

Rephael Harel Ben-Ari

The Normative Position of International Non- Governmental Organizations under International Law

An Analytical Framework

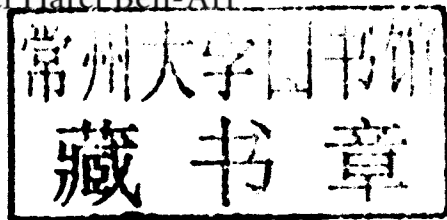
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By

Rephael Harel Ben-Ari



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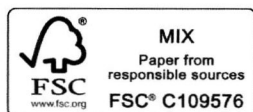
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The Normative Position of International
Non-Governmental Organizations under
International Law

*To my mother,
for her endless giving and countless prayers*

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Introduction

I. OVERVIEW: CONTEMPORARY INTERDISCIPLINARY RESEARCH

Any consideration of the normative position of International Non-Governmental Organizations (INGOs) must begin with an outline of the status of Non-State Actors (NSAs). Since INGOs *are* NSAs – that is both ‘non-states’ and ‘actors’ – the contemporary *normative* significance of this socio-political labeling must be appreciated. Various entities are gathered under the umbrella term ‘NSAs’, which is one of the reasons for the substantial confusion surrounding this usage.¹ Although the acronym ‘NGO’ is most widely used,² the term ‘NSAs’ may systematically incorporate all actors not based on the traditional criteria of the state,³ including Public Interest-Oriented Actors,⁴ Profit-Oriented Actors,⁵ and Public Inter-Governmental Organizations (IGOs). In this inquiry however, the term will refer to the group of *private* transnational actors, with both public and private purposes.⁶

Notwithstanding its frequent usage, the term ‘actor’ is not a concrete idiom in the glossary of international legal terminology.⁷ The traditional emphasis on the position of nation-states as the sole subjects of international law, and therefore the main actors in international relations,⁸ did not allow the development of a solid legal theory regarding the position of so-called ‘transnational actors’. However, the disciplines of international relations and political science, habitually dominated by state-centered positions, proved more receptive towards the incorporation of NSAs.⁹ Thus, a change in paradigm has occurred in most policy analysis

¹ See, for example, Grunfeld, ‘The UN and Non-State Actors: Legitimacy and Compliance’, in *The Legitimacy of the UN: Towards an Enhanced Legal Status of Non-State Actors* (van Boven, Flinterman, Grunfeld, Hut eds.) (SIM special, No. 19, Netherlands Institute of Human Rights, 1997) (hereinafter: *The Legitimacy*), Ch. 2, p. 14. See also Van Boven, ‘Non-State Actors: Introductory Comments’, in *The Legitimacy*, Ch. 1, pp. 5-6.

² Leaving aside at this point the definitional inquiry of the prototypical non-governmental entity; see Reinalda, Arts & Noortmann, ‘Non State Actors in International Relations: Do They Matter?’, in *Non-State Actors in International Relations* (Arts, Noortmann, Reinalda eds.) (Non-State Actors in International Law, Politics and Governance Series) (Ashgate, 2001) (hereinafter: *NSAs in International Relations*), Ch. 1, pp. 1-2. *The Legitimacy*, op. cit. note 1, pp. 5, 11.

³ *NSAs in International Relations*, pp. 1, 3. See also Reinalda, ‘Private in Form, Public in Purpose: NGOs in International Relations Theory’, in *NSAs in International Relations*, Ch. 2, p. 13, Fig. 2.1.

⁴ (International) Non-Governmental Organizations.

⁵ Transnational Corporations, Multinational Corporations, and Criminal Organizations.

⁶ Excluding the category of inter-governmental organizations; compare to *The Legitimacy*, fn 2, pp. 14-15.

⁷ International law acknowledges ‘subjects’, or, at the most, ‘derived’ or ‘limited’ subjects.

⁸ See, for example, Suy, ‘New Players in International Relations’, in *State, Sovereignty and International Governance* (Kreijen, ed. in chief) (Oxford, 2002) (hereinafter: *State, Sovereignty and International Governance*), Ch. 16, p. 374.

⁹ *NSAs in International Relations*, p. 3.

since the 1980s, when a multi-actor model replaced the state-centric one. Consequently, it has become standard practice to focus on NSAs. This development led to the adoption of the policy network approach, based on the hypothesis that policies are not formulated, implemented and enforced by (inter)governmental actors alone, but by a broad set of interdependent public and private actors, organized around policy issues.¹⁰ The process is based on the relationships emerging between state, market and 'civil society' in the public domain.¹¹ Neo-Realist international relations theory also focused on self-interested nation-states as primary units, while ignoring elements outside rational decision making by governments.¹² However, mainly as a result of economic and financial processes of 'globalization', a debate has emerged over the relative importance of states and the role of NSAs.¹³ Thus, although the realist and neo-realist state-centric views remain dominant,¹⁴ the question of the relevance of NSAs has been loudly raised as contesting schools of thought, such as the neo-liberal institutionalism, pluralism and transnationalism,¹⁵ focus on the role of international institutions and transnational actors.¹⁶

¹⁰ This approach, the most popular to-date, focuses on the process of political modernization, analyzing the political change in post-modern society since WWII; see Arts, 'International Policy Arrangements of State and Non-State Actors', in *NSAs in International Relations*, Ch. 3, p. 42.

¹¹ Consequently altering the old power relations – see *NSAs in International Relations*, p. 45. The approach concludes an ever-growing relevance of NSAs as players in international policy-making. Clearly, given the emphasis on the multi-actor model in policy sciences, NSAs are thus *already* considered meaningful actors. The extent that they are so, and the means applied to this end, become the major issues for consideration, but the very fact that they are already relevant and important actors is not questioned; see *NSAs in International Relations*, p. 56. Arts explains that this conclusion is based on several propositions: (1) the broadening of international policy coalitions, with ever-more NSAs being involved; (2) some diffusion of power, with NSAs becoming more powerful *vis-à-vis* states; (3) the pluralisation of rules, with ever-more opportunities for NSAs to participate in international policy making; (4) the extension of discourse as a consequence of ever-more NSAs' input into international policy making; and (5) a transition from intergovernmental to transnational policy arrangements – see pp. 46–56.

¹² Much like the international legal domain; see *NSAs in International Relations*, p. 15.

¹³ It is argued that globalization resulted in 'a shift of power resources from nation states to a whole range of NSAs' – see Reinalda & Verbeek, 'Theorising Power Relations Between NGOs, Inter-Governmental Organizations and States', in *NSAs in International Relations*, Ch. 9, p. 147. See also *NSAs and Authority in the Global System* (Higgott, Underhill & Bieler, 2000) (hereinafter: *NSAs and Authority*), Introduction p. 1.

¹⁴ Neo-realists maintain that states are the major actors in world affairs, with no real possibility for NSAs to undermine their position – see Weenink, 'The Relevance of Being Important or the Importance of Being Relevant? State and Non-State Actors in International Relations Theory', in *NSAs in International Relations*, Ch. 5, pp. 82–83. See also p. 146.

¹⁵ *NSAs in International Relations*, p. 79. Neo-Liberal institutionalists take account of the role of international institutions aside that of states, whereas transnationalists generally altogether ignore states and focus on the influence of transnational NSAs – see p. 79. Pluralism, based on the understanding that power in the international system is widely dispersed, constitutes a major attempt to incorporate NSAs, by treating them as equals to nation-states – see p. 147. In this respect, Toope observes that 'All [contemporary international relations] scholarly agendas hold one intellectual goal

Clearly, contemporary research regarding the position of NSAs is an outcome of the fact that 'NSAs cut through well-established concepts and theories'.¹⁷ The empirical and conceptual complexity of the investigation is thus evident. Nevertheless, the growing flow of data and theories identifying the new locus of political power and social authority postulate NSAs as a legitimate autonomous unit of analysis. Theories that regard the nation-state as the principal or sole actor have consequently been challenged in recent years.¹⁸ The changing rhetoric regarding 'global interests', the identification of new 'regimes' and the development of the concept of 'international governance', all characterizing the contemporary debate over NSAs, trigger an increased dialogue between international relations and international law.¹⁹ Since the impact of NSAs depends on multiple factors, such as the political or legal framework of which they form part, their organizational structure, their network interactions, and their actual presence, the investigation of their significance is based on interdisciplinary analysis. The expanding literature is indeed characterized by the endeavor to provide a comprehensive political, social, and legal outlook on NSAs' involvement in world affairs.²⁰ Jurists, as part of this endeavor, are thus called to shape the nor-

in common, that is, to dispute the realist assertion that international behavior is shaped entirely by the perceived self-interest of sovereign states, and that all interaction is determined by self-conscious calculations of relative power' – see Toope, 'Emerging Patterns of Governance and International Law', in *The Role of Law in International Politics – Essays in International Relations and International Law* (Byers ed.) (Oxford) (hereinafter: *The Role of Law*), Ch. 5, p. 94.

¹⁶ Notably however, unlike the debate in policy theories and political science, the debate in international relations is still characterized by the search for the major actor in world affairs. In any case, the study of both state and the variety of non-state authorities and their inter-relations, rather than investigating the world either as a purely state-dominated arena or a place without state authority, is quite unordinary, and still an emerging theme in international relations – see *NSAs in International Relations*, pp. 83, 86, 90. In the same light, an acknowledgement such as 'NSAs have become part of the institutional structure of international politics and policy making, and, hence, they matter from that perspective' is not to be taken for granted. It reflects a relatively recent and quite daring observation on the part of some contemporary international relations writers, based on interdisciplinary evaluations. See also *NSAs and Authority*, pp. 1-2, and see Florini, 'Who Does What? Collective Action and the Changing Nature of Authority', in *NSAs and Authority*, Ch. 1, p. 15. In that respect, Florini observes that 'what types of groups exist and are able to carry out collective action is becoming a question to be explored, not a starting assumption, even in the field of IR where scholars have long assumed that the only significant group identity comes from belonging to a nation-state' – see p. 19.

¹⁷ See Noortmann, Arts & Reinalda, 'The Quest for Unity in Empirical and Conceptual Complexity', in *NSAs in International Relations*, Ch. 18, pp. 299-300, 307.

¹⁸ Irrespective of whether these theories are called 'realism' or 'positivism' – see *NSAs in International Relations*, p. 307. It is concluded that 'the development of some of the more general theoretical approaches to international relations can be understood as an answer to the conceptual dogmatism and empirical one-sidedness of the state-centered approach of realism and positivism' – see pp. 304-305.

¹⁹ *The Role of Law*, Concluding Chapter, p. 329.

²⁰ See, generally, *NSAs in International Relations*; *NSAs and Authority*; *The Role of Law* – all are good examples of interdisciplinary collections of papers on the topic.

mative model that corresponds to the alleged transformations in the structure of international authority and governance. They are required to identify the parts of the changing social reality deemed legally relevant.²¹

Although these developments are reflected in the changing occupations of some international lawyers,²² for the most part the debate in international law still concerns the very validity of the discourse.²³ The emergent social reality is frequently described in terms of a change in the nature of authority relations with nation-states.²⁴ An 'agency competition' for the provision of human good is often outlined.²⁵ As a result, the process of normative adaptation meets with considerable doctrinal barriers.²⁶ Further, the rhetoric of 'global shifts' in authority and in identity formation, and the development of the concept of international governance with new regimes of 'transgovernmental' and 'transnational' mechanisms and institutions, encourage the ever-more flexible use by non-legal scholars of terms such as 'international community', 'international society', 'global society', and 'actors'.²⁷ Consequently, the contemporary socio-political conceptions of these terms diverge more and more from the juridical one. These conceptions, accepted in IR and policy-studies as a progressive expansion of the margins of research, are frequently regarded by jurists as an attack on the very foundations of the existing normative system. In other words, international lawyers are required today to consider a world where not every 'actor' is a 'subject', and where 'international community' no longer overlaps with the Westphalian notion of the 'community of states'. Or as Paulus notes, in the form of a concrete question: "Is an international law based upon the 'sovereign equality' of states viable in a globalized world in which markets seem to escape the regulatory power of the state and in which non-governmental actors all too often set the political agenda?"²⁸

²¹ This selective process is indeed a reflection of the relative autonomy of the legal order – *The Role of Law*, p. 331.

²² See *The Role of Law*, p. 92.

²³ Thus, the discussion in mainstream international law tends to reflect much earlier stages of the debates in policy and international relations studies.

²⁴ *NSAs and Authority*, p. 19. Due to the growing importance of transnational issues and the rapid information revolution, there is a clear tendency to describe a new world order with an ever-expanded identity choices, where people are part of a large and growing number of systems and collectivities outside the state – see pp. 19-23.

²⁵ The outcome of a growing ability of various actors to efficiently carry collective action – see *NSAs and Authority*, p. 15.

²⁶ As a result of centuries of preoccupation with the interrelations between nation-states, and in the last few decades, also their agents – the Intergovernmental Organizations (IGOs); At this preliminary stage, lawyers feel obliged to identify themselves either with the notion of the nation-state or with that of the 'non-state' – so alien to the average international lawyer. This way, uncompromising underpinning assumptions are frequently adopted, the outcome of protective attitudes with regard to the relevance of the nation-state as the main actor in world affairs.

²⁷ *NSAs and Authority*, pp. 25, 28; *The Role of Law*, Conclusion Chapter, p. 329.

²⁸ Paulus, 'Law and Politics in the Age of Globalization' (commentary on *The Role of Law in International Politics* (M. Byers, ed.)), *European Journal of International Law* 11 (2000), pp. 465, 468.

II. ANALYTICAL FRAMEWORKS

1. The Traditional Doctrinal Approach

1.1 The Doctrine of International Legal Personality

What are the main characteristics of the contemporary academic debate on the normative position of INGOs? What is the governing terminology? INGOs are often considered the prototypical or classical NSAs.²⁹ This view – incorrect conceptually and empirically – is a source of considerable complexity in the analysis of their status. While INGOs are probably the most significant and common form of non-state activity, they have very little in common with other settings gathered under the ‘catch-all’ term ‘NSAs’.³⁰ Distinguishing INGOs from other NSAs reveals that the current legal discourse on their position focuses on four main issues: (1) the existence of an international legal personality; (2) their role in international law-making processes; (3) their position in international dispute-settlement procedures; and (4) their institutional arrangements with international governmental organizations (IGOs).³¹ Clearly, these four issues are closely interrelated and indeed, upon closer inspection it becomes clear that the question of legal personality includes and gives rise to the others. Thus, the issue of personality is of an evaluative-normative character, while the other three lines of inquiry are essentially empirical.³² Once the question of personality is resolved, there is hardly any real need for discussion of the others.³³

Indeed, some prominent international jurists categorize the analysis of the normative position of INGOs as an issue of the quest for, and determination of, international legal personality. The following are illustrative examples. Professor Shabtai Rosenne, in a 2002 textbook based on his Hague Academy General Course,³⁴ deals with the question of INGOs in a sub-section of a chapter entitled

²⁹ See, for example, *NSAs in International Relations*, p. 303; *The Legitimacy*, p. 3.

³⁰ *NSAs in International Relations*, p. 303.

³¹ Noortmann, ‘Non-State Actors in International Law’, in *NSAs in International Relations*, Ch. 4, p. 60.

³² See *NSAs in International Relations*, p. 60.

³³ Whereas the inquiry into institutional arrangements and position in dispute settlement procedures is frequently fashioned to outline the role in international law-making, and that in turn can make an essential contribution in the provision of legal personality. Noortmann accordingly observes that: ‘The quest for and determination of the international legal personality is not merely a legal exercise irrelevant to the position in the international decision making processes. It may be assumed that NSAs benefit from legal personality as an element in their international capacity to engage in decision- and law-making processes as well as in the implementation of international rules.’ – see *NSAs in International Relations*, 64.

³⁴ ‘The Perplexities of Modern International Law’, *Hague Academy of International Law, Collected Courses*, Vol. 291 (2001) (Martinus Nijhoff Publishers, 2002) (hereinafter: ‘The Perplexities’).