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AN EMERGING INTERNATIONAL NORM FOR NON-GOVERNMENTAL ORGANIZATIONS

*Stephanie Jonassaint Cotton-Betteridge**

I. INTRODUCTION

“The image is a familiar one. There is a long line of people, mostly women and children waiting under a blue sky. At the far end of the line aid workers are handing out the daily ration of maize meal, with perhaps some powdered milk for the children. Looking at the scene you can almost feel the heat and the despair.”¹

This scene, from Swaziland, Africa,² describes the far too familiar and recurrent picture of a devastated population waiting for non-governmental organizations’ (NGOs’) humanitarian assistance after a natural disaster or an armed conflict. Women and children with shattered faces, often spend the whole day waiting in hopes of getting a little bag of food with a few bottles of water for the next few days from NGOs working in the country.

NGOs are groups that play an active role in administering humanitarian assistance³ in different countries and in deciding matters of international significance. NGOs play an important part in the development of international law in areas as diverse as human rights,⁴ religious rights,⁵ health,⁶ education,⁷ environmental,⁸ food,⁹ and human trafficking.¹⁰ NGOs are able to organize and provide much-needed assistance and support for private individuals and other entities all over the world.¹¹ Nevertheless, while the assistance and support these organizations provide can be invaluable, it has the potential to become

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¹ Gary Perkins, *Refugees Magazine, Issue 97 (NGOs and UNHCR) - Bright spot in Africa*, REFUGEES MAGAZINE, Sept. 1, 1994, available at <http://www.unhcr.org/3b540c254.html>.

² *Id.*

³ *Non-Governmental Organizations*, UNITED NATIONS RULE OF LAW, http://www.unrol.org/article.aspx?article_id=23 (last visited Nov. 15, 2014) [hereinafter UNITED NATIONS RULE OF LAW].

⁴ *Id.*

⁵ *Religious Right Research*, AMERICANS UNITED, <https://www.au.org/resources/religious-right> (last visited Nov. 16, 2014 6:13 PM) [hereinafter AMERICANS UNITED].

⁶ UNITED NATIONS RULE OF LAW, *supra* note 3.

⁷ *Id.*

⁸ GREENPEACE, (Nov. 26, 2014), <http://www.greenpeace.org/international/en/>.

⁹ FOOD FOR THE POOR, <http://www.foodforthe poor.org/> (last visited Nov. 26, 2014).

¹⁰ U.S. COMMITTEE FOR REFUGEES AND IMMIGRANTS, (Nov. 26, 2014) <http://www.refugees.org/resources/for-lawyers/human-trafficking-resources/human-trafficking-agencies.html>.

¹¹ *Id.*

counterproductive if the NGOs are not well-governed and if they do not ensure that the assistance is consistent with a set of best practices.

NGOs are generally the creations of private groups and are relatively simple to form.¹² They are governed by the national laws of the country of incorporation and do not enjoy a legal personality under international law.¹³ Because NGOs are inherently not part of a government,¹⁴ the assistance they offer is generally distributed independently of State actors.¹⁵ This creates a situation where NGOs go to countries (Receiving States) where help is needed and operate as separate entities from the Receiving Countries' national institutions.¹⁶ Although the organizations may utilize the inadequate framework or structure provided by the Receiving Countries, NGOs generally do not include a blueprint for the countries that would coordinate with their efforts. This is especially true when the NGOs are responding to emergency situations. The relief efforts are then disseminated among the different groups working in those countries without cooperation and often without consistency to promote or reinforce a long-term, sustainable model of change.¹⁷

This lack of cooperation results in Receiving States, at times, becoming almost completely reliant on NGO services¹⁸ and occasionally no longer providing adequately for the welfare of their own citizens. In some instances, the NGOs' work tends to replace the States' institutions because of the States' reliance on them. In other instances, the States' national institutions and industries are weakened because they cannot compete with free or donated resources from the humanitarian help.¹⁹

¹² *Id.*

¹³ Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM J. INT'L L. 348, 355–56 (2006); See generally Kerstin Martens, *Examining the (Non-)Status of NGOs in International Law*, 10 IND. J. GLOBAL LEGAL STUD. 1 (2003); Karsten Nowrot, *Legal Consequences of Globalization: The Status of Non-governmental Organizations Under International Law*, 6 IND. J. GLOBAL LEGAL STUD. 579 (1999).

¹⁴ UNITED NATIONS RULE OF LAW, *supra* note 3.

¹⁵ Charnovitz, *supra* note 13. ("In the eyes of the international donor community, NGOs are both cost-effective in reaching the poor and are considered "the preferred channel for service provision, in deliberate substitution for the state.").

¹⁶ See J. Wagona Makoba, *Nongovernmental Organizations (NGOs) and Third World Development: An Alternative Approach to Development*, GLOBAL POLICY FORUM, <https://www.globalpolicy.org/component/content/article/177/31620.html> (last visited Nov. 14, 2014) ("In order to maximize the impact of scarce development aid, many donors are channeling an increasing share of their overseas development aid (ODA) through NGOs. . . . Increasingly, a large number of NGOs in the Third World are funded by a small number of donors such as the World Bank, the United States Agency for International Development (USAID), and the United Nations Development Program (UNDP). The World Bank not only encourages member governments to work with NGOs on development projects, but also directly funds the NGO projects. It is reported that, 'from 1973 to 1988, NGOs were involved in about 15 [World] Bank projects a year. By 1990 that number had jumped to 89, or 40 percent of all new projects approved.' And in 1997, approved World Bank projects in Third World countries involving NGOs were: 84 percent in South Asia, 61 percent in Africa, and 60 percent in Latin America and the Caribbean. USAID is said to funnel 20 percent of its funds through NGOs. The Inter-American Foundation Survey of North and Latin America 'revealed that most of the multilateral banks, the United Nations, USAID, and advocacy organizations in the United States and Europe favored a restructuring of aid away from traditional government-to-government approaches toward people-to-people programs.' Furthermore, the public sentiment in the United States and Europe seems to be 'in favor of NGO participation in the development process and against governmental foreign aid.'") (emphasis added).

¹⁷ *Aid Dependency: I Need You as Much as You Need Me*, GLOBAL HEALTH POLICY AT NYU-WAGNER (Oct. 27, 2014), <https://globalhealthpolicynyu.wordpress.com/2014/10/27/aid-dependency-i-need-you-as-much-as-you-need-me/>.

¹⁸ *Id.*

¹⁹ *Id.*

For NGOs and States to accomplish long-term sustainable change, the NGOs should incorporate, as part of their best practices, an obligation to coordinate relief efforts with Receiving States, rather than working independently of the States. This Comment will demonstrate the anticipated positive effect of an obligation for NGOs to coordinate with Receiving States to maximize efficiency when offering their assistance, and to adopt this obligation as part of their international good governance principles. This proposed obligation is a social and emerging norm that would be diffused and emulated among NGOs and would serve as a more fruitful model that could be replicated consistently in any country needing similar aid.²⁰ Haiti is a prime example of a country becoming less self-sufficient due to NGOs not coordinating with the government and with each other. This example is discussed in detail in Part IV.

Part II will present background information about NGOs, their status, and role in the international community. Part III will analyze the best practices of NGOs and will introduce the concept of an emerging norm that NGOs ought to have the obligation to work with the Receiving States when providing humanitarian assistance. This is not an argument that NGOs must work through States or be controlled by States. Rather, they should be independent of States in order to offer objective support. This makes them very valuable in the international arena. NGOs should implement this proposed obligation as part of their best practices, which in turn would create an effective and consistent model of assistance in Receiving Countries that any NGO can later emulate. Part IV will examine a case study of some NGOs' work in Haiti that illustrates the need for the organizations to follow the emerging practice in good governance. Part V will reiterate and detail the emerging norm. Part VI will conclude.

II. WHAT ARE NON-GOVERNMENTAL ORGANIZATIONS?

A. NGOs Background

This section gives a background on NGOs and explains the roles they play specifically with regard to international law. NGOs play an important role in the development and the interpretation of international law. They also fill an important humanitarian need during times of emergency situations.

1. Definition

An NGO is generally defined as a group of people or private communities that come together to support or promote a mutual objective

²⁰ Haiti is mainly used throughout the paper as an example of the deficiency of the international organizations short-term relief as a long-term substitute because of the concentration of the NGOs in that country, but the problems highlighted are found in many different Receiving States that are in need of external international assistance.

as a non-profit organization.²¹ The term NGO, although widely used, is not the standard term used to identify these different groups. NGOs use terms such as “civil societies” as well as a variety of acronyms to classify the type of work they set out to accomplish. The following are some of the most common acronyms widely used:

BINGO (business-friendly international NGO or big international NGO); the Red Cross is one example of a BINGO;

ENGO (environmental NGO); the World Wildlife Fund is one example of an ENGO;

GONGO (government-operated NGO), by definition not an NGO, but an organization created by a government to resemble an NGO to further some agenda;

INGO (international NGO); Oxfam is one example of an INGO;

QUANGO (quasi-autonomous NGO), an NGO which may have some governmental members; the ISO is one example of a QUANGO;

RINGO (religious international NGO); the Catholic Relief Services is one example of a RINGO.²²

As expressed earlier, these groups are not typically part of States or governments.²³ They are relatively simple to form, and are organized on a local, national, or international level.²⁴ Because NGOs are not created under international law, the national laws of the country in which it was formed govern them.²⁵ They perform many activities that can be transnational in scope (performed in many different countries)²⁶ in areas such as human rights,²⁷ religious rights,²⁸ health,²⁹ education,³⁰ environmental,³¹ food,³² women’s rights,³³ and humanitarian assistance.³⁴

²¹ UNITED NATIONS RULE OF LAW, *supra* note 3.

²² Margaret Rouse, *NGO (non-governmental organization)*, WHAT IS, <http://whatis.techtarget.com/definition/NGO-non-governmental-organization> (last updated June 2010).

²³ UNITED NATIONS RULE OF LAW, *supra* note 3.

²⁴ *Id.*

²⁵ Charnovitz, *supra* note 13, at 352.

²⁶ *Id.*

²⁷ UNITED NATIONS RULE OF LAW, *supra* note 3.

²⁸ AMERICANS UNITED, *supra* note 5.

²⁹ *Id.*

³⁰ UNITED NATIONS RULE OF LAW, *supra* note 3.

³¹ GREENPEACE, *supra* note 8.

³² FOOD FOR THE POOR, *supra* note 9.

³³ UNITED NATIONS RULE OF LAW, *supra* note 3 (“International Women’s Rights Action Watch (IWRAP) promotes recognition of women’s human rights under the United Nation’s Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention). Since its inception, IWRAP’s program has expanded to encompass advocacy for women’s human rights under all the international human rights treaties. IWRAP Asia Pacific is an independent human rights organization with a regional focus, working towards the implementation of the human rights of women. It seeks to promote an effective flow of information on the CEDAW Convention between the local and the global levels, thereby enabling women to monitor and facilitate the implementation of the Convention domestically and utilize it to advance their interests. . . . Women Living Under Muslim Laws is an international solidarity network, linking individual women and organizations in

2. Role

According to Steve Charnovitz, an expert on NGO organization, NGOs are focused, among other things, on the development, interpretation, and enforcement of international law.³⁵ They are also sources of humanitarian assistance during times of conflict or natural disasters.³⁶

NGOs play an important role in the development of international law.³⁷ For example, Professor A. Dan Tarlock³⁸ argued that with international environmental law, “NGOs helped to spur action to accelerate the phase-out of CFCs (chlorofluorocarbons: [a] gas that threatens the ozone layer) and play an increasingly powerful role in setting the global environmental agenda.”³⁹ The United Nations Environment Programme describes the non-governmental role as follows: “Non-governmental organizations play a vital role in the shaping and implementation of participatory democracy.”⁴⁰ The Programme also mentioned that the NGO’s “credibility lies in the responsible and constructive role they play in society.”⁴¹ The Programme continues, saying that “formal and informal organizations, as well as grass-roots movements, should be recognized as partners in the implementation of Agenda 21, which is a comprehensive plan of action adopted by more than 178 Governments at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro, Brazil, in 1992.”⁴² Still according to the same source “the nature of the independent role played by non-governmental organizations within a society calls for real participation; therefore, independence is a major attribute of non-governmental organizations and is the precondition of real participation.”⁴³

NGOs can be a tremendous resource in the interpretation of international law.⁴⁴ They increasingly participate as observers in treaty

more than 70 countries. It provides information, support and a collective space for women whose lives are shaped, conditioned or governed by laws and customs said to derive from Islam.”).

³⁴ *Id.*

³⁵ Charnovitz, *supra* note 13, at 352.

³⁶ *International Organizations & NGOs*, UNITED NATIONS HUMANITARIAN RESPONSE DEPOT, http://www.unhrd.org/?page_id=853 (last visited Nov. 14, 2014) (“Some UN partners in providing humanitarian assistance in different countries and different sectors.”).

³⁷ *Id.*

³⁸ A. Dan Tarlock, *The Role of Non-Governmental Organizations in the Development of International Environmental Law*, 68 CHI.-KENT L. REV. 61, 63 (1992) (Distinguished Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Strengthening the Role of Non-Governmental Organizations: Partners for Sustainable Development*, UNITED NATIONS ENVIRONMENT PROGRAMME <http://www.unep.org/Documents/multilingual/Default.asp?DocumentID=52&ArticleID=75&l=en> (last visited Oct. 18, 2014).

⁴⁴ Charnovitz, *supra* note 13, at 352–53; Duncan Hollis, *Symposium: Globalization & The Erosion Of Sovereignty In Honor Of Professor Lichtenstein: Private Actors In Public International*

negotiations and actively submit amici curiae to numerous international courts such as the World Trade Organization (WTO),⁴⁵ the International Court of Justice (ICJ),⁴⁶ and the Inter-American Courts of Human Rights⁴⁷ with respect to the interpretation or clarification, inter alia, of treaties in dispute settlements.

Some NGOs play an active role in the development and the enforcement of international law.⁴⁸ The International Campaign to Ban Landmines (ICBL), for example, is an NGO that collaborated with other human rights organizations to play an integral part in the “changes, implementation, and enforcement of government policies and practices on addressing the humanitarian suffering caused by landmines.”⁴⁹

Additionally, NGOs are often sources of humanitarian assistance during times of conflict or natural disasters. They increasingly play a significant role in delivering humanitarian aid and development assistance. “Most non-governmental organizations in the rule of law field are engaged in some form of direct assistance or services.”⁵⁰ Many provide assistance directly in numerous local, regional, and international communities and as partners to United Nations (UN) agencies.⁵¹

Some organizations function as an NGO, yet do not consider themselves to be one. The International Committee of the Red Cross (ICRC) is one example. The ICRC is a UN partner whose organization is mandated by States that are parties to the Geneva Convention.⁵²

Law: Amicus Curiae And The Case For The Retention Of State Sovereignty, 25 B.C. INT’L & COMP. L. REV. 235 (2002).

⁴⁵ WTO, *Dispute Settlement System Training Module: Chapter 9, Participation in dispute settlement proceedings: 9.3 Amicus Curiae* submissions, WORLD TRADE ORGANIZATION http://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c9s3p1_e.htm (last visited Oct. 19, 2014).

⁴⁶ ICJ, *Verbatim Record of public sitting of 2009/32 - 10/12/2009 - Accordance with international law of the unilateral declaration of independence in respect of Kosovo* (Request for Advisory Opinion), INTERNATIONAL COURT OF JUSTICE, <http://www.icj.org/docket/files/141/15759.pdf#view=FitH&pagemode=none&search=%22amicus%20curiae%20ngo%22> (last visited Oct. 19, 2014 at 9:06 PM).

⁴⁷ *Inter-American Court Of Human Rights- Amici Curiae Brief*, NEW YORK CITY BAR, <http://www2.nycbar.org/citybarjusticecenter/pdf/EI%20Escrito%20de%20amicus%20curiae%20en%20ingles.pdf> (last visited Oct. 19, 2014 8:35 PM).

⁴⁸ Michael Crowley & Andreas Persbo, *The Role of Non-Governmental Organizations in the Monitoring and Verification of International Arms Control and Disarmament Agreements*, United Nations Institute for Disarmament Research (2006), THE INTERNATIONAL RELATIONS AND SECURITY NETWORK, <http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=47365> (last visited Oct. 19, 2014 at 10:42 PM).

⁴⁹ *Who We Are*, INTERNATIONAL CAMPAIGN TO BAN LANDMINES, <http://www.icbl.org/en-gb/about-us/who-we-are/the-icbl.aspx> (last visited Oct. 19, 2014 10:54 PM) (The International Campaign to Ban Landmines (ICBL) raises awareness and advocates at the national, regional, and international levels. Through its global membership, the ICBL brings the reality of mine-affected communities into the diplomatic arena. ICBL campaigners around the world work in a spirit of cooperation with their governments and other partners to ensure countries join the Mine Ban Treaty and live up to the letter and spirit of the treaty.).

⁵⁰ UNITED NATIONS RULE OF LAW, *supra* note 3.

⁵¹ *Id.*

⁵² *The ICRC Its Mission and Work*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (2009) available at https://www.icrc.org/eng/assets/files/other/icrc_002_0963.pdf (“The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.” The organization’s work involves developing and promoting international humanitarian law and humanitarian principles.).

Although the ICRC does not consider itself to be an NGO,⁵³ it basically fulfills the same functions as the typical NGOs with respect to delivering humanitarian aid.⁵⁴ To a certain extent, NGOs are “increasingly regarded as an alternative to direct State action in the implementation of specific projects. At times, some NGOs implement State directives, but on other occasions these same groups carry out projects without major State intervention.”⁵⁵ Food for the Poor is another example of an NGO involved in delivering direct humanitarian assistance to international communities.⁵⁶

NGOs play an important role in “national rule of law reform processes and at the global and international level.”⁵⁷ They can encourage individual States to adopt international legal obligations that are established by international standards or practices.⁵⁸

As recognized, NGOs represent very diverse groups that are involved in many areas of international interests and concerns that help with the development, interpretation, and enforcement of international law. They are also sources of humanitarian assistance during times of conflict or natural disasters.

B. NGOs’ Status and Binding Laws

The UN Charter, Article 71 States that NGOs are granted consultative status within their respective competence with the Economic and Social Council (ECOSOC), one of the six principal organs of the United Nations System established by the UN Charter in 1945.⁵⁹ In the U.S.,⁶⁰ for example, these organizations are generally incorporated as not-for-profit organizations under the Code of the U.S. Internal Revenue Service. With this status, they qualify as exempt from state and federal taxation. The tax-exempt status also allows donors to take a tax deduction for their donations. Under U.S. laws different statuses are available for different types of NGOs. For instance, NGOs that are organized under U.S. law that do not play a partisan political role, such as attempting to influence legislation (domestically or internationally),

⁵³ *The Movement*, INTERNATIONAL COMMITTEE OF THE RED CROSS, (Aug 24, 2013), <https://www.icrc.org/eng/who-we-are/movement/overview-the-movement.htm>.

⁵⁴ Charnovitz, *supra* note 13, at 352.

⁵⁵ Ingrid Rossi, *Legal Status of Non-Governmental Organizations in International Law*, KATHOLIEKE UNIVERSITEIT LEUVEN FACULTY OF LAW ACADEMIC YEAR 2009-2010, <https://lirias.kuleuven.be/bitstream/123456789/249936/1/Rossi.pdf> (last visited Oct. 27, 2014 at 11:50 PM).

⁵⁶ See generally FOOD FOR THE POOR, *supra* note 9.

⁵⁷ UNITED NATIONS RULE OF LAW, *supra* note 3.

⁵⁸ Charnovitz, *supra* note 13, at 361–63.

⁵⁹ *About ECOSOC and its Subsidiary Bodies*, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, available at <http://csonet.org/index.php?menu=123>.

⁶⁰ *Fact Sheet: Non-Governmental Organizations (NGOs) in the United States*, U.S. Department of State, HUMANRIGHTS.GOV (Jan 1, 2012), <http://www.humanrights.gov/fact-sheet-non-governmental-organizations-ngos-in-the-united-states.html> (According to the United States Department of States 2012 fact-sheet, approximately 1.5 million NGOs are active in the United States.).

can apply to receive exemption from federal income taxation on all income related to these purposes. U.S. law generally regulates organizations by requiring regular public disclosure—through filing information returns with the government—of an organization’s funding, activities, and leadership.⁶¹ This ensures that the NGO is subject to U.S. law.

Furthermore, NGOs have legal personality only in national law, which allows individuals or organizations to ascertain certain legal rights, protections, and responsibilities, domestically but not internationally.⁶² Because of the nature of their diverse endeavors, NGOs sometimes operate outside of the country of incorporation, where other governments or States might not recognize their status,⁶³ nevertheless, their work will still affect those other States.

As a result of the transnational nature of NGOs and their flexibility in working within different States in addressing public concerns, the ECOSOC can ask for NGOs’ assistance in developing procedures or deciding matters of international importance. This consultative status allows NGOs to participate either as observers or experts in UN meetings and conferences.⁶⁴ The purpose of consultative status is to enable ECOSOC organizations “to secure expert information or advice from organizations having special competence in the subjects for which consultative arrangements are made, and, on the other hand, to enable international, regional, sub regional and national organizations that represent important element of public opinion to express their views.”⁶⁵ Part of the requirements to be eligible for consultative status is defined by the ECOSOC: “Consultative relationships may be established with international, regional, sub regional and national non-governmental, non-profit public or voluntary organizations. . . . [NGOs] affiliated to an international organization already in status may be admitted provided that they demonstrate that their programme of work is of direct relevance to the aims and purposes of the United Nations.”⁶⁶

The ECOSOC has a set of requirements in place for the NGOs if they want to be accorded consultative status with the UN. “To be eligible, an NGO must have been in existence (officially registered with the appropriate government authorities as an NGO) for at least two years, must have an established headquarters, a democratic constitution, authority to speak for its members, a representative structure, appropriate

⁶¹ *Id.*

⁶² Charnovitz, *supra* note 13, at 355–56.

⁶³ *Id.* at 356 (“Yet because NGOs so often operate in more than one country, they face potential problems of being subject to conflicting laws and of inability to carry their legal status from one country to another.”) (quoting Pasquale Fiore who wrote that societies which are “the result of freedom of association for a common interest” are granted rights by the sovereignty of a state, and thus that such societies “may not as of right exercise their functions in foreign countries.” PASQUALE FIORE, *INTERNATIONAL LAW CODIFIED AND ITS LEGAL SANCTION* 34–35 n.1 (Edwin M. Borchard trans., 1918)).

⁶⁴ See *Consultative relationship between the United Nations and non-governmental organizations*, U.N. Charter Art. 71; ECOSOC Res. 1996/31 (July 23, 1996), UNITED NATION, <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>.

⁶⁵ *Id.*

⁶⁶ *Id.*

mechanisms of accountability and democratic processes.”⁶⁷ If an organization is established by governments or intergovernmental agreements, it is not considered an NGO. “The basic resources of the organization must be derived in the main part from contributions of the national affiliates or other components or from individual members.”⁶⁸

ECOSOC remains the only main UN body with a formal framework for NGO participation,⁶⁹ but the practice of consultative role for NGOs has become gradually established throughout the entire UN system.⁷⁰ From 1948 to 2007, the number of NGOs in consultative status with the ECOSOC has increased from 40 to more than 3,000.⁷¹

The national laws under which the NGOs are incorporated dictate the regulations that they have to follow in order to qualify for state laws status. NGOs also operate outside of the country of incorporation and can be granted consultative status as experts or observers, within their areas of work, with the ECOSOC, an organ of the UN. Because of the lack of international status accorded to NGOs, the work they accomplish on the international field can differ widely from one organization to another. As a result, established norms or best practices can provide a set of consistent practices NGOs can look to while operating in different countries around the world.

III. NON-GOVERNMENTAL ORGANIZATIONS’ OBLIGATION AS PART OF BEST PRACTICES

This Part examines the proposed emerging norm that non-governmental organizations ought to have a responsibility to work with and coordinate with the Receiving States. NGOs should implement this emerging norm into a set of best practices. This would create an effective and consistent model of humanitarian assistance that can be observed and followed in any Receiving Country. Such proposed coordination would also provide a system of checks and balances between the Receiving States and the NGOs. In the area of fund management for instance, it would promote accountability and transparency. The purpose of this article is to demonstrate that placing a responsibility, or social obligation, on NGOs to work with Receiving States would yield better results because it would enable both entities to pool their resources. NGOs working separately often undermine the Receiving States’ efforts, weaken national institutions, and distort the relationship between States

⁶⁷ *Consultative Status with ECOSOC*, UNITED NATIONS, <http://www.un.org/esa/coordination/ngo/about.htm> (last visited Oct. 28, 2014 at 12:08 PM) [hereinafter *Consultative Status*].

⁶⁸ *Id.*

⁶⁹ *Id.*

⁶⁹ *Working with ECOSOC: An NGOs Guide to Consultative Status*, UNITED NATIONS available at <http://csonet.org/content/documents/Brochure.pdf>.

⁷⁰ Charnovitz, *supra* note 13, at 358.

⁷¹ *Consultative Status*, *supra* note 67.

and its citizens. Working separately does not serve the States' interest in the long term.

The Oxford Dictionary defines best practices as “commercial or professional procedures that are accepted or prescribed as being correct or most effective.”⁷² The basic assumption about the term is that the governance, practices, and results are consistent enough such that a “best practice” can be derived and later implemented by another group. The ECOSOC’s Civil Society Network branch of the UN lists a number of best practices for several NGOs registered with the UN.⁷³ This list shows various best practices that NGOs use around the world in promoting their work and their general practice of good governance.⁷⁴

Another example of a successful NGO model occurred in South East Asia. The study featured in the ECOSOC Civil Society Network, demonstrates a number of successful best practices from NGOs that originated in Cambodia and are now used consistently throughout South East Asia.⁷⁵ The project was aimed at providing a set of good models in successful projects that can be benchmarked and applied in different contexts or countries with some tailoring and modification.⁷⁶ The study established the importance of combining multiple models and partnering among different stakeholders as two key factors to successfully creating a good model for a given region, in this case South East Asia.⁷⁷ Located in Cambodia, the NGO, Cambodia Development Resource Institute (CDRI) worked on a project that aimed at researching and reinforcing the democratic governance and public sector reform.⁷⁸ Its goal was to “[d]evelop a global partnership for development,” and CDRI included the further development of “an open, rule-based, predictable, non-discriminatory trading and financial system.”⁷⁹ It also included “a commitment to good governance, development, and poverty reduction – both nationally and internationally.”⁸⁰ Additionally, CDRI used a model of partnership with the government.⁸¹

A set of best principles to work and coordinate with States, while in the Receiving States, would enhance the assistance that NGOs are attempting to offer because it demonstrates respect for the autonomy of the Receiving States. The set of best practices would not require the NGOs to work through the state, which would make them a subsidiary of the state. Rather, it would assure the NGOs’ independence and their participatory status as unbiased parties that can denounce State inaction

⁷² *Definition of best practice in English*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/best-practice (last visited Oct. 24, 2014).

⁷³ *Best Practices*, ECOSOC CIVIL SOCIETY NETWORK, <http://esango.un.org/irene/?section=2&type=2> (last visited Oct. 31, 2014 at 7:17 PM).

⁷⁴ *Id.*

⁷⁵ Youjin Jung, *Successful Models on achieving the Millennium Development Goals in South East Asia*, ECOSOC CIVIL SOCIETY NETWORK, <http://csonet.org/content/documents/MDGsSEA.pdf> (last visited Nov. 22, 2014 at 3:30 PM).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

or help States in their efforts. At the same time, this emerging norm would ensure a consistent and successful model that NGOs could continue to follow and benchmark in different countries with similar humanitarian needs.

A. Emerging Norm: NGOs Ought to Work with the Receiving States

The main purpose of this Comment is to examine and propose an emerging norm that would place responsibility on NGOs to work and coordinate with Receiving States when providing assistance or services. This proposed norm emerged out of the need to address problems that were counterproductive to overall humanitarian goals. Problems such as uncoordinated efforts with the States do not maximize the effectiveness of the assistance offered—in part because they encourage State dependency on NGOs. This can incapacitate the local, national institutions and shift citizens' confidence from the State to NGOs. Another issue created by an NGO that refuses to coordinate with a State is that it fails to help establish the infrastructure that is so vital for the state's long-term self-sufficiency.

B. Problems

1. *Uncoordinated Efforts of States and NGOs*

The uncoordinated efforts of Receiving States and NGOs can make the assistance run parallel to the actors' work and challenge the efficiency of both parties. Usually NGOs are smaller organizations⁸² that have “smaller costs of bureaucracy and the potential for greater efficiencies in the use of donated funds,”⁸³ but that can create a situation where their work is not coordinated. Because of the generally private structure and flexibility of such organizations,⁸⁴ NGOs do not have an obligation to consult with each other, and many of these organizations often offer their help in the same area (education, health care, etc.) within a Receiving State.⁸⁵ This lack of coordination among NGOs themselves and with the States can lead to disjointed efforts, which creates the risk of wasteful overlap.

To illustrate this point, consider the humanitarian effort of several NGOs in the Philippines after a typhoon devastated a part of the country

⁸² *The List of the Most Powerful Development NGOs*, FOREIGN POLICY, (July 1, 2008) http://www.foreignpolicy.com/articles/2008/06/30/the_list_the_worlds_most_powerful_development_ngos (Smaller when compared to a nation's organization. Some NGOs have grown to be quite large in terms of organizational structure and access to funds.).

⁸³ Suzanne McCoskey, *NGOs in the Aid Community: Do Funding Source or Economic Conditioning Matter to Decisions of Country or Activity Involvement?* TUFTS (Feb. 23, 2009), <http://sites.tufts.edu/jha/archives/381>.

⁸⁴ See Perkins, *supra* note 1.

⁸⁵ John Sinden, *Ten Innovative NGOs in Education*, INTERNATIONAL RELATIONS ONLINE (Sept. 12, 2014), <http://ironline.american.edu/ten-innovative-ngos-in-education/>.

in 2013. The NGOs went to distribute vaccines in poor, rural areas because the State was not providing enough for its citizens.⁸⁶ Later, because of a lack of coordinated efforts to keep track of the immunization, another NGO went to the exact same area to provide the exact same vaccine.⁸⁷ Possibly because of language barriers, the people in the area could not confirm if they had already received the vaccine or not.

To further contextualize the argument, an example of a lack of coordinating efforts between NGOs and the Haitian government after the devastating 7.0 magnitude earthquake in January 2010, is represented in this article entitled “Haiti, One Year Later.”⁸⁸ The article makes reference to the many NGOs that went to Haiti to save lives and provide badly needed care.⁸⁹ But it also criticized the efforts that the article defined as “uncoordinated and often at cross-purposes with government policies.”⁹⁰ It elaborated by stating “the flood of volunteer doctors providing free emergency care has forced several Haitian hospitals into bankruptcy, weakening an already fragile medical ecosystem. Camps run by charitable organizations or celebrities like Sean Penn have discouraged some Haitians from leaving the overcrowded capital or returning to habitable homes.”⁹¹

An NGO’s practice to work with the Receiving States would provide coordination between the parties that would prevent overlap and promote efficiency. Such coordination would ensure that NGOs’ efforts do not undermine the state’s efforts in providing for its citizens. When NGOs register with countries on a humanitarian basis, these countries are then relying on the extra help. However, without coordination between the actors, the assistance can run parallel to each other’s efforts, and in some cases, be counterproductive.

2. States’ National Dependency

Another reason why NGOs should work with Receiving States as an emerging norm is because of those States’ increasing dependency on international help.⁹² In some cases, States can come to rely so much on NGOs that they almost completely neglect areas of traditional government support.⁹³ At some point, these sectors, or sometimes

⁸⁶ Vijaya Ramachandran & Owen Barder, *Let’s Help the Philippines — but Not Like We Helped Haiti*, WASHINGTON POST (Nov. 15, 2013), http://www.washingtonpost.com/opinions/lets-help-the-philippines-but-not-like-we-helped-haiti/2013/11/15/8b8a890c-4ca5-11e3-be6b-d3d28122e6d4_story.html (The Red Cross reported that there were too many doctors but not enough midwives in Indonesia’s Banda Aceh province. Children became ill with the symptoms of measles after being vaccinated three times by three organizations, because the NGOs did not share records of which immunizations children had received.).

⁸⁷ *Id.*

⁸⁸ G.D., *Haiti, One Year Later*, POST BOURGIE (Jan. 12, 2011), <http://www.postbourgjie.com/2011/01/12/haiti-one-year-later/> (last visited Nov. 16, 2014 1:46 PM).

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Todd Moss et al., *An Aid-Institutions Paradox? A Review Essay on Aid Dependency and State Building in Sub-Saharan Africa*, CENTER FOR GLOBAL DEVELOPMENT, (working paper Jan 2006), http://www.cgdev.org/files/5646_file_WP_74.pdf (last visited Dec. 30, 2014).

⁹³ *Id.*

industries, suffer from a lack of support and long-term foresight.⁹⁴ Such a situation, in the long run, creates State dependency by resulting in weakened national institutions, and a lack of autonomy.⁹⁵

Rather than helping countries be more self-sufficient and grow their industries, NGO assistance can, in spite of worthy intentions, do more harm than good by creating a State that is completely dependent.⁹⁶ By allowing countries to rely on donated funds as an apparatus to sustain the educational sector, for instance, NGOs and other international organizations create a dependency that is difficult to overcome. A State with a large portion of its national budget expenditure supported by international aid has to take into consideration the international donors' desires because these funds usually have conditions attached.⁹⁷ These conditions can hinder a state's right to self-determination.⁹⁸ As recently noted in *Forbes*:

In post-earthquake Haiti one can find multiple rubble removal programs. Due to the influx of cash donations, NGOs have more financial resources than the Haitian government and are able to pay day laborers \$7 per day to remove debris. Before the earthquake the Haitian government had reviewed the idea of setting a national minimum wage at \$7 but discovered that nation's economy would be unable to support it. This rubble removal program set up to help the Haitian people undermines the Haitian government, which in turn undermines Haiti as whole.⁹⁹

Dependency on NGOs also can have undesirable effects on States' national institutions. It can de-incentivize a State to provide solutions to its problems because "others" are taking care of them.¹⁰⁰ However, if the argument for state's dependency is focused on financial management, this dependency encourages unsupervised spending which can result in a usurpation of funds, no fiscal accountability from government, and

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Christine Sherry & Alexei Dunaway, *Haiti: Earthquake Response and Funding Opportunities Executive Summary*, SHERRY CONSULTING (Spring 2012), http://sherryconsulting.com/public_test_html/wp-content/uploads/2013/01/SC_HaitiExecSummary.pdf (Haitian officials have also complained of difficulties matching the desires of the donor community with Haiti's needs: donors want to build schools, but no one wants to fund the teachers.) (last visited Nov. 16, 2014 2:02 PM).

⁹⁸ See Aaron Kreuter, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, 19 MINN. J. INT'L L. 363 (2010).

⁹⁹ Lesly J. Michelot, *Haiti's Second Revolution*, FORBES (Apr. 26, 2011), <http://www.forbes.com/sites/megacities/2011/04/26/haitis-second-revolution/>.

¹⁰⁰ Emilie Jelinek, *A Study of NGO Relations with Government and Communities in Afghanistan*, HUMANITARIAN PRACTICE NETWORK (March 2009), <http://www.odihpn.org/humanitarian-exchange-magazine/issue-42/ngo-relations-with-the-government-and-communities-in-afghanistan> (last visited Nov 16, 2014).

inevitable corruption.¹⁰¹ When a State is dependent on international funds to conduct the management of its institutions, it cannot budget or plan appropriately.¹⁰² An additional problem is that the aid is not consistent every year. The State has to wait to determine its budget for the year, whereas other States depend on their revenues to budget accordingly.¹⁰³ Because the budget is then made so fluid, it is easy for spending to become unsupervised or have unexplained gaps in expenditure. These unexplained gaps allow for a lack of fiscal accountability and for corruption to flourish.¹⁰⁴

By continually subsidizing the NGOs instead of the Receiving States, there is a risk of counter productivity with respect to the States' efforts and the desire to assist them.¹⁰⁵ The United Nations Office of the Special Envoy for Haiti (OSE) reported that virtually all the early relief aid right after the 2010 earthquake was channeled through international humanitarian agencies, with little to none going towards rebuilding the shattered Haitian government, despite donors' claims that they were there to support the government.¹⁰⁶ The OSE declared that by the end of 2011, the majority of donors had not yet released roughly two-thirds of the funds pledged for 2010/2011 for earthquake response and recovery, and only twelve percent of international aid was channeled through the government.¹⁰⁷ This process undermines the existing government by creating more State dependency on international aid provided by NGOs, and weakening States' national institutions because, in a way, it is better to let the NGOs take care of the problems instead of not getting the relief aid funding at all.

A study conducted by the UN Office of the Special Envoy for Haiti shows the United States' disbursements of humanitarian funding of 1.295

¹⁰¹ See Anwar Shah, *Performance Accountability and Combating Corruption*, WORLD BANK PUBLICATIONS 393 (2007), <http://siteresources.worldbank.org/PSGLP/Resources/PerformanceAccountabilityandCombatingCorruption.pdf> (last visited Nov. 8, 2014).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ See *id.*

¹⁰⁵ *Congressional Budget Justification*, Volume 2 FOREIGN OPERATION, UNITED NATIONS DEMOCRACY FUND, available at <http://www.state.gov/documents/organization/185014.pdf> ("The UNDEF supports pro-democracy forces and activities in countries transitioning to democracy in order to effect broad change in dynamic ways under the UN framework. The Fund, which is financed through voluntary contributions by States, provides support to NGO projects that promote democracy, human rights, and fundamental freedoms in places where direct support from States may not be as welcome.") (last visited Nov. 8, 2014).

¹⁰⁶ *Focus on Haiti: Building Back Better?, The Humanitarian Response Index*, DARAINT (2011), <http://daraint.org/wp-content/uploads/2012/02/HRI2011-FocusOnHaiti.pdf> (last visited Nov. 8, 2014).

¹⁰⁷ *UN Special Envoy Report: More Aid Should Be Channeled Through Haiti's Elected Government*, PARTNERS IN HEALTH (June 29, 2011), <http://www.pih.org/blog/un-special-envoy-report-more-aid-should-be-channeled-through-haitis-elected>. ("Over the past year, donors have disbursed more than \$1.74 billion for recovery activities, but over half – \$2.84 billion – of what was pledged for 2010 and 2011 remains in donors' hands. The report highlights the fact that approximately 99 percent of post-quake relief aid was disbursed to humanitarian agencies, NGOs, and private contractors. This circumvention makes "the already challenging task of moving from relief to recovery...almost impossible," States the report. Only one percent of relief aid was distributed to the Haitian Government – the democratically elected public entity most capable of producing jobs and initiating the massive rebuilding effort facing the nation.")

billion dollars for Haiti since 2010.¹⁰⁸ Out of that gigantic amount, forty-nine percent of the money went to the countries donors' own civil and military entities with the rest going to the UN agencies and other contractors and international NGOs.¹⁰⁹ The Haitian government received only one percent of the \$0.995 billion recovery funding.¹¹⁰

A state's dependency on NGOs' assistance can also interfere with the accountability of those States to its citizens. For instance, in some Receiving States, not everyone has regular access to education. In many, there are just not enough resources to provide schooling for rural inhabitants. In others, students might have to walk long distances to get to schools or, there might be little to no educational infrastructure in place to provide continuous and relevant education. In any of these circumstances, a government might decide to rely on NGOs to reach the needs of the population. In so doing, it relinquishes to international aid all of its responsibility to provide education to those underserved citizens. At the same time, that government is also counting on organizations such as United States Agency for International Development (USAID) to subsidize a portion of the education budget.¹¹¹ In such cases, one or more NGOs that are active in education may assist the Receiving Country by sending teachers to the underserved portions of the population every three to six months in order to educate the children. However, if funding tapers off, the NGOs may no longer be able to bear the costs of sending more teachers, in which case, they become less and less active in the area. Even though the NGOs may have provided much-needed relief by educating the children, in too many cases, the relief is short-term. If they did not work with the States to create an infrastructure for providing teachers to these underserved portions of the population, together with a plan enabling the continued use and development of the infrastructure, their efforts would not be maximized for the best long-term results. The affected population would again be left with no infrastructure and would again be at the mercy of international generosity. This scenario enables a government to shirk its responsibility. More importantly, it distorts the relationship of the State with its citizens, who may believe that their own government played a role in providing the services and who now expect that government to continue providing those services.

As illustrated by this example, when a State relies heavily on NGOs' assistance, this reliance creates conditions of State dependency, non-autonomy, weak national institutions, and compromised government

¹⁰⁸ Vijaya Ramachandran & Julie Walz, *US Spending in Haiti: The Need for Greater Transparency and Accountability*, CENTER FOR GLOBAL DEVELOPMENT (Feb. 2013), http://www.cgdev.org/doc/full_text/CGDBriefs/1426965/US-Spending-in-Haiti-The-Need-for-Greater-Transparency-and-Accountability.html.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Non-Governmental Organizations (NGOs)*, UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT (May 15, 2014), <http://www.usaid.gov/partnership-opportunities/ngo> [hereinafter UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT].

relationship and accountability to citizens. The lack of State accountability to its citizens likewise results in the citizens losing confidence in their government and relying on themselves and international help for basic needs.

3. Receiving States' Population General Dependency

As mentioned earlier, the humanitarian aid from international organizations can create a relationship of reliance by the State and its citizens.¹¹² Typically, an NGO's work is more visible and accessible than that of the state.¹¹³ As a result, the population in the Receiving State comes to rely on humanitarian aid rather than the state, or itself, for many of the most fundamental public services. A consequence of this dependency is citizens not needing to find any method of coping with the lack of governmental structures. Instead, they take the attitude of "wait and see" or fatalism.¹¹⁴ When the situation becomes bad enough, either because of the government's incapacity or unwillingness to provide for its citizens, NGOs then step in to provide food, water, housing, or other basic services for the affected part of the population. In certain cases, some governments have even blamed the NGOs for unpopular or poor social services, as if they do not have a part to play in providing the services.¹¹⁵ Thus, in the long-term, a lack of governmental involvement in providing assistance does not promote State self-reliance because, rather than relying on the capacity or efficiency of their own government, citizens wait to see what aid an NGO will provide in the hope that it will be better than any self-help.¹¹⁶

Furthermore, the populations of the Receiving States perceive the continued aid as more stable than government aid, even though in reality, NGOs operate on a temporary basis.¹¹⁷ As established above, because NGOs are more flexible and have less bureaucracy than the State governments, they can establish operations fairly quickly in a new area. In many cases, they then provide employment opportunities to the local population. This employment can be very helpful over the short-term; however, if there are not permanent, or at least long-term opportunities, it

¹¹² See Moss, *supra* note 92.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ This is based on the author's own experience in Haiti with her husband, Sam, where they both worked on a project with the International Organization for Migration (IOM) to construct 100 minimal housings for a part of the country's community in the capital Port-au-Prince. The population there was so accustomed to wait for the NGOs to do everything for them, with a sense of entitlement that they did not do anything to help the paid workers who were building their houses. Instead they sat under mango trees watching the workers. After a few days, Sam had them participate on the construction of the houses that were, after all, going to be theirs. The people were not "lazy" and waiting for others to do the work for them, but their help was generally undermined, perceived as not good enough, and that the outside help "knew better" because they did not know how to use an electric saw, for example. After working on their own houses, the population then had developed a sense of accomplishment, of ownership. They had played a part in the construction of their own house. Even though the material was provided by IOM, they did not just "wait and see" what the IOM crew would come up with, they played an active part in putting the houses up for themselves and for their neighbors.

¹¹⁷ Moss, *supra* note 92.

creates heavy reliance on the NGOs.¹¹⁸ People who are qualified professionals accept work with NGOs in temporary positions as drivers, translators, administrative assistants, nursing assistants, etc. With their immediate needs met, these professionals do not challenge the State to create more employment opportunities in the area; the NGOs' jobs are more readily available and provide immediate income. One major pitfall of this phenomenon is "brain drain"—resulting in people with more education leaving the area for more lucrative jobs.¹¹⁹

As a result of temporary employment, competent workers prefer to work with NGOs rather than national institutions. These organizations generally pay better,¹²⁰ and there is a certain prestige associated with working for international organizations.¹²¹ As professionals move towards NGOs, the organizations move into direct competition with the government they purport to help. This would not be a problem if the States did not need the external assistance. If that were the case, the additional jobs would increase competitiveness and boost the local economy. However, since the States most likely need the external assistance, the danger lies in the temporary nature of the boost. After a while, NGOs leave and the local State population is again faced with the reality of unemployment.¹²²

A counter-argument to this dependency argument is that the jobs that are created by the NGOs were not available to the population in the first place. Whether the work is temporary or not, providing the people an opportunity to work for these NGOs is better than no opportunity at all.

This argument might present valid points, but does not maximize the NGOs' potential to help. Nor can it serve as a successful model when NGOs use short-term relief for a long period of time. Relief efforts should be a provisional support to States in order to help them develop long-term infrastructure.¹²³ Instead, NGOs use that provisional support for a long time with the funds provided by international donors. When this occurs, the jobs provided by the NGOs could arguably be taking skilled workers away from other long-term, sustainable projects.

Employment by NGOs, as a temporary structure, creates a false or skewed sense of employment or "band-aid" relief. In certain cases, it encourages a disconnection between the local government and the citizens because the State is not directly implicated in providing fundamental public or social services. In other cases, the temporary structure provided by the NGOs allows the local government to

¹¹⁸ *Id.*

¹¹⁹ Michelot, *supra* note 99.

¹²⁰ *Id.*

¹²¹ *Punjab Teachers Told No NGO Work Without Leave*, FIRST POST (May 21, 2014), <http://www.firstpost.com/wire/punjab-teachers-told-no-ngo-work-without-leave-1534737.html> (indicating that teachers in Punjab, India would rather work with NGOs than with the government).

¹²² Jose Bimbo F. Santos, *A Year After Yolanda, Urgent Needs Remain - NGO Plan International*, INTERAKSYON (Nov. 7, 2014 10:39 AM), <http://www.interaksyon.com/article/98740/a-year-after-yolanda-urgent-needs-remain---ngo-plan-international>.

¹²³ Moss, *supra* note 92.

discharge its accountability vis-à-vis the citizens because the people expect the NGOs to fill the need.

Lastly, NGOs, in the aggregate, bring a lot of people with them. Often, in the Receiving States where the infrastructure is generally missing, the NGOs look to private citizens to provide the basic infrastructure needed to operate, such as providing temporary housing, transportation, and laborers including security guards, housekeepers, and technicians. Due to the higher demand for services created by the NGOs, the market becomes artificially inflated. After NGOs cease work in the country, it can be difficult for the general population to afford post-NGOs lifestyle.¹²⁴ When the NGOs create temporary work, people become accustomed to a certain superficial standard of living including raised housing prices, rented private cars on a daily basis, rented buildings as temporary headquarters or convention centers, etc.; however, this is not a permanent infrastructure that can promote enduring or constant growth.¹²⁵

4. Lack of Long-Term Plans and Infrastructure

One underpinning problem presented within all the previous problems outlined is the lack of long-term plans and infrastructure from both the States themselves and the NGOs working in those States. As one recent report noted:

The barriers to implementing and reaping the benefits of an effective government performance audit function stem from the same fundamental challenges facing development for any other aspect of a society. These challenges include corruption; poverty; poor governance, at both the political and administrative levels; inadequate infrastructure; and brain drain.¹²⁶

Additionally, NGOs lack accountability; they generally work in geographic areas directly with the people. In certain cases, it can be hard to estimate the amount of work that has actually been done by an NGO¹²⁷ unless the NGO itself promotes transparency and keeps accurate records. Without transparency and records, work performed by a government or

¹²⁴ James Pfeiffer, *International NGOs and primary health care in Mozambique: the need for a new model of collaboration*, 56 SOC. SCI. & MED. 725 (2003), http://www.ghdonline.org/uploads/NGO_fragmentation_of_PHC_in_mozambique.pdf (“The per diem phenomenon, distributed by NGOs, had immediate detrimental effects on some routine community health programs once the program ended.”) (Last visited Nov 22, 2014).

¹²⁵ *Contra* UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, *supra* note 111. (“Following recovery efforts after the 2010 earthquake, USAID has been working through local, international, and U.S. NGOs to strengthen Haiti’s economy, build the capacity of Haitian institutions, improve democratic processes and the rule of law, and raise living standards to support long-term development and stability.”) (Last visited Nov. 8, 2014).

¹²⁶ Shah, *supra* note 101, at 9.

¹²⁷ See Int’l Ctr. for Not-for-Profit L., *Enabling Organizational Development: Ngo Legal Reform in Post-Conflict Settings*, 9 INT’L J. NOT FOR PROFIT L. 3 (2007).

an NGO is unaccounted for, and, in the case of an NGO, there is no concrete or outward confirmation of the assistance.¹²⁸

Lack of accountability can interfere with the relationship of trust between a State and its population. Furthermore, it does not reinforce the social contract between the State and the population,¹²⁹ but rather encourages the people to rely on NGOs.

Furthermore, the assistance is oftentimes based on very commendable day-to-day help or on an emergency, but after a few years, no real constructive framework has been established to support a long-term sustainable structure. Instead, States still seem to suffer from a lack of infrastructure and are still in need of the same assistance from another NGO because there is no real structure to create lasting relief. When countries rely too much on NGOs' assistance and do not have long-term plans, it ends up undermining the assistance that the NGOs intended to provide in the first place. All the help that the NGOs provided feels like just a drop in the ocean, which in turn creates a cycle of dependency on NGOs' work instead of creating sustainable structures. One recent commentator described the problem this way:

On top of the earthquake, aid workers in Haiti are contending with a cholera crisis, a disease of poverty spread through poor sanitation and contaminated drinking water. These are all things that NGOs like the Red Cross have expertise in fighting, but larger structural issues often trump their best intentions...

The money that poured into Haiti after the earthquake was focused almost solely on relief efforts in and around Port-au-Prince. As a result, dozens of health-oriented NGOs in Haiti focused their work in the capital, all but ignoring the countryside. So last October, when reports of people dropping dead of cholera in the rural Artibonite Valley 90 miles from the capital began to emerge, many in the aid community were blindsided. Even as the epidemic made its way to Port-au-Prince, some relief organizations still didn't respond.¹³⁰

This gives the impression that the State and the humanitarian organizations go from extinguishing one fire while another one pops up, and work is done without projecting into the future or creating long-term plans to establish a better system. Therefore, an emerging norm for NGOs to work with and coordinate with the Receiving States would enhance the assistance the NGOs are trying to offer.

¹²⁸ *Id.*

¹²⁹ Moss, *supra* note 94.

¹³⁰ Janet Reitman, *Beyond Relief: How the World Failed Haiti*, ROLLING STONE (Aug. 4, 2011), <http://www.rollingstone.com/politics/news/how-the-world-failed-haiti-20110804#ixzz3JD9jXVQL>.

C. Emerging Norm: As Part of NGOs International Best Practices

In light of the problems mentioned, the proposed norm will create a better model of humanitarian assistance that NGOs can observe as part of international best practices in any Receiving Country. Such a norm would create and inspire mutual respect, a quid pro quo generated by working relationships in an effort to strengthen the Receiving States' efforts, aid the national institutions and the relationship between States and the citizens, and build the people's confidence in creating opportunities for themselves for a more sustainable economic future.

An emerging norm to work and coordinate with Receiving States, while working there, would enhance the assistance the NGOs offer by providing provisional support to the States while encouraging and promoting long-term institutional development and behavioral changes. Encouraging the NGOs and Receiving States to work together would mitigate some of the problems caused by the lack of long-term plans and general infrastructure that the States face during and after disasters. This norm would encourage the parties to sit down and devise better ways to help each other accomplish the tasks that each wishes to accomplish. Instead of NGOs and States working independently of each other or NGOs replacing the States in certain capacities, they could coordinate their efforts to create a sustainable system that would help States launch programs promoting autonomy, self-sufficiency, and national growth. A model that NGOs would be able to rely on and consistently implement as an international best practice will be discussed in the following case study.

IV. CASE STUDY

This Part turns to a case study that illustrates the need to have Receiving States and NGOs cooperate with each other in order to maximize the results of an effective and coordinated effort when offering humanitarian assistance. The case study will explore the situation of Free Rice in Haiti and will consider whether the assistance would have been more effective had the NGOs coordinated their efforts with the Haitian government. It will also assess whether the assistance provided by the NGOs undermined Haiti. Finally, it will look at whether or not the aid will serve Haiti's best interest in the long-term.

Haiti is used as the case study because of the confluence of NGOs in the country known as "the Republic of NGOs."¹³¹ The problems stressed in the case study, nonetheless, are not unique to Haiti, but are generally

¹³¹ Vijaya Ramachandran & Julie Walz, *Is Haiti Doomed to Be the Republic of NGOs?*, HUFFINGTON POST (Mar 13, 2012), http://www.huffingtonpost.com/vijaya-ramachandran/haiti-relief-ngos_b_1194923.html; Kathie Klarreich & Linda Polman, *The NGO Republic Of Haiti: How the International Relief Effort After the 2010 Earthquake Excluded Haitians from Their Own Recovery*, THE NATION (Oct 31, 2012), <http://www.thenation.com/article/170929/ngo-republic-haiti>; Madeline Kristoff & Liz Panarelli, *Haiti: A Republic of NGOs?*, UNITED STATES INSTITUTION OF PEACE (Apr 26, 2010), <http://www.usip.org/sites/default/files/PB%2023%20Haiti%20a%20Republic%20of%20NGOs.pdf>.

posed in relation to NGOs' work in Receiving States.¹³² Despite the NGOs' goodwill and intentions after decades of work in Haiti, the country is still in a state of dependency with a disarticulated and broken economy.¹³³ The case study points to the problems expressed in the previous section and establishes that rather than funneling the donated funds through NGOs and discounting the state,¹³⁴ the emerging standard of the NGOs working with the States would be more effective in creating a sense of investment and accountability with all actors that would help establish a model of assistance with similar Receiving States.¹³⁵

A. The Case of Free Rice in Haiti

“First, the quake damaged the nation's main port, disrupting the regular supply of imported rice. . . . Then, aid groups distributed free rice to thousands of people—who stopped buying rice from street vendors. . . . As demand dried up, the street vendors stopped buying from small, local rice wholesalers. That's been a devastating blow to many vendors and small wholesalers.”¹³⁶

This excerpt describes in a few lines what is known as “the case of free rice in Haiti.”¹³⁷ Similar to the problems presented earlier, this case illustrates the non-coordination between the humanitarian international aid, whose purposes violated the Haitian government's policies regarding the agricultural sector, and the local population who needed help the most.¹³⁸ The aid groups that distributed the free rice in an effort to provide humanitarian assistance to thousands of people after the earthquake, while motivated by the best intentions, had a substantial negative effect on the country's agricultural sector.¹³⁹ One recent commentator described how the subsidization of rice by international organizations undermined Haiti's efforts.¹⁴⁰ He said: “As recently as the early 1980s, Haiti was producing just about all of its own rice. Now more than 60 percent is imported from the US, making it the fourth largest recipient of American rice exports in the world.”¹⁴¹ The author expressed some criticisms as the rice subsidization was encouraged by President Clinton “to help his home State of Arkansas, the largest rice producing state in the US, thereby crippling a sector of the economy in Haiti where

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Charnovitz, *supra* note 13.

¹³⁵ Ramachandran & Walz, *supra* note 131.

¹³⁶ Adam Davidson, *The Problem with Giving Free Food to Hungry People*, NATIONAL PUBLIC RADIO (June 27, 2010 8:47 AM), <http://www.npr.org/blogs/money/2010/06/26/128134222/haiti-rice>.

¹³⁷ Donovan Webster, *Haiti Earthquake: Two Years Later, Where Did the Money Go?*, HUFFINGTON POST (Jan 12, 2012 6:50 AM), http://www.huffingtonpost.com/2012/01/11/haiti-earthquake-funds_n_1200229.html.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

Clinton has worked so tirelessly to help with the recovery.”¹⁴² He continues: “You might say it is a perfect metaphor for what is wrong with aid to Haiti,” says Marc Cohen, a senior researcher for Oxfam, one of the largest non-government organizations in the world, which raised approximately \$106 million for a three-year response but struggled to deliver the aid effectively.”¹⁴³ Still from the article, Mr. Cohen from Oxfam adds: “Instead of bringing subsidized rice in on ships from Miami, we could be helping Haiti grow rice in its own fields.”¹⁴⁴ Cohen worked for many years in Haiti with the International Food Policy Research Institute and studied the broad economic impact of American rice subsidies.¹⁴⁵

The donated funds and rice, in this case, increased Haiti’s dependency on the international help, which resulted in the country’s state of non-autonomy, weakened national institutions, and distortion of accountability to the citizens. Rather than helping Haiti be more self-sufficient and grow its industries, the NGOs’ assistance, in spite of worthy intentions, weakened the country’s rice production in the long-term. The NGOs’ help in providing rice to the people during the disaster was very beneficial at that time.¹⁴⁶ The interference occurred in the years following the disaster as the NGOs continued to distribute free rice.¹⁴⁷ These distributions did not have a desirable effect on Haiti’s national institutions, and essentially discounted Haiti’s efforts.¹⁴⁸ The USAID subsidized CARE International (an NGO) to distribute the rice to the impoverished peasants.¹⁴⁹ “The NGO began to distribute U.S. crops as food aid, during both bad and good harvests, further undermining Haitian peasant’s ability to compete for the market.”¹⁵⁰ Often the CARE brand was still affixed to the rice packaging after the local elites would receive the food and resold it on the market.¹⁵¹ “CARE seemed to care so little that it never really followed up on the consequences of its food aid program.”¹⁵² As mentioned earlier with the American study conducted by the UN office of special Envoy for Haiti, over ninety-eight percent of the foreign aid was given to partners more trusted by some donors, generally the NGOs, which had worked in Haiti for years.¹⁵³ “But these groups, while experienced in relief, were not as knowledgeable about what it takes to rebuild a nation Much of the money on these contracts to NGOs goes to their overhead.”¹⁵⁴

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Ashley Smith, *How NGOs are Profiting off a Grave Situation: Haiti and the Aid, Racket, COUNTERPUNCH* (Feb. 24, 2010), <http://www.counterpunch.org/2010/02/24/haiti-and-the-aid-racket/>.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ Reitman, *supra* note 130.

**Top NGO and Private Contractor Recipients of
United States Contracts and Assistance in Haiti,
2010–2012¹⁵⁵
(\$US 654 million)**

Chemonics International	153
International Organization for Migration	86
ACC Construction–McKnight Joint Venture	81
DAI/Nathan Group	69
World Vision	56
PAE Government Services	54
Catholic Relief Services	50
Management Sciences for Health	39
Family Health International/FHI 360	35
Haitian Study Group Kaposi Sarcoma (GHESKIO)	31

As discussed earlier, by continually subsidizing the NGOs instead of the Receiving States, there is also a risk of counter productivity with respect to the States' efforts and the NGOs' desire to assist them. This practice of rice subsidization had been going on for over a decade (even before the disaster), which had not helped the country's self-reliance as to the agriculture sector nor encouraged Haiti to provide solutions to the problems associated with the dependency.

The rice subsidization undermined the existing government and its policies by creating more State dependency on rice that the NGOs were providing, and weakening the country's national institutions because it was better to let the NGOs weaken the economy instead of not receiving the relief aid at all and not being able to feed the population.

The food security problems in the twenty-first century in Haiti as argued by some free-trade critics are caused or exacerbated by the structural adjustment policies proposed and promoted by the World Bank and the International Monetary Fund.¹⁵⁶ "These policies led Haiti to reduce rice tariffs from 50 to 3 percent, a shift that allowed large amounts of subsidized rice grown in the United States to enter the Haitian market, displacing Haitian-grown rice and destroying the livelihoods of rice farmers."¹⁵⁷ It was known as the "American Plan," which was a disaster.¹⁵⁸ Small farms could not compete against the

¹⁵⁵ Ramachandran & Walz, *supra* note 108 (all data from USASpending.gov as of Jan. 22, 2013).

¹⁵⁶ Reitman, *supra* note 130.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

subsidized imported rice from the United States.¹⁵⁹ Farmers were forced to look for survival elsewhere and grounded the already overpopulated towns of Port-au-Prince while working at the American-owned assembly plants, earning less than two dollars a day.¹⁶⁰

Former President Clinton apologized for the plan before the Senate Foreign Relations Committee in March of 2010.¹⁶¹ He said, “We made this devil's bargain, and it wasn't the right thing to do. . . . It was a mistake that I was a party to. I did that. I have to live every day with the consequences.”¹⁶²

The rice subsidization in Haiti also illustrates the reliance of the population on international humanitarian aid rather than on the government or on the people themselves. To the general population, it appeared that the government did not have the capacity to support or revamp the rice industry and had to rely on the rice the NGOs were distributing in certain regions of the country. The people then, rather than putting pressure on the State to remedy the situation, relied on NGO aid (although sometimes with an attitude of resignation). Some people even resold the rice and created temporary income from NGO subsidization.

The NGOs have also reproduced and exacerbated class inequality in Haiti.¹⁶³ Since the NGOs can pay much better than anyone else, including the Haitian state, they have swept up middle class professionals into their ranks.¹⁶⁴ Haitians actually now call them the “NGO class.” As anthropologist Mark Schuller writes:

In addition to higher salaries, NGO employees have access to many privileges: clean drinking water, electricity to charge cell phones, e-mail and the ever-prized U.S. visa. These privileges in turn plug individuals into the global economy. People's first visits to the U.S. solidified neoliberal ideologies. This artificial, dependent middle class—the “NGO class”—thus directly support a form of economic globalization, accomplishes ideological work and further stratifies the Haitian population, selecting a chosen few for privileges denied Haiti's poor majority.¹⁶⁵

This situation not only demonstrates the dependence of the population on the NGOs' well-meaning intentions of providing temporary employment, but also the fragile condition that can result from the false or skewed sense of that temporary employment or band-aid relief.

The lack of long-term plans and structure from the NGOs that are working in Haiti for long periods does not encourage the long-term

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Reitman, *supra* note 130.

¹⁶² *Id.*

¹⁶³ Smith, *supra* note 146.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

institutional development or behavioral changes that would help Haiti progressively be less dependent of the aid and move towards self-initiated, economic growth.

In April 2009, Senator Hillary Clinton ordered a thorough review of U.S. policy toward Haiti.¹⁶⁶ She wanted a new strategy grounded in “evidence-based solutions.”¹⁶⁷ “The idea,” recalls Cheryl Mills, Clinton’s Chief of Staff, “was that if we’re putting in the assistance, we need to know what the outcomes are going to be.”¹⁶⁸ Mills was appalled by the abysmal record of U.S. aid in Haiti, and was particularly critical of the NGOs, many of which had spent decades there without producing any lasting change.¹⁶⁹

One commentator gives a fairly accurate summary of the problems highlighted in the report:

A central issue within the NGO system is coordination. According to the Haitian Minister of Planning and Foreign Cooperation (MPCE), on any given year, only 10-20% of NGOs submit their annual report to the government, despite it being a requirement to function in the country. Since the 1980s through 2009, almost every report commissioned by donors, government of Haiti, NGOs, or independent researchers, on NGOs concludes with a recommendation that NGOs need to do a better job coordinating with one another, and the government needs to set a framework that NGOs will work under, to avoid duplication of services and gaps and to ensure that local development priorities are being implemented.

.....

The fact that for almost 30 years researchers from across the political spectrum make the same recommendations suggests that NGOs continue to act on their own. Many in Haiti call NGOs “parallel States” or “States within the state” or simply “fiefdoms” because of their tendency toward isolation and near total control over geographical regions. Further, NGOs directly drain the capacity of the State by paying much higher salaries – many people estimate three times greater – what World Bank researcher Alice Morton termed “raiding” (1997:25).¹⁷⁰

¹⁶⁶ Reitman, *supra* note 130.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

V. ANTICIPATED POSITIVE EFFECT OF THE EMERGING NORM AS PART OF NGOS' BEST PRACTICES

In spite of generous intentions of the NGOs to assist Receiving States, the aid, if distributed on an emergency basis for a long period of time, and not done in coordination with the States, has the potential to escalate the problems already present in those countries or even create additional burdens. As demonstrated in the case study and throughout the article, NGOs can be perceived as “parallel States” or “States within the state” or simply “fiefdoms.”¹⁷¹ They can create unintended consequences while attempting to help the Receiving Countries. When the aid is not coordinated, it can undermine the Receiving States, or not serve the States’ best interest in the long-term. For NGOs and Receiving States to accomplish long-term sustainable changes, NGOs should take on the responsibility to coordinate relief efforts with the State actors to ensure a functioning model that would be added to the NGOs’ best practices and could be replicated in any country.

This emerging norm to have NGOs work with Receiving States is not unreasonable or unrealizable. The NGOs can develop a working relationship with the Receiving States, and this system is proven to generate a more effective result.¹⁷² An example of such collaboration between NGOs and States is demonstrated in an NGO–government partnerships project for disaster preparedness in Bangladesh where all parties are working together to “support capacity-building for preparedness, with a particular focus on collaboration between government actors and civil society.”¹⁷³ The project was realized by six humanitarian and development NGOs (CARE, Catholic Relief Services, Mercy Corps, Oxfam, Save the Children, and World Vision) now working in collaboration with the local government and other actors in five pilot countries around the world.¹⁷⁴ It is a successful project that encourages the NGOs and the States to work together on long-term plans, capacity building programs that are focused on disaster risk reduction, staff capacity, accountability, and impact measurement.¹⁷⁵

It has likewise been done in Haiti in the healthcare sector where an NGO (Partners in Health/Zanmi Lasante) focused on long-term improvement was working with the government to establish sustainable changes.¹⁷⁶ This NGO is an example of successful partnership between an NGO and the Haitian government in the healthcare sector. The conditions in Haiti were difficult regarding that sector even before the 2010 earthquake, but this partnership has improved the conditions of the local population.¹⁷⁷ “Ground was recently broken on a new, large

¹⁷¹ McCoskey, *supra* note 83.

¹⁷² Matt Bannerman et al., *NGO–Government Partnerships for Disaster Preparedness in Bangladesh*, HUMANITARIAN PRACTICE NETWORK (Apr. 2011), <http://www.odihpn.org/humanitarian-exchange-magazine/issue-50/ngo%E2%80%93government-partnerships-for-disaster-preparedness-in-bangladesh> (last visited Nov 16, 2014 3:14 PM).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ McCoskey, *supra* note 83.

¹⁷⁷ *Id.*

capacity teaching hospital in Mirebalais in partnership with Partners in Health/Zanmi Lasante and the Haitian government, approved by the Haiti Reconstruction Fund in their second meeting in August.”¹⁷⁸

This NGO, working in collaboration with the Haitian government, shows that such collaboration yields much better long-term results. This hospital is now open and functional.¹⁷⁹ The hospital provides primary care services to about 185,000 people in Mirebalais, Haiti, and two nearby communities.¹⁸⁰ Patients from a much wider area—all of central Haiti and areas in and around Port-au-Prince—can also receive secondary and tertiary care.¹⁸¹ As many as 700 patients are seen every day in the ambulatory clinics.¹⁸² At a time when Haiti desperately needs skilled professionals, the hospital provides high-quality education for the next generation of Haitian nurses, medical students, and resident physicians.¹⁸³ This is an example of a strong collaboration between humanitarian actors and the State that produced something durable that could be replicated around the country or with different NGOs. It is an example of best practices.

Another example of NGO coordination with a Receiving State that produced dynamic results is represented in a study prepared by the Support for Analysis and Research in Africa (SARA) project in partnership with the USAID, Bureau for Africa, and Office of Sustainable Development.¹⁸⁴ This study contemplated the potential of achieving better results in the education sector between NGOs and four different Receiving States in Africa (Ethiopia, Guinea, Malawi and Mali) by building a perdurable partnership and collaborative relationship between the main actors.¹⁸⁵

Such models of working relationships demonstrate the anticipated positive effect of the emerging norm as part of NGOs best practices to work and coordinate with Receiving States. United with Receiving States, they create an effective effort when offering assistance. This would be a more productive model that could be replicated in any other country with the same needs and safeguard a more consistent model of international humanitarian aid standard. This model would also be effective in helping the Receiving States develop overall plans to strengthen their national institutions where the NGOs can lend their expertise and work with the States on a more long-term basis. This is a

¹⁷⁸ *Id.*

¹⁷⁹ *Hôpital Universitaire de Mirebalais*, PARTNER IN HEALTH, <http://www.pih.org/pages/mirebalais> (last visited Dec. 20, 2014).

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Yolande Miller-Grandvaux, et al., *Evolving Partnerships: The Role of NGOs in Basic Education in Africa*, DOCHAS (July 2002), <http://www.dochas.ie/Pages/Resources/documents/EvolvingPartnerships.pdf> (last visited Nov. 16, 2014).

¹⁸⁵ *Id.*

model that could be benchmarked and applied in different contexts or countries with some tailoring and modification.

VI. CONCLUSION

Without advocating for non-participation of NGOs in the humanitarian aid system, nor denying the generous aid they have provided in emergency situations and humanitarian assistance all over the world, a new standard for NGOs to work and cooperate with Receiving States would be beneficial and promote a best practice in delivering the international aid.

NGOs play an important role in the development of international law and many have been active in providing emergency response. That is why the proposed emerging norm to work with the Receiving States would be a key step toward delivering better assistance and helping the States achieve viable changes. Receiving States would have to make substantial efforts to be able to handle international support; at the same time, NGO undertakings and donor funding must support and assist States' efforts rather than replace them. Otherwise, NGO assistance will not produce visible, beneficial outcomes.

This proposed framework for NGOs would ensure a more consistent practice that would not undermine the Receiving Countries. It would encourage the States to be accountable to their citizens, instead of relying heavily on NGOs to provide the services they have responsibility over. It would also empower a Receiving State in its efforts to develop general or structural plans with the NGOs' expertise.

Instead of just relying on humanitarian aid over a period of many years, the new norm would help develop a model that will encourage self-sufficiency and accountability from all the actors. It would also strongly encourage long-term institutional development and behavioral changes with the countries the NGOs so willingly want to help.