it is the governments that decide on NGO applications and these “decisions on admission, classification, suspension or withdrawal of an INGO, taken by ECOSOC’s committee on NGOs, are highly motivated by political considerations.”⁶⁶

Importantly, consultative status does not equate to legal personality and [a]s a result, NGOs are obliged to accept the national legislation of the state in which they have been established and where they are based. In the Western world, the right to societal organization can be linked back to basic civil rights such as freedom of association and freedom of speech. National laws differ, however, from country to country, and therefore NGO status also varies.⁶⁷

Professor Ben-Ari, Bar-Ilan University Law Faculty, outlined current and previous attempts to acquire formal legal status for NGOs and noted:

In any case, it is generally acknowledged that granting consultative status to an INGO does not mean, conjointly, the transfer of rights, immunities and privileges of a member of ECOSOC or the [U.N.] to that organization. Nevertheless, some claim that if an INGO is granted consultative status by an IGO, it simultaneously acquires “a *certain international legal status*, albeit not that of a subject of international law.” The essence of “status” short of personality remains, however, peculiar and blurred. Certainly, one may not conclude that the mere enjoyment of a consultative (or observer) status corresponds to the acquisition of ILP.⁶⁸

Yet, despite the general acknowledgement that consultative status does not equate to legal personality, the impact of the U.N. Charter on the legal status of NGOs should not be overlooked.

Article 71 has served as a model and springboard for other international organizations to establish strong relationships with NGOs, including granting them legal personality. Notably, the African Court for Human and Peoples’ Rights allows NGOs with “observer” status before the African Union to bring cases

⁶⁴ Ben-Ari, *supra* note 13, at 12.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Martens, *supra* note 62, at 21.

⁶⁸ Ben-Ari, *supra* note 13, at 13 (emphasis in original).

directly before the Court.⁶⁹ Further, the Organization of American States (OAS) adopted *The Guidelines for the Participation of Civil Society Organizations in OAS Activities* in 1999, which provides a scope of participation by NGOs within the OAS similar to that found in the U.N.'s ECOSOC.⁷⁰ Finally, the Organization for Security and Cooperation in Europe took the U.N.'s Article 71 and consultative status scheme as a "model for their relationship to non-governmental actors."⁷¹

B. The Historical Movement for Legal Personality

To further understand the current status of NGOs in the international legal sphere and to explore the possibilities for legal personality for NGOs in the years to come, it is critical to understand that discussion of legal personality for NGOs is not new. In fact, there has been a "formal movement" for legal personality for NGOs for over 100 years.

In 1910, the Union of International Associations (UIA) hosted the First World Congress of International Associations. At the Congress, the UIA became the first organization to propose establishing a "super-national status" for NGOs through diplomatic convention.⁷² That same year, the International Law Association adopted a similar resolution in favor of legal status for NGOs. These steps became the catalyst for the Institute of International Law's *1912 Institute Proposal* which would allow state signatories to grant international associations like NGOs legal personality. While the Proposal was a major step for the movement, it was too simple and failed to thoroughly consider the structure of legal personality for NGOs as well as the implications of granting NGOs legal personality in terms of their relationships with states.⁷³ No states signed onto the proposal. Thus, it floundered and was consequently abandoned.

In 1923, the movement gained new life through a *1923 Institute Proposal* with intentions for the following: "to grant international associations 'an international status which is compatible with the requirement of public order'" and to ensure that "associations 'be at liberty not to have exclusive ties with any given country.'"⁷⁴ The proposal included a system by which states would grant legal protection to international associations, which would be organized into an international registry. This plan, like the *1912 Institute Proposal*, died out when

⁶⁹ See generally Abdelsalam A. Mohamed, *Individual and NGO Participation in Human Rights Litigation Before the African Court of Human and Peoples' Rights: Lessons from the European and Inter-American Courts of Human Rights*, 8 MICH. ST. U.-DCL. J. INT'L L. 377 (1999).

⁷⁰ Alihusain, *supra* note 12.

⁷¹ Martens, *supra* note 62, at 18.

⁷² Ben-Ari, *supra* note 13, at 5–6.

⁷³ *Id.*

⁷⁴ *Id.* at 7.

enthusiasm fizzled and the world became embroiled in World War II.⁷⁵ Both the 1912 and 1923 Institute of International Law proposals were flawed in failing to address the mechanisms required for an international registry of NGOs, as well as incentives to induce states to sign on to such a proposal.⁷⁶

The next step in the international movement for NGO legal status was the U.N. Charter of 1949 and Article 71, discussed in more detail above. While some hoped that Article 71 would be just one step toward expanded legal status for NGOs, the optimism was met with disappointment, as the U.N. did not take additional steps to grant legal personality beyond the consultative status of Article 71. For others, Article 71 served as an immediate disappointment due to the subject matter limitations on NGOs:

Although most of the NGO participation under the League had occurred on economic or social issues, there had also been involvement in mandates and disarmament issues. Yet, Article 71 did not go beyond Economic and Social Council. Indeed, [the Secretary of the Federation of Private International Organizations] viewed Article 71 as “a so-far-and-no-further obstacle to any continuance of the pragmatic but close IGO-NGO partnership developed under the League [of Nations].⁷⁷

The 1950 and 1959 proposals by the Institute of International Law and the UIA, respectively, illustrate a focus on developing both a coherent definition of NGOs and an international agency that could run such a registry and enforce standards among the organizations.⁷⁸ While the focus of these two proposals was not on legal personality, both documents sought to improve legitimacy by ensuring proper standards of NGO activities across the world.⁷⁹ In particular, the 1959 proposal emphasized that NGOs were often impeded by “*administrative difficulties*” and that an international registry could overcome some of these difficulties by maintaining standards among NGOs and lobbying for benefits of NGOs from the nations in which they were operating.⁸⁰ Again, while portions of the NGO community initially met both proposals with enthusiasm, neither developed sufficient traction to go through a formal approval process.

This series of failed proposals was largely supported by NGOs themselves rather than the international community at large, and the cumulative failures culminated in a shift toward regional treaties and away from a conference that would provide for, or at least consider, international legal personality for NGOs

⁷⁵ *Id.* at 10.

⁷⁶ *Id.* at 7–8.

⁷⁷ Charnovitz, *Two Centuries of Participation*, *supra* note 9, at 250.

⁷⁸ Ben-Ari, *supra* note 13, at 20, 23.

⁷⁹ *Id.*

⁸⁰ *Id.* at 23 (emphasis in original).

on a global level. For example, the 1986 European Convention on the Recognition of the Legal Personality of International NGOs “recognizes a national legal personality, obtained within any state party, as having equal effect in another state party” for NGOs.⁸¹ This designation grew out of the *1983 Report on INGOs and Their Legal Status* (“Merle Report”), which was submitted to the Council of Europe to support that body’s consideration of the legal status of NGOs.⁸² The Merle Report concluded that the intellectual and political environment of Europe provided fertile ground for progress in the realm NGO status.⁸³ Despite this optimistic conclusion, the Merle Report acknowledged that states would likely continue to be disinclined to grant NGOs international legal personality out of fear that doing so would threaten the states’ authority. The Report argued that this mistrust would probably lead to the adoption of a regional status for NGOs that remained at the discretion of the states.⁸⁴ The Report’s conclusions and observations remain salient today. Just as in the 1980s, states remain wary of granting NGOs status that might threaten or usurp state power or allow NGOs to engage in activities that they believe will threaten national security.

In the 21st century, conversations surrounding the legal status of NGOs remain regionally focused and, similar to the proposals of the 1950s, concerned with accountability and international standards for NGOs. In 2006, eleven NGOs endorsed the NGO Accountability Charter. The charter was “heralded by its founders as the first international, cross-sectoral code of conduct for NGOs and thus an ‘unprecedented[ed] step.’”⁸⁵ While the NGO Accountability Charter clearly represents only a very minor fraction of the NGO community, it is a positive example of NGOs using accountability to seek legitimacy in the realm of international law. Importantly, the NGO Accountability Charter requires members to report operations and funding information to a central tool on an annual basis in order to promote oversight.⁸⁶ It therefore is a small-scale realization of the reporting elements of the proposals of the 20th century.

In the same theme of accountability, the International Bar Association’s Human Rights Institute, in conjunction with the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, launched the Lund-London Guidelines in 2009. These guidelines aimed to produce international standards of good practice for NGOs to improve “accuracy, transparency, and credibility.”⁸⁷ While the

⁸¹ *Id.* at 28–29.

⁸² *Id.* at 25.

⁸³ *Id.*

⁸⁴ Ben-Ari, *supra* note 13, at 26.

⁸⁵ *Id.* at 33.

⁸⁶ *Id.* at 36.

⁸⁷ *Id.* at 37.

guidelines do not directly advocate or require particular legal rights or obligations for NGOs, the focus on legitimacy and accountability for NGOs addresses one of the most stubborn hurdles to NGO legal personality both historically and today.

Finally, the 2010 International Law Association's Report on NGOs provides a more ambitious and creative approach to legal personality than the International Law Association has communicated in decades. Namely, the Report "employs Article 71 of the [U.N.] Charter as a starting point for constructing a theory of kinds of [Non State Actor] legal status."⁸⁸ The Report also commends the 1986 European Convention on the Recognition of the Legal Personality of International NGOs as the best example of states bestowing legal status to NGOs through a treaty.⁸⁹

IV. INFLUENCE OF NGOS

If NGOs did not serve such an integral role in the international sphere, it would be difficult to advocate for legal personality. However, because NGOs' rights and duties have a significant impact on international law, they should enjoy legal personality status. NGOs play a critical role in the health of the international system as a whole, in addition to their commonly recognized role in providing direct aid to communities in need. NGOs are numerous, continue to have an increasingly influential role in international legal affairs, and operate in both formal and informal capacities.

NGOs are numerous, and their participation in global affairs has increased substantially over the last century, with their influence reaching virtually every subject of international law. The UIA reports that the number of NGOs has increased from 176 in 1909 to 5,936 in 2002.⁹⁰ As previously mentioned, 5,161 NGOs enjoy consultative status with ECOSOC.⁹¹ Within the general category of NGOs, approximately one quarter of organizations are human rights focused.⁹² Further, NGOs do not limit their focus to domestic affairs. In fact, "[m]ore than 840 NGOs participated in the Vienna Conference on Human Rights in 1993" and "around 1,400 NGOs took part in the Earth Summit in Rio in 1992."⁹³ At the Earth Summit, NGOs served as members within government delegations and in

⁸⁸ *Id.* at 40 (internal quotation marks omitted).

⁸⁹ *Id.* at 41.

⁹⁰ Martens, *supra* note 62, at 4 (noting also that the 1970s and 1980s involved a particularly notable uptick in registered NGOs).

⁹¹ NGO BRANCH: DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *supra* note 61.

⁹² Martens, *supra* note 62, at 4.

⁹³ *Id.* at 5.

advisory roles.⁹⁴ In 2017, 2,133 NGOs were admitted to the U.N. Framework Convention on Climate Change.⁹⁵

Over the past fifty years in particular, international NGOs have seen their influential role increase substantially. Kerstin Martins, Associate Professor of International Relations at the University of Bremen, Germany, writing in the *Indiana Journal of Global Legal Studies*, argues that:

since the end of the Cold War, NGOs have enjoyed increasingly easy access to, and better possibilities to affect, political processes taking place above the national level. In fact, the increasing intensity of their activities over the last decade demonstrates that they have become an integral part of the procedures and structures of global governance.⁹⁶

The widespread and increasing influence of NGOs has been recognized as a unique development within the international legal system. The former President of the International Court of Justice, Rosalyn Higgins, has stated that NGO demands on the international legal system represent “one phenomenon in the reformation in international law. . . . An aspect of that reformation is a change in the concept of international law, and in particular, in our notions of the identity of the users and beneficiaries of international law.”⁹⁷ Much of NGO influence on international law can be categorized as soft law. Indeed, “campaigning, mobilization, advocacy, lobbying, agenda-setting, and negotiation” are “widely acknowledged” as effective forms of NGO influence in the realm of international law.⁹⁸

Although the recent role of NGOs in international governance is quite notable, it would be a mistake to regard NGO influence as a modern phenomenon. Just as a movement for legal personality for NGOs has existed for over 100 years, NGOs themselves have been involved in international governance for over 200 years.⁹⁹ As such, the history of NGOs illustrates “a longtime custom of governmental interaction with NGOs in the making of international policy.”¹⁰⁰

The reasons for the recent rise in NGO activity are varied. Professor Steve Charnovitz, Associate Professor at the George Washington University Law School, in the *Michigan Journal of International Law*, offered four reasons as to why

⁹⁴ *Id.*

⁹⁵ *Statistics on Non-Party Stakeholders*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://perma.cc/8HAV-BLES>; *COP 23*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, <http://perma.cc/7636-8SQ7>.

⁹⁶ Martins, *supra* note 62, at 1.

⁹⁷ Alihusain, *supra* note 12 (internal citations omitted).

⁹⁸ Jenkins, *supra* note 6, at 460.

⁹⁹ Charnovitz, *Two Centuries of Participation*, *supra* note 9, at 185.

¹⁰⁰ *Id.*

NGOs have been more active in international policy since the 1990s than in the decades before:

First, the integration of the world economy and the increasing recognition of global problems have led to more intergovernmental negotiations that affect domestic policy. Second, the cessation of the Cold War ended the superpower polarization in world politics. Third, the emergence of a worldwide media, such as CNN International, provides opportunities for NGOs to publicize their views. Fourth, the spread of democratic norms has raised expectations about the transparency of international organizations and the opportunities they provide for public participation.¹⁰¹

President Bill Clinton, when discussing the rise of NGO activities, focused on the importance of charitable giving and public exposure to NGOs. He highlighted the “vast pool of new wealth available for giving, and the rising influence of small donors” as important factors in the growth of the role NGOs play in civil society.¹⁰²

The marked increase in NGO activity in shaping international law has raised difficult questions about accountability and legitimacy for NGOs. Professor Ben-Ari argues that although NGOs “have become a source of power and legitimacy in world politics . . . being unelected, unaccountable, and unrepresentative . . . raises difficult questions of legality and legitimacy.”¹⁰³

NGOs also play an important role as watchdogs within the borders of states who have made international commitments, especially in the area of human rights. This role is less formal than, for example, being granted legal status by international commissions¹⁰⁴ or filing amicus briefs with international tribunals.¹⁰⁵ Because of this lack of formality, the impact of this role is difficult to quantify and study. However, “Oscar Schachter, a keen observer, detected this [role of review of state compliance with international obligations] in 1960, and in the following decades, the NGO role flowered in the monitoring of human rights, humanitarian, and environmental law.”¹⁰⁶ The “watchdog” role serves a complementary function to NGOs’ formalized influence in the creation of international law. In particular, “[o]nce international norms have legal effect, NGOs . . . ensure that these norms

¹⁰¹ *Id.* at 265–66.

¹⁰² Jenkins, *supra* note 6, at 460 (citing Bill Clinton, GIVING: HOW EACH OF US CAN CHANGE THE WORLD 11 (2007)).

¹⁰³ Ben-Ari, *supra* note 13, at 3.

¹⁰⁴ Charnovitz, *Two Centuries of Participation*, *supra* note 9, at 267.

¹⁰⁵ Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L. L. 348, 353 (2006) (explaining that in 2004, the International Court of Justice implemented a process by which NGOs could submit briefs in advisory proceedings which would be available to the States, albeit not as part of the official case file).

¹⁰⁶ *Id.* at 354.

are applied in accordance with the spirit in which they were negotiated, or that they are interpreted in a way that is favorable to the enforcement of legal rights.”¹⁰⁷

It is this “watchdog” role that is particularly threatened by the rising tide of domestic restrictions on NGOs. For example, when the MacArthur Foundation closed its Russian office in 2015, its main areas of focus were in higher education and human rights.¹⁰⁸ The Foundation worked for progress in these areas both directly and through grants to other NGOs. In its human rights work, the Foundation promoted access to the European Court of Human Rights.¹⁰⁹ Thus, the Foundation was both directly and indirectly encouraging Russian citizens to hold their government accountable to the human rights commitments it made on an international level. While many NGOs focused on human rights and other subject areas remain active in Russia, the story of the MacArthur Foundation is one example of how domestic regulation can directly inhibit NGOs from performing their crucial “watchdog” function internationally.

V. POSSIBILITIES FOR LEGAL PERSONALITY

This Section argues that, given the rise of domestic restrictions that prevent NGOs from fulfilling their vital functions within the international legal system, it is time for the system to grant NGOs legal personality—the right to sue and be sued. NGOs with legal personality status could then take nations to court for (a) restricting their rights as NGOs, or (b) not abiding by commitments the nation has made in their international agreements. This Comment has not set out to provide a comprehensive system that would grant legal personality for NGOs. Further, legal personality is not the end-all solution for NGOs seeking to fight restrictive national legislation. Instead, this Comment addresses the benefits of granting NGOs legal personality and the subsequent issues such status may create. Legal personality grants NGOs the ability to sue and be sued, but legal instruments create rights and duties that form the basis for causes of action that can be brought on behalf of or against NGOs. Legal personality is the crucial first step towards a comprehensive international legal system that encourages NGOs to act as independent entities before various tribunals. Thus, this Section explores potential solutions within the U.N. structure and lessons from the ACHPR to consider the feasibility and attractiveness of using legal personality as a weapon against domestic restrictions on NGOs.

¹⁰⁷ Alihusain, *supra* note 12.

¹⁰⁸ Hitoshi Mayer, *supra* note 8, at 1205.

¹⁰⁹ *The MacArthur Foundation in Russia: 1991–2015*, MACARTHUR FOUNDATION, <http://perma.cc/CL6D-YGF5>.

A. The Importance of Legal Personality

Legal personality status is critical to NGOs because it is the only way for them to bring affirmative claims in international courts on their own behalf, without relying on states or individuals. If an NGO hopes to combat its host state's domestic restrictions, for example, it is unlikely that the state that imposed those restrictions will bring the NGO's claims to court for it.

According to Professor Ben-Ari, legal personality would serve two interests. First, legal personality would assist in confining the number of NGOs and would allow institutions to “monitor[] and scrutiniz[e] their activity, thereby improving their proficiency and responsible advocacy.”¹¹⁰ Proponents of confining the growth of NGOs argue that the proliferation of NGOs has created inefficiency and threatened their legitimacy. Second, legal personality would facilitate NGO activities through the provision of rights, privileges, and immunities that they can use to protect their operations. Under this line of reasoning, legal personality for NGOs would create a “fairer international legal order that would reflect the position and relevance of all significant international actors, including [NGOs], thereby legitimizing their voice and ensuring their participation.”¹¹¹

Of course, both of these interests are based on the underlying assumption that NGOs play an important and legitimate role in international law, as Section IV of this Comment suggests. Legal literature supports this argument. For example, Professor Bosire Maragia, University of Maryland, Baltimore County has argued that NGOs are “increasingly becoming legitimate actors contrary to traditional theories of international law and international relations.”¹¹² Maragia goes on to argue that NGOs may even be acquiring international legal personality implicitly.¹¹³ According to Maragia, NGOs have gained legitimacy, because they “have been recognized in international legal documents that accord them certain rights; states are increasingly co-opting NGOs as partners in development; and NGOs have been very active in the development and . . . enforcement of international law especially in the environmental, human rights and trade areas.”¹¹⁴ While this Comment does not argue that NGOs have acquired international legal personality implicitly, it does argue that the legitimacy of NGO activity in international law has been recognized to an extent that the next logical step for NGOs is to acquire legal personality so as to protect their current status, and the

¹¹⁰ Ben-Ari, *supra* note 13, at 3–4.

¹¹¹ *Id.* at 4.

¹¹² Bosire Maragia, *Almost There: Another Way of Conceptualizing and Explaining NGOs' Quest for Legitimacy in Global Politics*, 2 *NON-ST. ACTORS & INT'L L.* 301 (2002).

¹¹³ *Id.* at 317.

¹¹⁴ *Id.* at 318.

benefits to the international system that flow from it, from intervention by state actors.

While traditionally only states have been granted legal personality, it would not be unprecedented for legal personality to extend beyond nations in the international legal sphere. For example, in human rights litigation, multiple international tribunals have granted *individuals* the right to sue on their own behalf: the European and Inter-American Courts of Human Rights both allow individuals to bring cases before the court, either directly or indirectly.¹¹⁵ Further, the World Bank Inspection Panel allows private parties to submit complaints against organizations.¹¹⁶ Conversely, the ICC prosecutes individuals who have committed crimes against humanity, among other things.¹¹⁷ Given the extension of legal personality to individuals across multiple international tribunals, legal personality for NGOs appears feasible. While individuals are distinct from NGOs, both possess rights under domestic and international law that are often minimized in international tribunals that grant legal personality only to nations.

B. Potential within the U.N.

The most impactful form of legal personality would likely be recognition by the U.N. of a right of NGOs to sue state actors. This would be significant because of the central role of the U.N. in international governance, the wealth of commitments that state actors have made through U.N. treaties that could be vehicles for causes of actions brought by NGOs, and the role the U.N. plays in setting the stage for legal rights in other intergovernmental organizations. Because it is the U.N. that took the critical step forward in granting NGOs consultative status through Article 71, it is natural for the U.N. to be the first body to take the step of granting them legal personality as well.

Since ratification of the U.N. Charter, the 1996 ECOSOC regulations, and the opening of the U.N. to national NGOs in 1996, the number of NGOs recognized by the U.N. has increased substantially. The critical role of NGOs in ECOSOC is undeniable, and therefore legal personality should be granted through ECOSOC as a starting point for the international system. Doing so might appease both state actors that seek oversight of NGO activities and NGOs that seek to protect themselves from domestic restrictions that damage civil society.

A small step towards legal personality within ECOSOC, such as a grant of power to NGOs to bring grievances about domestic regulations to the committee,

¹¹⁵ Francisco Orrego Vicuna, *Individuals and Non-State Entities Before International Courts and Tribunals*, 5 MAX PLANCK Y.B. UNITED NATIONS L. 53, 55 (2001).

¹¹⁶ *Id.* at 62.

¹¹⁷ *Id.* at 56.

may also assuage the fears of NGOs that “see the entrance door to the U.N. closing and not opening before their eyes,” given that some members of ECOSOC’s NGO Committee have been accused of carrying out unfriendly policy against NGOs.¹¹⁸

One step toward legal personality would be granting NGOs the right to bring grievances about domestic restrictions imposed by U.N. member states, at least to the ECOSOC committee at large, if not in front of an international court such as the International Court of Justice. ECOSOC could amend its rules of procedure to create a forum for NGOs to bring grievances, but this would of course be challenging, given the presence of powerful authoritarian countries in ECOSOC that have proved unwilling to expand consultative status NGOs in the past. To allow NGOs to bring grievances to the General Assembly would likely require an amendment to the U.N. Charter itself. Article 108 of the U.N. Charter clarifies that amendments must be adopted by two thirds of the General Assembly and ratified by two thirds of member nations, “including *all* . . . permanent members of the Security Council.”¹¹⁹ As one might expect, this is an extremely difficult process. Such a step would likely only be possible if regional institutions had shown great success in granting legal personality to NGOs, thus prompting the U.N. to do so as well.

A second avenue for creating legal personality would be to grant NGOs consultative relations beyond ECOSOC, to the General Assembly. This would authorize NGO activity within the general organ of the U.N. and would be a step toward legitimacy required for legal status. Steps by the U.N. such as these could also be seen as steps toward creating legal personality implicitly through customary law, as Maragia argues.¹²⁰ While the amendment process would likely be required for this change as well, it would probably be a less controversial amendment to pursue.

Partnership between the UIA and the U.N. could provide support for granting NGOs legal personality as well. The UIA is a nonprofit and apolitical organization that provides criteria for NGOs and hosts an international NGO database. The organization currently purports to offer detailed information on 40,300 organizations.¹²¹ The criteria relate to the “aims, membership, governance, and financing” of international NGOs. The UIA also demands that the “aim of

¹¹⁸ Jurij Daniel Aston, *The United Nations Committee of Non-Governmental Organization: Guarding the Entrance to a Politically Divided House*, 12 EUR. J. INT’L L. 943, 945 (2001).

¹¹⁹ *Can the UN Charter be Amended, and How Many Times Has this Occurred?*, DAG HAMMARSKJÖLD LIBRARY, <http://perma.cc/UM2B-K4P3> (emphasis added).

¹²⁰ Maragia, *supra* note 112, at 328.

¹²¹ *The Yearbook of International Organizations*, UNION OF INTERNATIONAL ASSOCIATIONS, <http://perma.cc/5TRB-HPUK>.

[an NGO] be genuinely international in character” to qualify for its registry.¹²² Partnering with such an organization could calm fears that the international system would be flooded with organizations newly possessing legal personality but lacking in sophistication or “international-ness.” In other words, the U.N. could use the criteria and registry of the UIA or adopt criteria and a registry using its own mechanisms to ensure legal personality was granted only to NGOs that play a legitimate role in the international system. This would be one way to overcome the failures of twentieth-century proposals which overlooked the importance of an administrative body to serve as a gatekeeper to legal personality, ensuring that only legitimate NGOs would receive legal rights in the international system.

Rather than taking small steps toward legal personality through ECOSOC, Professor Van De Velde has argued for realizing legal personality for NGOs through the specific mechanism of Article 41 of the International Covenant on Civil and Political Rights (ICCPR).¹²³ Van de Velde argues that state commitments made under the ICCPR conflict with the domestic NGO restrictions passed by nations in recent years, and that the ICCPR most directly addresses the importance of NGOs in civil society and international governance.¹²⁴ This is another way for NGOs to take advantage of their preexisting status within the international system to gain universal legal personality. However, it is worth noting that the mechanism recommended, Article 41, has not been used to date.¹²⁵

C. The African Court of Human and Peoples’ Rights: A Regional Solution

The ACHPR offers a regional solution to the problem posed by anti-NGO legislation for NGOs operating in Africa. Critically, the instrument that created the court, Article 1 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights,

¹²² Martens, *supra* note 62, at 16 n.63. Among the criteria listed above, the UIA requires that:

NGOs show their intention of engaging in activities in at least three other countries. Moreover, membership must also be drawn from individuals or collective entities of at least three countries and must be open to any appropriately qualified individual or entity in the organization’s areas of operation. The constitution of an NGO must provide for a permanent headquarters and make provisions for the members; officers should be rotated among the various member countries in such a way as to prevent control of the organization by one national group. Substantial financial contributions to the budget must come from at least three countries. Moreover, the NGO must be free of the influence of other organizations.

¹²³ See generally Van De Velde, *supra* note 17.

¹²⁴ *Id.* at 730–31.

¹²⁵ *Id.* at 738.

also granted NGOs legal rights and remedies and the court jurisdiction to hear complaints from NGOs.¹²⁶ Thus, the instrument combines legal personality with complementary rights, duties, and jurisdiction to provide for a comprehensive system under which NGOs can protect themselves. Because legal personality is only as effective as the rights, remedies, and jurisdiction under which an entity can bring cases, the court is an example of a well-rounded approach to legal personality for NGOs.

The ACHPR grants observer status to NGOs based on an application process conducted in front of a commission prior to and separate from any filings with the court.¹²⁷ In general, to attain observer status, an NGO must “(i) have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter on Human and Peoples’ Rights; (ii) be organisations working in the field of human rights; and (iii) declare their financial resources.”¹²⁸ Article 6(1) of the Protocol also allows the court to grant NGOs observer status “to institute directly before it urgent cases or serious, systematic or massive violations of human rights.”¹²⁹ In other words, when an NGO has been granted “observer status” it also attains at least partial legal personality within the ACHPR.¹³⁰

Importantly, Article 6(1) allows NGOs to bring cases against only those states that have signed on to the Protocol. Because of this added layer to legal personality, the mechanism is currently limited to nine state signatories: Benin, Burkina Faso, Côte d’Ivoire, Gambia, Ghana, Mali, Malawi, Tanzania, and Republic of Tunisia.¹³¹ There have been twelve applications by NGOs to make a claim before the court against a state that has signed the optional protocol.¹³²

The status of NGOs before the ACHPR represents an innovation in how to grant legal personality to NGOs within intergovernmental organizations. Other regional bodies—or even the U.N.—might consider using the African Court’s approach to NGOs as a model for instituting their own procedures granting legal personality to NGOs. Perhaps, just as the historical movement for legal personality shifted to the Council of Europe in the mid-twentieth century, the atmosphere of the twenty-first century also requires regional innovation before more global innovation takes hold. Amendments to regional instruments to

¹²⁶ *African Court on Human and Peoples’ Rights*, AFRICAN COURT, <http://perma.cc/F66K-G8MC>.

¹²⁷ Windridge, *supra* note 53.

¹²⁸ *Id.*

¹²⁹ Mohamed, *supra* note 69, at 377.

¹³⁰ Windridge, *supra* note 53.

¹³¹ *African Court on Human and Peoples’ Rights*, *supra* note 126.

¹³² *The Human Rights Jurisdiction of the African Court of Justice and Human and Peoples’ Rights*, in *THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES’ RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES* 965, 967 (Rachel Murray 2019).

provide NGOs legal personality and to grant tribunals the jurisdiction required to hear cases between NGOs and states may be the best approach to protecting the efficacy of NGOs and their role within international governance. NGOs could then point to the effectiveness of these regional approaches when advocating for a similar approach, or at least broader rights, within the U.N.

Unfortunately, the initial step of determining which NGOs should be granted observer status hamstrings the efficacy of the African system. Because only those organizations that have observer status can bring claims before the ACHPR, the Commission that accepts applications for observer status serves an important gatekeeping function. The existence of a gatekeeping function, through requisite criteria and a registry, is often regarded as an important element of any system that intends to grant legal personality for NGOs. It is, therefore, not surprising that legal personality is contingent upon observer status. However, as with ECOSOC, there are worrisome implications when applications for observer status are seemingly denied for political reasons.

For example, in 2018, the Commission stripped the Coalition of African Lesbians (CAL) of its observer status following a decision of the African Union Executive Council that “called on the ACHPR to consider ‘African values’” when determining NGO status.¹³³ The ACHPR stripped CAL of its observer status after ten years of conflict with them. This dynamic illustrates a complication within NGOs’ quest for legal personality in the international realm. Namely, the same political forces that thwart NGOs on a domestic level may simply thwart them at an international level as well, given the role of state actors in international governance. This is one reason a solution within the U.N. may be preferable to a regional system. A universal system, especially a registry run by a non-state organization, might protect NGOs from regional or nationwide political bias. Then, the U.N. could focus more on general criteria like accountability and legitimacy than domestic political attitudes.

D. Challenges to Legal Personality for NGOs

As the historical movement for legal personality for NGOs suggests, “international agreements on the legal personality of NGOs seem to advance only slowly.”¹³⁴ Thus, a primary challenge to legal personality for NGOs is catalyzing the NGO community and the international community to invest in change. For example, in 1972 “Wilfred Jenks observed . . . that [w]hile the number, importance, and influence of international associations have continued to

¹³³ *African Commission Bows to Political Pressure, Withdraws NGO’s Observer Status*, INTERNATIONAL JUSTICE RESEARCH CENTER (Aug. 28, 2018), <http://perma.cc/U4VX-QFVW>.

¹³⁴ Martens, *supra* note 62, at 24.

increase, the problem of their legal status has not become of such acuteness and urgency as to make a comprehensive solution oft imperative.”¹³⁵ This perspective remains forceful today. However, the domestic restrictions discussed in this Comment introduce a degree of “urgency,” and may serve as a catalyst for NGOs to organize for a renewed push for legal personality. It remains to be seen whether NGOs will respond to domestic restrictions by organizing for legal personality.

Additionally, most international legal scholars and NGO advocates have traditionally regarded the quest for legal personality as advantageous to NGOs, but not to states. Therefore, both in the past and today, NGOs have pushed for legal personality without powerful state actors to serve as allies.¹³⁶ This, of course, raises an immense challenge for accomplishing legal change. While NGOs may play a key role in the formation of international law, they do so with the support of state actors and within the structures of inter-governmental organizations. Attaining legal personality will require similar support from state actors and institutions. Notably, the “initial quest” for legal personality came under scrutiny because the proposals by the International Law Association and other bodies failed to provide solutions to the “problems of registration, control and order.”¹³⁷ These problems represent the anxieties that states have about expanding NGO rights: how will those rights be limited and contained in an orderly fashion? As argued above, modern technology and the increased visibility of NGOs would likely mitigate these problems, thus protecting modern proposals from the same sort of criticism. However, NGOs should seek state allies to support any renewed proposals for legal personality. For example, states that have made public comments denouncing restrictive legislation in countries like China and Russia may be more amenable to the idea of protecting NGOs through legal personality and the concomitant right to bring disputes before international tribunals.¹³⁸

The diversity among NGOs poses an additional problem for achieving legal personality. While “there may be a tendency to think of NGOs as a monolithic collective, individual organizations vary considerably. The interests of NGOs vary widely.”¹³⁹ Professor Jenkins describes multiple ways in which NGOs are diverse:

NGOs may provide direct basic services, organize communities to formulate solutions to problems, or advocate the implementation of particular policies. They focus on a wide range of activities and differ in their organizational

¹³⁵ Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 105, at 356 (2006) (citing *Multinational Entities in the Law of Nations*, in *TRANSNATIONAL LAW IN A CHANGING SOCIETY: ESSAYS IN HONOR OF PHILIP C. JESSUP* 70, 77 (C. Wilfred Jenks 1972)).

¹³⁶ Ben-Ari, *supra* note 13, at 43.

¹³⁷ *Id.* at 17.

¹³⁸ See, for example, Van De Velde, *supra* note 17, at 689–90 (U.S. Secretary of State John Kerry’s comments on China’s legislation).

¹³⁹ Jenkins, *supra* note 6, at 466.

structures and sources of support. Most NGOs receive funding from one or more sources, including donations, grants, contracts, fees for services, product sales, and membership dues. They may be centrally organized or loosely affiliated through federation structures. In general, this large and diverse universe of organizations operates at local, national, and international levels.¹⁴⁰

This analysis sheds some light on the difficulty of uniting NGOs around legal personality. Their different characteristics lead to a diverse set of goals.

Beyond diversity, there is also the problem of motivating NGOs to expend lobbying power and funds for legal personality when they may not feel their interests *require* legal personality. Professor Ben-Ari has argued that such indifference provides a hurdle to legal personality for NGOs:

It is highly significant that, generally, members of the INGO community have shown considerable indifference toward the recurring attempts to achieve formal recognition for their legal position. . . . [A]lthough most of the important proposals were indeed initiated by INGO forums, the INGO community, as a whole, has almost completely ignored these attempts. Evidently, even with their impressive capacity for networking, lobbying, and media manipulation, INGO activists were simply reluctant to invest their resources or to cooperate on this matter.¹⁴¹

This indifference on the part of NGOs may be best described as wariness. Throughout the historical movement for legal personality for NGOs, a recurring tension arose related to the advantages and disadvantages of legal personality for the NGOs themselves. On the one hand, legal personality “may help prevent interstate conflicts and, in the words of the 1923 draft convention, may further ‘the general interest of the international community to encourage the development of non profit-making international associations.’”¹⁴²

However, “[o]n the other hand, states have worried that granting international recognition to NGOs may reduce governmental control over them, and NGOs have worried that such recognition might entail a loss of autonomy.”¹⁴³ After all, legal personality involves both the right to sue *and be sued*. While NGOs are already responsible for following domestic law and regulations, the ability to be sued in international tribunals may push some NGOs to avoid legal personality altogether. Given this dynamic, alongside the “increased attention to NGO (mis)behavior in recent years” it is possible that “a new treaty would more likely

¹⁴⁰ *Id.* at 466–67 (internal citation omitted).

¹⁴¹ Ben-Ari, *supra* note 13, at 56.

¹⁴² Charnovitz, *Nongovernmental Organizations and International Law*, *supra* note 105, at 356–57 (citing *Draft Convention Relating to the Legal Position of International Associations*, INSTITUT DE DROIT INTERNATIONAL (1923), reprinted in 1 UNION OF INTERNATIONAL ASSOCIATIONS, INTERNATIONAL ASSOCIATION STATUTE SERIES, app. 4.5. (1988), available at <http://perma.cc/KZ7K-7JLZ>).

¹⁴³ *Id.* at 357.

impose regulation on NGOs than facilitate freedom of association.”¹⁴⁴ Therein lies a difficult balance for achieving legal personality.

As previously mentioned, NGOs will not be able to attain legal personality without the support of state actors and state actors will not wish to support legal personality without imposing some requirements on NGOs. Because neither group of entities can predict where the balance between the two options (legal rights versus duties of NGOs) will lie, there is a risk in even opening the conversation. If NGOs seek legal personality at a time when state actors are hostile to the very idea, NGOs may face backlash or a tightening of their current role in international governance. Further, states could respond to an NGO-led movement for legal personality by tightening control over NGO behavior within their borders. For example, additional states could implement restrictive domestic legislation against NGOs. Until NGOs succeed in organizing for legal personality, there is very little they could do in response to such tightening.

This balancing act leads to a final key challenge to legal personality for NGOs: establishing legitimacy and accountability among NGOs in a way that would justify a grant of legal rights. It is important to remember that NGOs are “not by necessity altruistic and not always a force for good.”¹⁴⁵ This is not a bar against legal personality in itself; individuals, states, corporations, and other entities with legal personality are not necessarily a force for good either. However, the possibility of bad actors raises questions for legitimacy and accountability that must be addressed when considering the rights and duties that would be inherent in granting legal personality to NGOs. Jurij Daniel Aston, University of Bonn, has argued that:

NGO representatives are at most . . . only accountable to the members of the NGO on whose behalf they are acting. To put it bluntly, if a society does not want the government it has elected to advocate certain positions, it can vote it out of office. This system of democratic control does not function with respect to NGOs, though. There is no *contrat social* between society and NGOs.¹⁴⁶

The lack of democratic control of NGOs suggests that a central registry that can track NGO funding or activities on the ground may be a necessary requirement before granting legal personality. The connection between a central registry and legal personality status is not immediately apparent. Legal personality does not *require* that there be a registry and accountability mechanism outside of the courts. In fact, one might argue that the grant of legal personality is in itself a step toward accountability: giving states the power to sue NGOs for abuse of their role or funding in international courts could be one effect of legal personality that

¹⁴⁴ *Id.*

¹⁴⁵ Aston, *supra* note 118, at 961.

¹⁴⁶ *Id.* (emphasis in original).

encourages accountability. Further, many parties with legal personality commonly sued in domestic courts, such as corporations, are not democratically governed. However, given that states have historically been hesitant to grant other entities legal personality out of fear that it might impact their power in the international system, a central registry might ease their concerns. Notably, anti-NGO criticism has been lobbed from both the left and right ends of the political spectrum.¹⁴⁷ Thus, it is implausible to imagine that states would allow *all* NGOs access to international tribunals. This then raises the question of just what sort of requirements states would erect for inclusion in the central registry. Therefore, part of the discussion around legal personality should address baseline requirements for organizations that seek classification as an NGO with legal personality.

While creating and maintaining a registry, which would likely include reporting requirements for NGOs, is certainly a logistical challenge, it should not be regarded as insurmountable. Indeed, NGOs are no strangers to reporting requirements. Even under the current legal framework, once an NGO gains consultative status with ECOSOC, it is “under an obligation to submit every four years a report on its activities, the so-called quadrennial report.”¹⁴⁸ This is just one example of current reporting requirements. Domestic regulations, requirements from funding agencies, or requirements by other international governmental organizations may compound NGO reporting requirements. As such, while an important consideration, the likely requirement of a central agency for NGOs should not be seen as a bar on legal personality altogether.

VI. CONCLUSION

This Comment argues that the international legal system should use its preexisting mechanisms to grant NGOs legal personality so that they may combat domestic restrictions that impede their ability to serve as watchdogs for international legal agreements. In doing so, the Comment acknowledges that there are major hurdles standing in the way of legal personality for NGOs. Nonetheless, NGOs have gained legitimacy in international governance and serve important roles for the vitality of the system. NGOs already play a formalized role in the U.N. through Article 71 consultative status. NGOs should consider organizing to expand their role in the U.N. so as to take steps towards gaining legal personality. Regional institutions such as the ACHPR offer another promising solution for NGOs. While the ACHPR’s system is not perfect, it offers a model that other regional institutions should consider adopting.

¹⁴⁷ Jenkins, *supra* note 6, at 479–92.

¹⁴⁸ Aston, *supra* note 118, at 949.

Changes to the U.N. structure and to regional institutions to grant NGOs legal personality would promote NGO activity by giving them confidence when making investments and establishing operations within countries. This is because NGOs could do so with less fear that the domestic government might turn against them and require them to shut their doors. When entities have the ability to sue and be sued, they can both hold states accountable and are incentivized to hold themselves accountable as well. NGOs, especially those that serve as watchdogs of governments or provide services to communities in need, serve the international community by ensuring that states abide by their international commitments and by providing stability in struggling nations. Given the current onslaught of legislation designed to restrict NGO activities, the time is ripe for NGOs to mobilize for legal personality.