

A Puzzle for International Law: NGOs at the United Nations

Abstract

A challenge for contemporary international lawyers is the democratic deficit in the United Nations. One suggestion that has been used to address this deficit is the introduction of NGOs into the decision-making processes. This article seeks to address whether this 'inclusion' is democratic. Once the progressive history of liberal democracy in international law is contested, alternative models and standards of democracy can be and have been expected of NGOs. Rather than seeking to suggest which model is desirable, it is the aim of this article to explore the way in which the current procedures for granting consultative status to NGOs manage the tensions between functionalism, internal and external accountability, participatory and representative democracy. In January 2014, the United Nations Committee for NGOs decided on the consultative status of over 400 NGOs. Whilst the terms of reference for the Committee refers to the democratic status of the NGOs and their accountability mechanisms, the questions permitted by states at the Committee reflect states' concerns with the 'interests' NGOs represent rather than their internal governance structures. Using these decisions from the Committee, it will be shown how the Committee manages the tension by leaning in favour of representation and expertise at the expense of accountability.

1. Introduction

On 25th March 2014, a number of nongovernmental organisations (NGOs) stood up in The Human Rights and Alliance of Civilizations Room, in *Palais des Nations*, holding photos or hand drawn pictures of human rights defender Cao Shunli. It was the Universal Periodic Review of China at the United Nations Human Rights Council, and the NGO, International Service for Human Rights (ISHR) had just made a statement, at the end of which a minute's silence was called for to mark the death of Cao Shunli. Shunli had been detained by the Chinese authorities in September 2013 for protesting against the refusal to allow the public to participate in a national human rights review.¹ China reacted, interrupting ISHR's statement, to highlight that a minute's silence went beyond what an NGO could contribute to discussions. The President moved onto the next NGO statement, ISHR and the NGOs that joined them were 'silenced'.

The stifling of NGOs at the United Nations Human Rights Council raises concerns about the undemocratic nature of the United Nations (UN). The participation of NGOs in international decision-making was supposed to mitigate against the democratic deficit. This instance also raises concerns about the relations between states and civil society at the UN. The history of participation by NGOs at the UN highlights a tensional relationship between state and non-state actors, but it is the procedures for access to the UN bodies that is at the crux of this problematic relationship. Access to the United Nations is predominantly managed through the UN Economic and Social Council (ECOSOC) Resolution 1996/31. Although other specialized bodies have their own procedures, the consultative status granted by ECOSOC is the main mechanism. ECOSOC Resolution 1996/31 outlined criteria that the United Nations Committee on NGOs should take into account when considering applications from NGOs.

¹ Jonathan Kaiman, 'Chinese activist Cao Shunli dies after being denied medical help, says website' *The Guardian* (14 March 2014)
<<http://www.theguardian.com/world/2014/mar/14/china-activist-cao-shunli-dies-human-rights>> accessed 23 April 2014.

This includes, the prioritisation of representation from developing countries and those countries that have transitional economies,² as well as providing that NGOs should have a representative structure, possess accountability mechanisms, and they should exercise voting or other appropriate democratic and transparent decision-making processes.³ Consultative status is divided into general status and special status, with a roster for those NGOs that are considered useful.⁴ Broadly speaking, general status grants more participatory rights than special status, as NGOs with general consultative status are able to submit an increased amount of material.⁵ General status is reserved for those NGOs that are ‘international’ or are more widely representative.⁶ These criteria or principles highlight the puzzle for international law. Tensions between internal and external accountability, representation and participation and expertise underpin the language of Resolution 1996/31. The Preamble to Resolution 1996/31 shows the balance that it is attempting to strike between representation and expertise. It acknowledges the democratic pluralism of the ‘full diversity’ of NGOs, whilst also paying heed to the ‘breadth of expertise’.⁷ Thought carefully balanced in the text of the resolution, there is much overlap between these themes, such as the UN Committee on NGOs is able to prioritise representation over participation.

The problem of reconciling these tensions has not gone unaddressed in the scholarship. In 2006, Peter Willetts analysed the approach taken in the Cardoso Report on the UN and Civil Society. He argued that the report attempts to combine three irreconcilable frameworks; functionalism, neocorporatism, and democratic pluralism. If, he suggests, functionalism and neocorporatism are focused on expertise (and expertise within the government), then democratic pluralism which is premised on the diversity of participants,⁸ is not possible. This “confused” approach and the panels ignorance of the current ECOSOC procedures,⁹ means that the Cardoso reforms to the ECOSOC procedure are weak. Willetts criticises the report for overlooking the current ECOSOC procedures, but he does not acknowledge that those procedures are manifestations of a similarly confused and combined framework. It is the aim of this article to show the tension, first at the superficial level, between functionalism and democratic pluralism in the ECOSOC procedures. Secondly, the tension is much deeper because democratic pluralism has to be unpacked, namely what form or ‘model’ this democratic pluralism takes. Maria Ludovica Murazzani suggests that democratic pluralist approaches bring about ‘transparency, participation and accountability’, but she does not note the tension between these.¹⁰ Analysing the criteria for ECOSOC and the meetings, there are a further three tensions between accountability, representative democracy and participatory democracy. These tensions sit at the heart of the debate on the democratic credibility of non-state actors.

² ECOSOC ‘Consultative relationship between the United Nations and non-governmental organizations’ Resolution 1996/31 (25 July 1996), para 6.

³ *ibid* para 12.

⁴ *ibid* paras 22, 23, 24.

⁵ *ibid* para 31.

⁶ *ibid* para 22.

⁷ *ibid* Preamble

⁸ Peter Willetts, ‘The Cardoso Report on the UN and Civil Society: Functionalism, Global Corporatism, or Global Democracy?’ (2006) 12 *Global Governance* 305, 317.

⁹ *ibid* 306.

¹⁰ Maria Ludovica Murazzani, ‘NGOs, Global Governance and the UN: NGOs as “Guardians of the Reform of the International System”’ (2009) 16 *Transit Stud Rev* 501, 506.

This article is separated into three sections. Firstly, the role of NGOs at the United Nations will be outlined. The increasing influence of NGOs in international decision-making raises concerns about the democratic nature of NGOs and the possible threat to democracy from the inclusion of NGOs. Secondly, the question of democracy is addressed. Challenging the dominant narrative of liberal democracy in international law, the particularities of NGOs allows for discussion of alternative models. The approach to democracy and NGOs has predominately centred on four themes; expertise, accountability, participation and representation. These four themes are in a tensional relationship, the overlaps will be analysed to show the questions that a procedure managing access to the United Nations, such as the ECOSOC Resolution, would need to address. Thirdly, using the ECOSOC procedures and the decisions from the United Nations Committee on NGOs, the approach of states to NGOs will be explored. Taking in turn the four theoretical themes that give rise to tension, the criteria and the questions put to applicant NGOs will be discussed. Ultimately, the Committee on NGOs leans towards prioritising questions of representation because then the states can control what issues, persons and peoples are represented.

2. The United Nations, Civil Society and Nongovernmental Organisations

Before discussing the role of civil society and NGOs at the UN, it is beneficial to outline the debates on the meaning of civil society and NGOs. The contested meanings of the terms lead into a debate on the contested role of these non-state actors at the UN. From awareness-raising to standard setting, the roles of NGOs at the UN are varied. Analysing ECOSOC Resolution 1996/31 shows how the plethora of diverging roles have been managed to balance both expertise and participation. Looking at the documentation on the meeting of the UN Committee on NGOs, the balance of these roles is different, as the Committee are seen to favour particular interests or ‘expertise’.

The meaning and contents of civil society is contested. At its broadest, it might mean ‘a sphere of social life that is public but excludes government activities’.¹¹ Missoni has noted that rather than speak of the more formal NGOs, United Nations Development Programme (UNDP) and the World Bank have shown their ‘desire to engage with a wider range of groups’ by using the vocabulary of civil society.¹² Despite the shift in some international organisations to talk of their relations with civil society,¹³ the majority of civil society participants at the UN are NGOs and the ECOSOC accreditation procedures that will be discussed in detail later, are geared towards the access of NGOs.

What is meant by an NGO (as opposed to civil society more broadly, or social movements), is not initially clear either.¹⁴ The UN Charter defines NGOs in the negative, as ‘not

¹¹ Errol Meidinger, ‘Law Making by Global Civil Society: The Forest Certification Prototype’ (Baldy Center for Law and Social Policy, State University of New York, 2001) cited in Barbara Gemmill and Abimbola Bamidele-Izu, ‘The Role of NGOs and Civil Society in Global Environmental Governance’, 4 <<http://environment.research.yale.edu/documents/downloads/a-g/gemmill.pdf>> accessed 23 April 2014.

¹² Eduardo Missoni, ‘International Non-Governmental Organisations’ in Eduardo Missoni and Daniele Alesani (eds), *Management of International Institutions and NGOs: Frameworks, practices and challenges* (Routledge 2013) 53.

¹³ *ibid* 53.

¹⁴ See, Balakrishnan Rajagopal, *International Law from Below; Development, social movements and third world resistance* (CUP 2003).

governmental organizations’.¹⁵ Whilst this does allow for a broad scope of organisations, Dianne Otto has noted that this puts NGOs at the peripheries in international law.¹⁶ Paragraph 18 of ECOSOC Resolution 1996/31 refers to Article 71 of the UN Charter and confirms that the nature of participation of organisations is more limited than the participation of states. In fact, Otto has shown that Article 71 ‘limited the earlier practices by confining mandated consultation to the areas covered by ECOSOC’.¹⁷ These provisions confirm that states are the primary actors, and the role of NGOs is secondary. Such exclusion, even in the definition, runs throughout the relationship between NGOs and states.

Despite this secondary position, NGOs play an important role in decision-making at the international level. Initially in 1946 there were 41 NGOs, but these numbers grew. There was a dramatic increase in the 1990s and there are currently over 3,910 NGOs that have ECOSOC consultative status at the UN. Missoni notes that since the 1970s NGO participation at the UN has extended beyond ECOSOC.¹⁸ Against this lineal history of progress, Thomas Davies in his recent history of NGOs exposes the non-linear, cyclical, history of the rise of NGOs in international institutions. With peaks in the 1930s and the 1990s, rather than a gradual increase, the inclusion of NGOs has not been a steady process. Focusing on numbers, however, overlooks the actual activity of these NGOs.

There has been a shift in the role played by NGOs, which is reflected in the rhetoric used to describe the relationship between the UN and NGOs. Whereas initially NGOs had ‘consultative status’, there is a shift in favour of discussing the ‘partnership’ with NGOs.¹⁹ Willetts notes that the ‘term *consultative status* was deliberately chosen to indicate a secondary role’.²⁰ Coupled with the negative definition of NGOs, that places them on the peripheries, this secondary role reinforces the state-centric nature of international law. Consultation evoked advice giving, rather than the NGOs being part of the decision-making process.²¹ Placing NGOs in partnership with states invokes equality,²² yet the places that NGOs are acting and the procedures for accreditation suggest that these non-state actors are not equal.

Taking part in ‘informal mechanisms such as lobbying and other political processes’,²³ NGOs are able to have influence on states. For Christine Chinkin et al, this lobbying role played by non-state actors is minimal,²⁴ but for C. Tinker these are ‘real contributions of “non state” groups to the process of international law making’.²⁵ The size or importance of the role

¹⁵ Dianne Otto, ‘NGOs in the UN System: The Emerging Role of International Civil Society’ (1996) 18(1) HRQ 107.

¹⁶ *ibid* 110.

¹⁷ Otto, ‘NGOs in the UN System’ (n 15) 109.

¹⁸ Missoni (n 12) 64.

¹⁹ Peter Willetts, ‘From “Consultative Arrangements” to “Partnership”: The Changing Status of NGOs in Diplomacy at the United Nations’ (2000) 6 Global Governance 191.

²⁰ *ibid* 191.

²¹ *ibid*.

²² Willetts, ‘From “Consultative Arrangements” to “Partnership”’ (n 19) 192.

²³ Christine Chinkin, Dianne Otto, John Jackson, Mark Janis and Virginia Leary, ‘Wrap-Up: Non-state actors and their influence on international law’ (1998) ASIL 380.

²⁴ *ibid*.

²⁵ C Tinker, ‘The Role of non-state actors in international law-making during the UN decade of international law’ (1995) 89 American Society of International Law 177, 179.

played by NGOs is determined by the approach to international law. Whereas, Gunther Teubner has a broader understanding of law making, and notes that agreements take place between ‘semi-public, quasi-private or private actors’,²⁶ for commentators that have a state-centric understanding of international law, non-state actor involvement is secondary. Nevertheless, this debate on the size of the role of non-state actors is suggestive at least, of a function for NGOs.

At the UN Human Rights Council, NGOs can attend and observe proceedings at the Council, submit written statements and make oral interventions, and organise events alongside Council Sessions.²⁷ More importantly for the purposes of facilitating democracy at the UN and for the purpose of ensuring the robust protection of human rights, NGOs can participate in debates, interactive dialogues, panel discussions and informal meetings. NGOs working with the International Labour Organisation (ILO) had involvement with standard-setting, Erik Bluemel shows the example of the ILO Minimum Age Convention No. 38.²⁸ Bluemel also shows that NGOs involved in working against climate change can help supervise and implement the Convention; Article 7(2)(a) of the UNFCCC provides that NGOs may contract with the Conference of the Parties, where appropriate, to supervise and implement the Convention.²⁹ Many bodies allow NGOs to ‘act as enforcement agents’ who can inform of non-conforming states.³⁰

Whilst NGOs have functions as diverse as agenda-setting, norm-setting and enforcement,³¹ looking at the places NGOs are found highlights their peripheral status. NGOs at the Human Rights Council are often found in side panels that they organise. For example, the World Federation of UN Associations (WFUNA), which is within the framework of the NGO Committee on Human Rights held a side panel at the 23rd Human Rights Council Session, to share concrete advice on how NGOs can engage effectively with the Human Rights Council.³² Observational research from the Human Rights Council shows that NGOs are often paid less attention than state delegates; delegates go to the back of the room or use their phones.³³ This approach to NGOs that side-lines their participation, has an impact on the extent to which NGOs can be said to play a part in the democratisation of international organisations.

²⁶ Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-centred Constitutional Theory’ (Storrs Lectures 2003/2004 Yale Law School, 2004) 13 < http://www.jura.uni-frankfurt.de/42852793/societal_constitutionalism.pdf > accessed 23 April 2014.

²⁷ UNGA Res. 60/251, ‘Human Rights Council’, 15 March 2006, UN Doc. A/RES/60/251, para 11.

²⁸ Erik B Bluemel, ‘Overcoming NGO Accountability concerns in International Governance’ (2005) 31 Brooklyn J Intl L 139, 169.

²⁹ *ibid* 167.

³⁰ *ibid* 177.

³¹ *ibid* 162-164, 175.

³² WFUNA, ‘Side Event to 23rd Session of the Human Rights Council: Introduction to the Human Rights Council’ <<http://www.wfuna.org/side-event-to-23rd-session-of-the-human-rights-council-introduction-to-the-human-rights-council>> accessed 23 April 2013.

³³ Rosa Freedman, *The United Nations Human Rights Council: A Critique and Early Assessment* (Routledge 2013) 113-114.

2.1 NGOs and Democracy

The way in which NGOs are defined or described has an impact on the role they are seen to play at the UN. At times NGOs are described as ‘represent[ing] a global polity’ and are included in ‘deliberative processes as a way of overcoming what might otherwise be deemed a “democratic deficit”’.³⁴ Some argue that NGOs facilitate ‘more direct citizen participation’.³⁵ These conceptualisations invoke the role NGOs play in representative or participatory democracy. At other times ‘NGOs are more appropriately seen as interest groups focused on specific issues [rather] than as representatives of bottom-up constituencies’.³⁶ In contrast to the representative or participatory role played by NGOs, this conceptualisation favours the ‘expertise’ of the NGO. The debate between whether NGOs are facilitators of democracy or experts creates a tension that runs throughout the ECOSOC resolution and the approach by the UN Committee on NGOs.

If, however, NGOs are solely to provide representation and participation in an attempt to generate democratic practices at the UN, they do not always meet expectations. The ‘paradox’ of the NGOs in international governance is that whilst on the one hand they are seen as a tool for democratisation, on the other their lack of accountability and transparency undermines their democratic credentials.³⁷ The involvement of NGOs can be either a sign of health or an ‘indicator of its anti-democratic nature’.³⁸ Some organisations operate without a public mandate,³⁹ others are overrepresented at the international level, to the detriment of more vulnerable voices.⁴⁰ There is a concern that the inclusion of NGOs is elitist, as it is the well-funded and better organised groups that can participate.⁴¹ Despite Thomas Davies in his history of transnational NGOs showing that there are both Eastern and Western organisations,⁴² there has been a western bias at the United Nations. These criticisms raise concerns about the internal accountability mechanisms of NGOs, as well as, the representative nature of the organisations individually and as a group. Internal accountability and representation are questions that the Committee have to ask of applicant NGOs. The way the Resolution and the Committee deal with these questions is discussed in Section 4.

³⁴ Peter L Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community’ (1999) 99(3) Columbia Law Review 628.

³⁵ Magdalena Bexell, Jonas Tallberg and Anders Uhlin, ‘Democracy in Global Governance: The promises and pitfalls of transnational actors’ (2010) 16 Global Governance 81-101, 82.

³⁶ Kenneth Anderson, ‘The Ottawa Convention Banning Landmines, The Role of International Non-governmental Organizations and the Idea of International Civil Society’ (2000) 11(1) European Journal of International Law 91 cited in Paul Schiff Berman, ‘From International Law to Law and Globalization’ (2005) 43 Colum J Transnatl L 485, 548.

³⁷ Pauline Jones Luong and Erika Weinthal, ‘The NGO Paradox: Democratic Goals and Non-democratic Outcomes in Kazakhstan’ (1999) 51(7) Europe-Asia Studies 1267-1284.

³⁸ See Kal Raustiala, ‘What is the democracy problem in International Law’ in *Sovereignty and Multilateralism* (2000) 1 Chicago Journal of International Law 401, 409.

³⁹ Jan Aart Scholte, ‘Civil society and democratically accountable global governance’ (2004) 39(2) Government and Opposition 211, 231.

⁴⁰ Magdalena Bexell, Jonas Tallberg and Anders Uhlin, ‘Democracy in Global Governance: The promises and pitfalls of transnational actors’ (2010) 16 Global Governance 81-101, 87.

⁴¹ *ibid.*

⁴² T Davies, *NGOs; A New History of Transnational Civil Society* (Hurst, 2013).

The extent of the influence of NGOs in international decision-making raises concerns about their undemocratic nature. By way of an example, those groups that control the agenda have ‘control over the scope of the governance system and its ability to change over time’.⁴³ If that group is an NGO or group of NGOs, that are not accountable, self-interest or biased agendas may dominate.⁴⁴ However, the issue is what democracy means in this context. It has already been suggested that NGOs have an inherent tension between democracy and expertise, making them susceptible to being labelled undemocratic. The next section will consider the meaning of democracy in context, and explore the different models or standards that are already present in the approach to NGOs.

3. What is Democracy?

There is no agreed definition of international democracy.⁴⁵ Usually, a liberal, nation-state model of democracy is held up to the international level as a template to follow. Terry MacDonald and Kate MacDonald have shown how cosmopolitan democrats have sought to replicate ‘some version of the legal and electoral structures that are employed within states’.⁴⁶ However, the particularities of international decision-making necessitates an examination of democracy. As Murazzini suggested, democratic pluralism can be broken down into firstly, internal and external accountability, and secondly, the different models that are discussed at the international level; participatory democracy or representative democracy.⁴⁷ The particular functions of NGOs in international decision-making requires a discussion on the relation between democracy and expertise as well. This particular context of NGOs in international decision-making, facilitates a challenge to the prevailing narrative of liberal democracy. Before accountability and the models of democracy are discussed, it is useful to recount the problems with this progressive narrative of liberal democracy in international law.

The end of the Cold War confirmed, for some, that liberal democracy was the only legitimate form of governance. Liberalism in international law gave rise to a drive for democracy and a “consensus” on the benefits of the rule of law’.⁴⁸ The emphasis on liberal democracy is derived from the Kantian liberal peace, the perceived failure of alternative forms of government and the legitimacy that attaches to a liberal democracy. Coupled with the evidence that other forms of government failed, a rationale for the call for democracy is the increased stability and the promise of international peace.⁴⁹ There is a ‘common belief’ that democracy increases ‘prosperity and even quells terrorism’.⁵⁰ Democracy is rising in prominence in international instruments, a few examples include; the Independent Expert on the on the promotion of a democratic and equitable international order as part of the Human

⁴³ Bluemel (n 28) 162.

⁴⁴ *ibid.*

⁴⁵ Same Varayudej, ‘A Right to Democracy in International Law: its implications for Asia’ (2006) 12(1) *Annual Survey of International & Comparative Law* 1, 14.

⁴⁶ Terry MacDonald and Kate MacDonald, ‘Non-electoral accountability in Global Politics: Strengthening Democratic Control within the Global Garment Industry’ (2006) 17(1) *The European Journal of International Law* 89, 90.

⁴⁷ Murazzani (n 10) 506

⁴⁸ Balakrishnan Rajagopal, ‘Invoking the Rule of Law in post-conflict rebuilding: a critical examination’ (2007-2008) 49 *William and Mary* 1347, 1349.

⁴⁹ E Hay, ‘International(ized) Constitutions and Peacebuilding’ (2014) *Leiden Journal of International Law* 149.

⁵⁰ Jean d’Aspremont, ‘Legitimacy of governments in the age of democracy’ (2006) 38 *NYU Journal of International Law and Politics* 878, 885.

Rights Council Special Procedures, and the ‘Millennium Development Goals’. Highlighting the connection between democracy, human rights and gender equality, as well as the consolidation of democracy in Africa to ensure peace, the Millennium Goals show that democratic governance has become increasingly intertwined with various international projects.⁵¹ This focus on liberal democracy means that it is not sufficient to be an ‘illiberal’ democracy.⁵² Democracy and the rule of law have become an international benchmark not only for national governance,⁵³ but for international law.

The liberalism approach to international law comes with a history of progression or ‘liberal millenarism’.⁵⁴ Francis Fukuyama announced that the fall of the Soviet Union was the end of history, the only form of government left was liberalism, or the liberal democracy. However, there is a problem with these progressive narratives of history. Thomas Franck wrote that the eventual victory of democracy was a gradual process,⁵⁵ and yet ‘liberal democracy’ only emerged in the 19th Century.⁵⁶ This progressive approach to the history of democracy overlooks the centuries of philosophers that criticised democracy for being dangerous.⁵⁷ For example, Tocqueville bemoans the ‘election of inferior people to office’.⁵⁸ Plato in *The Republic*,⁵⁹ and similarly Hegel, argues against democracy. Their complaints focus on the lack of ‘coherent unity’ in a democratic, anarchic society and the propensity ‘to follow their citizens’ impulses and desires, rather than any concern for the common good.’⁶⁰ Hegel argues that it would be better to ‘have those with expertise’.⁶¹ The tension between expertise and democracy is not, then, a contemporary phenomenon resulting from the technological age.⁶² Rather, this tension underlies democratic governance, but it becomes more visible in a discussion on NGOs because of the joint role they are seen to play.

The absence of a definition of democracy at the international level has given rise to comment on whether the liberal model is appropriate. Liberalism in international is not without its critics. It has been widely critiqued for being homogeneous. Eriksen criticises the futility of a ‘one size fits all’ approach that does not take into account the idiosyncrasies of power-sharing

⁵¹ UNGA Resolution 55/2, ‘Millennium Development Goals’, 18 September 2000, UN doc. A/RES/55/2 para. 6 and para. 27.

⁵² d’Aspremont (n 50) 879-880.

⁵³ Catherine Turner and Ruth Houghton, ‘International Law, Constitution Drafting and Post Conflict Reconstruction Policy’ in M Saul and J Sweeney (eds) *International Law and Post-Conflict Reconstruction Policy* (forthcoming)

⁵⁴ Susan Marks, ‘The Emerging Norm: Conceptualising Democracy Governance’ (1997) ASIL 373, 374.

⁵⁵ T Franck, *Fairness in international law and institutions* (Clarendon Press 1995) 85.

⁵⁶ Christopher Hobson, ‘Beyond the End of History: The Need for a “Radical Historicisation” of democracy in International Relations’ (2009) 37(3) *Millennium* 631, 639.

⁵⁷ *ibid* 362.

⁵⁸ See Marc F Plattner, ‘Reflections on Governance’ (2013) *Journal of Democracy* 17-28, 25.

⁵⁹ See Thom Brooks, ‘Is Plato’s Political Philosophy anti-democratic?’ in Erich Kofmel, *Anti-democratic thought* (SCIS, 2008) 117.

⁶⁰ See Simone Chambers, ‘Rhetoric and the Public Sphere: has deliberative democracy abandoned mass democracy?’ (2009) *Political Theory* 323-350, 327.

⁶¹ Thom Brooks, *Hegel’s Political Philosophy: Systematic Reading of the Philosophy of Right* (Edinburgh University Press 2013) 116.

⁶² Frank Fischer, ‘Professional Expertise in a Deliberative Democracy: Facilitating Participatory Inquiry’ (2004) 13(1) *The Good Society* 21, 21.

or local knowledge in the individual state.⁶³ Commentators deny the homogeneity of the liberal peace, noting that creation of the liberal democratic state has been varied.⁶⁴ These criticisms are intensified when the focus shifts from states to non-state actors. Although, the liberalisation of international law has cemented liberal democracy as the benchmark, some commentators suggest that NGOs should be held to a different standard than states,⁶⁵ that they can be ‘measured against different democratic theories and normative ideals’.⁶⁶

Discourses on NGOs in international decision-making have already adopted a set of rhetorical tools to discuss democracy in relation to NGOs. There is an underlying question on the tension between functionalism, or expertise, and democracy. In addition, some commentators have discussed the paradox between internal and external accountability. Others have debated the role of NGOs in participatory democracy because NGOs can, as discussed above, facilitate the participation of other non-state actors. Finally, some commentators have noted the contested meaning of representation and have sort to explore this in contemporary decentralised politics. These four approaches to NGOs and democracy will be discussed in turn. It will be apparent that there is a tension between these four approaches, a tension that ECOSOC Resolution 1996/31 attempted to address and an ongoing tension that the UN Committee on NGOs has to manage.

3.1 Functionalism and Democracy

Firstly, the debate on the tension between democracy and expertise has been long drawn out. Scholarship has sought to suggest models that can reconcile the two. J Dewey argued that the two could be divided, that experts would ‘identify basic social needs’ and that citizens ‘would set a democratic agenda for pursuing them’.⁶⁷ The problem with separating out the experts from the citizens is that it can give rise to ‘a more top-down technocratic form of consultation and decision making’.⁶⁸ An alternative is to merge the two together, through dialogue.⁶⁹ Frank Fischer proposed that democracy and expertise could potentially be reconciled through a participatory style democracy.⁷⁰ Similarly, Lawrence B Mohr attempts to reconcile expertise and democracy through voluntary democracy.⁷¹ This voluntary model invokes compromise, whilst an expert can lead in ways ‘consistent with organizational task democracy’ as the others ‘exercised their right under such a democratic system to defer to

⁶³ S Sundstøl Eriksen, ‘The Liberal Peace is neither: peacebuilding, state building and the reproduction of conflict in the Dominion Republic of Congo’ (2009) 16(5) *International Peacekeeping* 652-666, 660.

⁶⁴ See Jonathan Goodhand and Oliver Watton, ‘The Limits of Liberal Peacebuilding? International engagement in the Sri Lankan Peace Process’ (2009) 3(3) *Journal of Intervention and Statebuilding* 303, 307.

⁶⁵ Eva Erman and Anders Uhlin (eds), *Legitimacy Beyond the State? Re-examining the Democratic Credentials of Transnational Actors* (Palgrave MacMillian 2010) 4-5.

⁶⁶ *ibid* 5.

⁶⁷ J Dewey, *The Public and Its Problems* (Shallow 1927) cited in Frank Fischer, ‘Professional Expertise in a Deliberative Democracy: Facilitating Participatory Inquiry’ (2004) 13(1) *The Good Society* 21.

⁶⁸ Frank Fischer, ‘Professional Expertise in a Deliberative Democracy: Facilitating Participatory Inquiry’ (2004) 13(1) *The Good Society* 21, 22.

⁶⁹ *ibid* 25-26.

⁷⁰ *ibid* 21.

⁷¹ Lawrence B. Mohr, ‘Authority in Organizations: On the Reconciliation of Democracy and Expertise’ (1994) 4(1) *J-PART* 49, 63.

expertise',⁷² this compromise could easily become coercion. This voluntary model is also premised on a participatory style democracy, yet, the UN is predicated on a representative model of democracy, with states acting as intermediaries.⁷³

Willetts, however, suggests that expertise 'is not necessarily antidemocratic'; rather, democracy is undermined if 'policy networks are limited to "relevant" actors' such as experts.⁷⁴ Willetts is correct to argue that the participation of experts who can inform the public is contributing to the debate.⁷⁵ However, as Mohr highlights, expertise and the opinions of experts in contemporary society are often accepted without challenge; their opinion has the power to drown out the more vulnerable voices.⁷⁶

It has been suggested that functionalism is so far entrenched in the UN as to undermine the chances of democracy.⁷⁷ Willetts spots a functionalist approach in the specialist bodies at the UN. This functionalist approach, he suggests, is present in the language of expertise used in the Cardoso report. The report, he notes, talks of 'expertise, skills, evidence, knowledge, experience, efficiency, independent specialists, mutual learning, and objectivity-and of being results-focused, technical and more effective'.⁷⁸ Arguably, the specialization of different tasks has 'created levels of fragmentation that now make it quite difficult to bring decisions under the control of elected representatives'.⁷⁹

However, in the NGO both functionalism or expertise and democracy collide. Willetts argues that 'democratic pluralism' is 'a reason for why NGOs have influence in the UN' and that functionalism, such as expertise, is the tool NGOs need to use to have 'better chances to influence'.⁸⁰ This suggestion overlooks the ways in which NGOs are classified and selected in the ECOSOC procedures. The role of the NGO at the UN is to simultaneously provide expertise and to represent interests or facilitate the participation of those usually excluded from the decision-making. According to ECOSOC, NGOs have a dual function, they provide expert information and advice to the international organisation and they also allow representation of 'important elements of public opinion'.⁸¹ The need to balance expertise and democracy is more visible in discussions on NGOs at the UN.

3.2 Internal and External accountability

Secondly, throughout the discourse on the democratic 'credentials' of NGOs,⁸² there is a paradox between external and internal accountability. The recognition that state-based electoral accountability is not appropriate in the international, decentralised system, has led

⁷² *ibid* 63.

⁷³ See, Anne Peters, 'Dual Democracy' in Jan Klabbers, Anne Peters, and Geir Ulfstein (eds), *The Constitutionalisation of International Law* (OUP 2009) 264.

⁷⁴ Willetts, 'The Cardoso Report' (n 8) 317.

⁷⁵ *ibid* 317.

⁷⁶ Mohr (n 71) 54.

⁷⁷ Willetts (n 8) cited in Maria Ludovica Murazzani, 'NGOs, Global Governance and the UN: NGOs as "Guardians of the Reform of the International System"' (2009) 16 *Transit Stud Rev* 501, 507.

⁷⁸ Willetts (n 8) 305-324.

⁷⁹ Fischer (n 68) 21.

⁸⁰ Willetts (n 8) cited in Murazzani (n 77) 506.

⁸¹ ECOSOC Resolution 1996/31, para 20.

⁸² Erman and Uhlin (n 65).

academics to discuss alternative notions of accountability. However, as noted by MacDonald and MacDonald, forms of accountability will differ from those that happen within states.⁸³ MacDonald and MacDonald have posited that it is 'possible instead to devise certain forms of non-electoral democratic accountability'.⁸⁴ Breaking down the advantages of democratic accountability, MacDonald and MacDonald show that transparency and public disempowerment are desired traits.⁸⁵ It is possible, therefore, that NGOs could become more transparent and as watchdogs, NGOs often perform the task of challenging and therefore disempowering public powers. In positing this shift towards non-state accountability, MacDonald and MacDonald have not abandoned the internal and external accountability paradigm. Enhanced transparency works to increase internal accountability and the act of disempowering public powers is a form of external accountability, it results from holding those powers to account.

Whilst NGOs have made international institutions 'more publicly answerable',⁸⁶ NGOs themselves are not always answerable to the peoples they represent. Backstrand draws on this distinction between external and internal accountability to say that 'External accountability means that decision-makers have to justify their action vis-a-vis stakeholders that are affected by their decisions.'⁸⁷ An example of this in practice, she suggests, is the consultations with civil society held by The World Bank.⁸⁸ Yet, looking at the role of NGOs, external accountability is broader than the international organisation justifying their decision, it includes the holding to account of states or international organisations. NGOs through their awareness raising, lobbying and implementation roles are playing a part in holding states and international organisations accountable. Internal accountability, by contrast, can be described as the mechanisms within the NGOs that make it accountable to its members.⁸⁹

This binary distinction between internal and external is not fixed. Rana Lehr-Lehnardt collapses the distinction between internal and external accountability when she suggests that 'accountability is the responsible representative of issues and problems in the global community'.⁹⁰ Where the representative issues would act to hold to account the states and international organisations as a form of external accountability, the pressure to do this 'responsibl[ly]' is a comment on the organisations internal accountability. Yet, even in this more closely linked forms of internal and external accountability, both are needed for legitimate non-state actors participation in international affairs. When discussing the tension between democracy and expertise, Mohr notes that the tension may also be 'managed by

⁸³ MacDonald and MacDonald, 'Non-electoral accountability' (n 46) 98.

⁸⁴ *ibid* 90.

⁸⁵ *ibid* 105, 112.

⁸⁶ Scholte (n 39) 217.

⁸⁷ Karin Backstrand, 'Democratizing Global Environmental Governance? Stakeholder Democracy after the World Summit on Sustainable Development' (2006) 12 *European Journal of International Relations* 467, 478.

⁸⁸ *ibid*.

⁸⁹ *ibid*.

⁹⁰ Rana Lehr-Lehnardt, 'NGO Legitimacy: Reassessing Democracy, Accountability and Transparency' (*Cornell Law School Inter-University Graduate Student Conference Papers*, 2005) 26 <

http://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=1020&context=lps_clacp > accessed 23 April 2014.

hypocrisy’.⁹¹ Hypocrisy, or the incorporation of different organisational processes for the internal and the external parts of the organisation, has been developed by Nils Brunsson,⁹² not only allows for the reconciliation between democracy and expertise, but it can also be used to discuss the tension between internal and external accountability. Hypocrisy would suggest that the NGO could play a part in external accountability without being internally accountable. Whilst this might happen in practice, the ECOSOC Resolution focuses too heavily on internal accountability for hypocrisy to underpin the access of NGOs to the UN.

The role of the NGO as watchdog or holding states accountable, is not democratic without internal accountability mechanisms being in place within that NGO. The ECOSOC procedures, highlighted above and developed further below, focus on the internal accountability of the NGOs. States are asked to consider the democratic nature of the structures within the organisation. Less is provided for about the external accountability of the NGO, but the documentation from the Committee on NGOs shows that it is the external accountability, the ability of the NGO to hold certain states to account, that preoccupies the UN Committee on NGOs.

3.3 Participation

Thirdly, it is often assumed that ‘[p]articipation of a wider range of social and other stakeholders interests add to the legitimacy of outcomes’.⁹³ NGOs, it is argued, ‘can open political space for social circles’ which means that vulnerable or often excluded groups can participate in the decision-making processes.⁹⁴ The question to consider is what is meant by participation. Despite the drive for liberal democracy in international law, free and fair elections are not a frequent occurrence in the decision-making processes in international organisations. The involvement of NGOs at the UN does not include voting.⁹⁵ The lack of voting, however, does not mean that the NGOs do not participate, rather it highlights again that democratic practice in international decision-making has to be distinguished from national practice. Alternatively, participation is akin to discussion, and it has been shown that NGOs can participate in the meetings through written submissions and sometimes oral statements. The rules on consultative status show that participation can vary according to the body or the status granted to the NGO. Participation is used in the rhetoric on NGOs, as UN specialised bodies make known their support for the participation of NGOs. For example, UN Women state that ‘the active participation of non-governmental organizations (NGOs) is a critical element in the work of the Commission on the Status of Women’.⁹⁶ However, the varying degrees of participation and the forbidding of negotiation by NGOs in 1996, which severely reduces the influences that NGOs can have in the decision-making processes, shows the tension underlying procedures managing access to the UN. Although, as Willett notes,

⁹¹ Mohr (n 71) 59.

⁹² Nils Brunsson, *The Organization of Hypocrisy: Talk, Decisions and Actions in Organizations* (Copenhagen Business School Press 2002); Nils Brunsson, ‘The Necessary Hypocrisy’ (1993) *International Executive* 1, 4.

⁹³ Backstrand (n 87) 472.

⁹⁴ Jan Aart Scholte, ‘Civil Society and Democracy in Global Governance’ (2002) *Global Governance* 281, 293.

⁹⁵ Willetts, ‘From “Consultative Arrangements” to “Partnership”’ (n 19) 206.

⁹⁶ UN Women, ‘NGO Participation’ < <http://www.unwomen.org/ru/csw/ngo-participation> > accessed 23 April 2014.

there is not a clear line between what amounts to negotiation and what does not,⁹⁷ suggesting that NGOs still have a role to play in negotiating deals, the step to forbid negotiation shows the step taken by states to limit the participation of NGOs.

Participation alone is not sufficient to be democratic, it has to be democratic participation. As Kal Raustiala highlights, 'widened participation' 'may affirmatively worsen the situation if information is asymmetric and participation not balanced'.⁹⁸ At the UN one of the concerns is the western bias of NGOs. The richer, more resourced NGOs from Western states are more capable of being heard at the UN. Participation, then, is not balanced. However, Kilby argues that even 'participatory democracy has been at the expense of representative democracy'.⁹⁹ Using examples from domestic governance, Kilby shows that the participation of more resourced NGOs can replace the interests of the citizens as a whole. Similarly, at the international level the stronger voices of the Western or larger NGOs might overwhelm the less powerful voices. This negative effect on representational democracy, in a broader sense, shows the tensions that persist in discussions on the democratic credentials of NGOs.

3.4 Representation

The final theme is that of representation. Representative democracy, mainstay across the democratic states, has 'become a dominant idea' in governance.¹⁰⁰ The domestic, and therefore traditional, way of conceptualising representative democracy is through the free and fair election of representatives. Yet, what is meant by representation is contested and the definition of representation is 'hidden behind a cloud of countless definitions'.¹⁰¹ The standard definition of representation is 'to make present what is absent'.¹⁰² Yet, this does not address what it is that needs to be made present and by whom or how. In addressing the whom or how element, Yigit has shown how in the European Union there are examples of both direct representation (via the Parliament) and indirect representation (via the Council).¹⁰³ Although this acknowledges the different sources of representation, it is still premised in electoral-based representation. EU citizens elect Members of the European Parliament and their domestically elected Ministers represent them in the Council. In contrast, Pollak et al., challenge the definition of representation, suggesting that its current form was crafted for a 'remarkably different [political community] from the [current] ones'.¹⁰⁴ The shift away from monolithic systems, to political systems 'inhabited by various kind of actors, formal and informal ones', makes 'elections as the *differentia specifica*' no longer 'a defining criteria for political representation'.¹⁰⁵ The example of NGOs in international decision-making, noting that some commentators have already suggested that a different standard can be applied

⁹⁷ Willetts, 'From "Consultative Arrangements" to "Partnership"' (n 19) 207.

⁹⁸ Raustiala (n 38) 401.

⁹⁹ Patrick Kilby, 'Nongovernmental Organisations and Accountability in an Era of Global Anxiety' (2004) *Seton Hall Journal of Diplomacy and International Relations* 67, 78.

¹⁰⁰ Dilek Yigit, 'Democracy in the European Union from the perspective of representative democracy' (2010) 6(22) *Review of international law and politics* 119, 120.

¹⁰¹ J Pollak, J Batora, M Mokre, E Sigalas, P Slominski, 'On Political Representation: Myths and Challenges' (RECON Online Working Paper 2009/03) 1 <http://www.ihs.ac.at/vienna/resources/Political%20Science/Publications/RECON_wp_0903.pdf> accessed 23 April 2014.

¹⁰² *ibid.*

¹⁰³ Yigit (n 100) 141.

¹⁰⁴ Pollak et al., (n 101) 2.

¹⁰⁵ *ibid* 16.

them,¹⁰⁶ shows that traditional forms of representation through elections is not appropriate at the international level.

Shifting to the international level, there are a number of questions that need to be addressed. In contrast to politicians, NGOs might not be an appropriate actor in a representative democracy. There is a suggestion that 'being like the people is a necessary but not sufficient condition [and that] representatives also need to act like the people'.¹⁰⁷ Often NGOs are not like the people, nor do they act like the people, whose interests they represent. However, Pollak et al., note that representatives can be selected on the basis of their expertise.¹⁰⁸ Indeed, as will be discussed, the ECOSOC Resolution 1996/31 places particular emphasis on the expertise of NGOs. However, as Willetts has suggested, the balance between representation and expertise can err on the side of being undemocratic if it excludes actors. Similarly, there is a concern that the interests of some can prevail to the detriment of other, more vulnerable interests. This tension between representation and participation has already been noted, but it is worth highlighting that the factors of expertise can undermine participation from the diversity of NGOs.

The second question to consider is whether representative democracy can overcome the accountability gaps. Michael Young in 'Non-state Actors in the Global Order' showed how he included NGOs in international discussions because he 'knew that these NGOs and the interests they represented were often precluded from participating in internal domestic dialogues'.¹⁰⁹ Young emphasised representation and participation above internal accountability. This shows that there is a divide, similar to that between internal and external accountability, between internal and external representation. Internal representation addresses whether an NGO represents its members, but external representation is more concerned with the breadth of that representation. The ECOSOC Resolution seeks to address both questions of representation. Yet, the Committee of NGOs is more preoccupied with 'external representation' and the activities of NGOs in states.

4. ECOSOC and the United Nations Committee on NGOs

The discussions on the tensions within discussions on international democracy, and democratic theory, have highlighted those themes that run throughout the management of NGO participation at the UN. Focusing on the ECOSOC Resolution 1996/31 that provides for the consultative status of NGOs, these tensions will be addressed. The Resolution, whilst acknowledging the different themes, does not adequately engage with the particular tensions and overlaps. This allows for the manipulation of the process by the Member States of the UN Committee on NGOs. Before addressing internal accountability, participation and representation, the provisions of the ECOSOC Resolution will be outlined in detail.

4.1 Access and Participation at the United Nations

The bodies within the UN have a myriad of processes for providing access to NGOs. However, given that many of the bodies mimic or reflect the ECOSOC procedure, the starting point for NGOs and access at the UN is the granting of ECOSOC consultative status. A subsidiary body of the Economic and Social Council, the United Nations Committee on Non-

¹⁰⁶ Erman and Uhlin (n 65).

¹⁰⁷ Pollak et al., (n 101) 4.

¹⁰⁸ *ibid* 5.

¹⁰⁹ Michael K Young, 'Non-state Actors in the Global Order' (2010) *Utah Law Review* 81, 89.

governmental organisations, comprises 19 member states that recommend NGOs for consultative status. Responding to criticisms of a western bias within the Committee, membership is based on equitable geographical distribution.¹¹⁰ Nevertheless, as will be expanded upon below, the Committee is still shrouded in an undemocratic politicisation.

ECOSOC Resolution 1996/31 outlined criteria for the granting of access to NGOs. This Resolution attempts to address concerns about the undemocratic nature of NGOs. When the Committee on NGOs is selecting, there are a number of principles which should guide them. The principles to take into account highlight the importance of representation, for example the principles prioritise representation from developing countries and those countries that have transitional economies.¹¹¹ The principles also pay attention to the internal democratic structures of NGOs. NGOs should have a representative structure, possess accountability mechanisms, and they should exercise voting or other appropriate democratic and transparent decision-making processes.¹¹² These criteria, then, address the paradox of NGOs, by making sure that both representation and accountability are considered.

However, in the ECOSOC resolution on the participation of NGOs, there is a tension between expertise and representativeness. NGOs are acknowledged not only for their representative nature, but also for their expertise.¹¹³ ‘Competence’ or the ‘representative character’ of an NGO is necessary to obtain consultative status.¹¹⁴ The Resolution states that;

‘consultative arrangements are to be made, on the one hand, for the purpose of enabling the Council or one of its bodies to secure expert information or advice ... and, on the other hand, to enable international, regional, subregional and national organizations that represent important elements of public opinion to express their views.’¹¹⁵

The clash between representation and expertise is seen most clearly in paragraph 5 of the Resolution, where the two principles the Committee should take into account when considering the application are outlined. Whilst the Committee should ‘ensure, to the extent possible, participation of non-governmental organizations from all regions, and particularly from developing countries, in order to help achieve a just, balanced, effective and genuine involvement of non-governmental organizations from all regions and areas of the world’, the Resolution also provides that ‘The Committee shall also pay particular attention to non-governmental organizations that have special expertise or experience upon which the Council may wish to draw.’¹¹⁶ Whereas the inclusion of NGOs from all regions is evocative of Willetts’ ‘democratic pluralism’, the focus on expertise limits the types of NGOs that will be included in such a ‘pluralism’.

Whereas general observation status applies to those organisations that are more broadly representative, special status invokes a special competence.¹¹⁷ The number and length of written submissions is then limited depending on the nature of the status granted; General

¹¹⁰ Otto, ‘NGOs in the UN System’ (n 15) 115.

¹¹¹ ECOSOC Resolution 1996/31, para 6.

¹¹² *ibid* para 12.

¹¹³ *ibid* Preamble.

¹¹⁴ *ibid* para 9.

¹¹⁵ *ibid* para 20.

¹¹⁶ *ibid* para 5.

¹¹⁷ *ibid* para 22 and 23.

status allows 2,000 word submissions and Special status allows only 500 words for submissions to the ECOSOC, and 1,500 words to other subsidiary bodies.¹¹⁸ Expert groups then are granted less space to participate than those broader representative groups. This is suggestive of a prioritisation of the representation of interests. The recent decisions by the UN Committee on NGOs on NGO consultative status highlight how these tensions between expertise, accountability, representation, and participation play out in the questions and decisions.

4.2 Internal accountability

Towards the end of January 2014, the United Nations Committee on NGOs met to decide the consultative status of some 400 NGOs. Comparing the criteria set out in Resolution 1996/1 with the questions that are asked by the Committee, shows that there is a lack of emphasis placed on the internal accountability of the NGOs by the Committee.

Resolution 1996/31 provides that the NGOs internal governance structure should be democratic. The NGO must have ‘a democratically adopted constitution’,¹¹⁹ ‘a representative structure’, the NGO must ‘possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes’.¹²⁰

Some of the questions addressed to the organisations attempt to probe the democratic nature of these organisations. Relying on resolution 1996/31 and the reference to the democratic status of the NGOs and their accountability mechanisms,¹²¹ some of the questioning from states refer to the transparency of the organisations and their funding. The question posed by China to *Collectif des Familles de Disparu(e) en Algerie (Coalition of Families of the Disappeared in Algeria)* on why 60 per cent of the organization’s expenditures were for administrative purposes, is not a rare type of question. Many states ask organisations to provide information about their finances. Concern with the internal accountability mechanisms of the NGO can be seen when India ‘asked for clarification about why responses to questions posed to the NGO seemed to represent the view of only one person, rather than the organization as a whole.’¹²² The failure to reflect the views of the NGO as a whole, suggested that the internal accountability mechanisms or the democratic structure were not strong enough. It also highlights, however, the overlap between the concern for internal accountability and the internal representative nature of NGOs. The question from the Indian representative not only comments on the democratic nature of the NGO, but it also comments on the extent of its representation.

However, this overlap between internal accountability and representation is not explicitly dealt with in the ECOSOC Resolution. Questions relating to the democratic structure invoke a narrow, elections based accountability. It is the rules on types of consultative status where

¹¹⁸ *ibid* para 31(d) and (e) and 37(e).

¹¹⁹ *ibid* para 10.

¹²⁰ *ibid* para 12.

¹²¹ *ibid* para 12.

¹²² UN News, ‘Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week’ (*United Nations* 27 January 2014) <<http://www.un.org/News/Press/docs//2014/ecosoc6593.doc.htm>> accessed 23 April 2014.

questions of representation arise, yet these are focused on the external representation or the extent to which an NGOs work represents a number of countries.

4.3 Participation

Comparing the ECOSOC resolution with other procedures at the UN, the approach to participation by ECOSOC is quite restrictive.¹²³ The procedure for membership to the Department for Public Information section devoted to NGOs (DPI/NGO) is more lax than the ECOSOC procedure. However, the benefits of being a member to the DPI/NGO are less desirable. There is an Annual Conference where around 1,500 NGOs take part in discussing a topic that is part of the UN agenda, but this connection seems to be a one-way conversation. The UN provides access and information to the NGOs so that they can disseminate information about the UN to their members, rather than the NGOs being able to disseminate information about their specific concerns.

Before 1996 the exclusion of national organisations from consultative status particularly disadvantaged Third World NGOs.¹²⁴ The reform of the ECOSOC resolution in 1996 helped to address the disadvantaged position of Third World NGOs. One of the debates in the academic commentary is over whether ECOSOC includes national NGOs. It is now agreed that the 1996 Resolution allows national and regional NGOs to apply for consultative status. Eduardo Missoni highlights that the ECOSOC definition of NGOs did not include 'international' NGOs.¹²⁵ However, the condition that general consultative status NGOs are 'representative of major segments of society in a large number of countries in different regions of the world'¹²⁶ can be read to suggest that regional and national NGOs cannot fulfil the criteria of general consultative status.¹²⁷ Instead, national NGOs are encouraged to apply for special status or Roster status.¹²⁸ Yet, Missoni notes that it was the practice before 1996 to classify national NGOs as 'Category II'.¹²⁹ The question then is whether this is a change that increases participation, or whether this just reflects practice.

Beyond the particulars of the criteria, attendance and participation at United Nations conferences by NGOs has increased. Willetts shows that the process has changed from invitation to 'all NGOs recognised by ECOSOC having an automatic right to register'.¹³⁰ UN Conferences now allow 'other "interested" NGOs' to apply to attend.¹³¹ Since the United Nations Conference on Environment and Development (UNCED) in 1992, there have been a number of attempts to drive reform in the relations between the UN and civil society. In July 1997, the Secretary-General report, *Renewing the UN: A Programme for Reform* advocated for engagement with civil society.¹³² This report had little impact, and in 2002 another report,

¹²³ See the procedures for UNCED, Office of President of the Millennium Assembly, 55th Session of UNGA, 1st August 2001.

¹²⁴ Otto, 'NGOs in the UN System' (n 15) 115.

¹²⁵ Missoni (n 12) 50.

¹²⁶ Resolution 1996/31 para 12.

¹²⁷ Missoni (n 12) 67.

¹²⁸ *ibid.*

¹²⁹ *ibid.*

¹³⁰ Willetts, 'From "Consultative Arrangements" to "Partnership"' (n 19) 193-194.

¹³¹ *ibid.* 194.

¹³² UNGA, 'Renewing the United Nations: A Programme for Reform: Report of the Secretary-General' (14 July 1997) UN Doc. A/51/950.

Strengthening the UN reiterated the growing importance of NGOs.¹³³ Whilst there are a number of mechanisms that facilitate engagement with NGOs, such as the NGO Liaison Committee (NGLS) or Department of Economic and Social Affairs, NGO Branch (UNDESA NGO), the procedure that grants consultative status is still problematic. Prior to these UN led mechanisms, as early as 1948 the Conference of NGO in Consultative Status (CONGO) aimed to facilitate participation in the UN.¹³⁴ This ‘independent, international, non-profit membership association of NGOs’, arranged NGO committees that allowed discussion between members and UN officials and agencies.¹³⁵ Membership to CONGO was on the basis of consultative status, but NGOs could be associate members if they were associated with the UN system.¹³⁶ In addition to these facilitating bodies, one of the ways in which the UN attempts to combat the exclusion of Third World NGOs, is to take into account ‘geographical representation’ when drawing up lists of NGOs that can attend UN conferences.¹³⁷

Although symbolically these bodies enhance the visibility of NGOs, there is still the procedural bar of the ECOSOC process which is highly politicised, being described as having the worst reputation.¹³⁸ There are also other procedural reasons why access or participation at the UN is curtailed for NGOs. ISHR have noted the often short deadlines for NGOs to apply for accreditation.¹³⁹ This highlights, that despite some improvements in the extent of participation allowed by ECOSOC and the modalities of conferences or forums, NGOs still have a secondary position. ECOSOC and the UN are not prioritising the participation of NGOs, rather than is a biased process of selection.

4.4 Representation

Although the terms of reference for the NGO Committee in Resolution 1996/31 provides criteria that should be taken into account when selecting NGOs, the reports from the Committee show that states are obstructing the selection of organisations by persistent, and irrelevant questioning. Asking questions of NGOs can postpone the application for consultative status. The questions permitted by states at the Committee often reflect states’ concerns with the ‘interests’ NGOs represent, rather than their internal governance structures. Examples from the January 2014 Committee on NGOs, show the preoccupation of states with the representative nature of NGOs allows states to control what interests are being represented.

¹³³ UNGA, ‘Strengthening of the United Nations: an agenda for further change’ (9 September 2002) UN Doc. A/57/387.

¹³⁴ Missoni (n 12) 70

¹³⁵ *ibid* 70.

¹³⁶ *ibid* 71.

¹³⁷ UNGA, Resolution 67/219 ‘International migration and development’ (26 March 2013) UN Doc. A/RES/67/219.

¹³⁸ K Martens, ‘By Passing Obstacles to Access: How NGOs are taken piggy-back to the United Nations’ (2004) Human Rights Review 80 84.

¹³⁹ ISHR, ‘Accreditation procedure threatens to undercut civil society participation at UN meeting’ (24 April 2013, updated 1 May 2013) <<http://www.ishr.ch/news/accreditation-procedure-threatens-undercut-civil-society-participation-un-meeting>> accessed 23 April 2014.

Questioning from the Committee is heavily politicised. States will often be concerned with NGO activities in their own territories. China repeatedly asks NGOs to state their position on Tibet or Taiwan. States often ask about the scope of an NGOs work, showing a particular interest in the states that NGOs will work in. For example, Cuba asked the *Korea Differently Abled Federation* if it intended to establish a presence there,¹⁴⁰ and Nicaragua asked Italian NGO *Casa Generalizia della Societa del Sacro Cuore* whether it planned to carry out activities in Central America.¹⁴¹ The questioning of NGO, the *Islamic African Relief Agency (IARA) (Sudan)*, shows the politicisation of the process as the US, Pakistan and Israel debate the relevance of the questions being asked. The extent of the politicisation is apparent in the questioning of *Human Life International* on 29th January, when Israel asked for their opinion on gay marriage.¹⁴² The extent to which state interests dominated raises the question of who is deciding what a legitimate interest amounts to.

Although Willetts argues that activists are over-exaggerating to suggest that NGOs are rejected for political reasons, this undermines the effect of the persistent questions and constant delays.¹⁴³ Smaller NGOs cannot afford to keep going through the process and stop trying. In any case, the ‘hostility from particular governments’ is sufficient to show that the politicised process is undermining any democratic credibility.¹⁴⁴ This sort of politicisation shows the problem that arises if a representative model of democracy is prioritised at the expense of the necessary checks on the accountability of participants. It is worth noting, in the domestic context, in ancient history, representative government was supposed to prevent democracy, by denying the unruly masses direct participation in decision-making.¹⁴⁵ At the contemporary international level the rhetoric of ‘representative’ is being used to exclude NGOs.

The current procedures on the participation of NGOs in international decision-making shows that focus on representation are dominated by state interests. In the ECOSOC resolution, NGOs are acknowledged not only for their representative nature, but also for their expertise. However, the ECOSOC procedure overlooks the problem that representation lacks a definition. Pollak et al, have shown how to talk of representative ‘assumes that the object of representation can be discerned and then represented’.¹⁴⁶ Representation, they suggest

¹⁴⁰ UN News, ‘Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week’ (30 January 2014) <<http://www.un.org/News/Press/docs//2014/ecosoc6596.doc.htm>> accessed 23 April 2014.

¹⁴¹ UN News, ‘Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week’ (27 January 2014) <<http://www.un.org/News/Press/docs//2014/ecosoc6593.doc.htm>> accessed 23 April 2014.

¹⁴² UN News, ‘Seventeen Non-Governmental Organizations Recommended for Status with Economic and Social Council, as Committee Session Enters Second Week’ (29 January 2014) <<http://www.un.org/News/Press/docs//2014/ecosoc6595.doc.htm>> accessed 23 April 2014.

¹⁴³ Willetts, ‘From “Consultative Arrangements” to “Partnership”’ (n 19) 192.

¹⁴⁴ *ibid.*

¹⁴⁵ N Urbinati, ‘Condorcet’s Democratic Theory of Representative Government’ (2004) 3(1) *European Journal of Political Theory* 53, 54 cited in Pollak et al., (n 101) 8.

¹⁴⁶ Pollak et al., (n 101) 13.

‘requires simplification’,¹⁴⁷ which is further simplified through this process of classification. The tension between representation and expertise is evident in the approach taken by the committee and the distinction between general and consultative status. As has already been shown, general status, applicable to those organisations that are more broadly representative, are allowed 2,000 word submissions. Yet, special status NGOs, granted status for their special competence,¹⁴⁸ are allowed only 500 words for submissions to the ECOSOC, and 1,500 words to other subsidiary bodies.¹⁴⁹ Expert groups then are granted less space to participate than those broader representative groups. This is suggestive of a prioritisation of the representation of interests.

5. Silencing of NGOs

Access to the UN, the specialised bodies and other forums is surrounded by a tension that has largely been managed in favour of representation. States can control who or what they want represented. The power that states wield to exclude NGOs is great and even the discussion on access does not highlight the increasingly common practice of silencing NGOs. It has already been discussed that NGOs have a secondary status to states. The ECOSOC resolutions provides for the suspension for up to three years or withdrawal of NGOs on the basis that they have acted against the United Nations Charter, which includes ‘politically motivated acts against Member States’. Other criteria for suspension include if the NGO has received proceeds from criminal activity, or if for three years the NGO made no contribution to the work of the UN or ECOSOC.¹⁵⁰ Few NGOs have been suspended,¹⁵¹ but the threat of suspension of an NGO on the basis that it has undertaken ‘politically motivated acts against Member States’,¹⁵² shows the power of the states over the NGOs. What amounts to a politically motivated act is not further defined and is open to abuse by states.

In addition to the ECOSOC procedures, the modalities of various High Development Panel sessions highlight this trend to deny participation to NGOs. States have started to introduce a ‘non-objection’ rule; NGOs are allowed to attend only if no state objects. In October 2013, the UNGA, despite wishing to create a participatory procedure for the High Level Dialogue on International Migration and Development,¹⁵³ the draft resolution planned only to let relevant NGOs with consultative status that states did not object to participate.¹⁵⁴ Moreover, the states do not have to provide reasons for their objection.¹⁵⁵ Whilst the procedure was modified somewhat for the Migration and Development Dialogue, other similar meetings have included the same no-objection rule. This steady process of chipping away at the

¹⁴⁷ *ibid.*

¹⁴⁸ ECOSOC Resolution 1996/31, para 22 and 23.

¹⁴⁹ *ibid* para 31(d) and (e) and 37(e).

¹⁵⁰ Resolution 1996/31, para 57.

¹⁵¹ Peter van den Bossche, ‘Regulating Legitimacy of the role of NGOs in global governance: legal status and accreditation’ Anton Vedder (eds), *NGO Involvement in International Governance and Policy: Sources of Legitimacy* (Martinus Nijhoff Publishers 2007) 159.

¹⁵² Resolution 1996/31, para 57.

¹⁵³ *ibid* para 16.

¹⁵⁴ ISHR, ‘States should reject procedure that results in exclusion of non-government organisations from UN’ (1 February 2013) < <http://www.ishr.ch/news/states-should-reject-procedure-results-exclusion-non-government-organisations-un> > accessed 23 April 2014.

¹⁵⁵ *ibid.*

participation of NGOs has been matched by a public display of exclusion at the 25th Human Rights Council Session.

As described above, at Human Rights Council session in March 2014) the ability of NGOs to participate was restricted. The NGO, International Service for Human Rights (ISHR), made a statement at China's Universal Periodic Review (UPR) and at the end call for a minute's silence to mark the death of the human rights defender Cao Shunli.¹⁵⁶ China made a point of order, stating that in Resolution A/HRC/RES/5/1, paragraph 31 NGOs are only allowed to make 'general comments', a moment's silence would not fall under that remit. The President of the Council called for a vote on whether he could postpone his decision, but only 13 states voted for allowing ISHR to continue. 20 states supported China and voted against and 12 abstained. This meant that ISHR were prevented from holding their moment's silence and the President moved onto the next NGO. The silencing of these organisations (especially when this is supported by undemocratic states) shows the undemocratic nature of international law and suggests that NGOs do have an important function in challenging that undemocratic force. It shows the power of states to decide what interests and persons should be represented.

6. Conclusion

The silencing of NGOs at the Human Rights Council shows the current trend of excluding NGOs from international decision-making. Included in processes to help cure the democratic deficit, NGOs have facilitated participation, represented vulnerable voices, and held states and International Organisations accountable. Yet, this potential democratic force is being undermined in a strong undemocratic move by some states. This silencing is a manifestation of the tensional relationship between states and NGOs at the UN. Despite increased participation by NGOs over the years, this singles strongly that NGOs are secondary to states.

As gatekeepers of NGO access to the United Nations, states have the ability to exclude NGOs according to their own, state, interests. Focusing on the ECOSOC procedures for consultative states, this article has shown how an underlying tension between accountability, representation, participation and expertise is written into the text of Resolution 1996/31. The overlaps between these themes has allowed for Member States to manipulate proceedings to exclude those NGOs that are representing interests a state disagrees with.

The particularities of NGOs in international decision-making, the disassociation from a state, the inappropriateness of elections, shows that the model of liberal democracy is not plausible at the international level. Rather, discussions on NGOs and their democratic credentials have highlighted four themes; expertise, accountability, participation and representation. These themes, some of which are models of democracy themselves, overlap and are not clearly demarcated. It has been shown that there is a tension between certain of these themes, for example the irreconcilability of expertise and participation. It was these themes that create the puzzle which the ECOSOC Resolution 1996/31 had to balance or manage, and it has been shown that while the text balances these themes, it does not engage with the overlaps or the potential clashes. Instead, these clashes have been manipulated by the United Nations Committee on NGOs. Asked to consider questions of accountability and to take into account participation, the Committee has focused on representation and more loosely expertise.

¹⁵⁶ UPR Info, 'China prevents moment of silence in memory of human rights defender' (25 March 2014) <<http://www.upr-info.org/en/news/china-prevents-moment-silence-memory-human-rights-defender>> accessed 23 April 2014.

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Focusing on the representative nature of NGOs allows states to manage which interests are heard at the UN.