Human rights NGOs: Imperative or impermissible actors in (post)-conflict societies?

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Normative questions of what human rights and humanitarian NGOs are permitted and required to do in conflict and post-conflict societies are relatively neglected in the current debates about NGOs. Are they permissible agents? A multi-disciplinary approach is used to dissect this question. It is concluded that on the one hand clear duties for these NGOs can be discerned; they are often the sole agents in operation that can safeguard some respect for human rights. On the other hand, they complicate, if not frustrate, the purpose for which they came into action, the formation of a stable state that can itself respect human rights.

Key words: Human rights NGOs, humanitarian NGOs, post-conflict societies, permissible agents, required agents, law, ethics.

INTRODUCTION

Asking normative questions regarding NGO involvement in conflict and post-conflict societies

Today, several hundreds of thousands non-governmental organizations (NGOs) claim to promote human rights and humanitarian goals around the world. They are non-profit organizations which are based on voluntary engagement by individuals and depend, at least partially, on donations from private citizens (Vedder, 2007). They differ in many ways – for example, the degree to which they work across borders, are professionalized, are organized or resemble social movements. These divergent organizations constitute a huge new power on the global scene. Moreover, although they aim to promote human rights and humanitarian goals, their involvement is not necessarily beneficial. One of the most extreme examples being the aid to Hutu refugees – former genocidaires in Congo, in the aftermath of the Rwandan genocide in 1994. The combination of their great power and the possibility that their involvement may not turn out well, justifies an inquiry into what NGOs may and ought to do – in other words, what they are permitted and required to do. While there is a huge literature on humanitarian NGOs and how they function, to date there is very little literature about explicitly normative questions (the most important contributions being (Bell and Coicaud, 2007, 2004; Vedder, 2007; cf. Collingwood and Logister, 2005). When normative questions are discussed, the focus is mostly on the administrative level (cf. Heyse 2004; Hilhorst, 2003).1

This article aims to address this gap and to explicitly engage the normative questions of what human rights and humanitarian NGOs are permitted and required to do: are these NGOs permissible agents at all, or, as it is often put, are they legitimate agents on the global scene? And, do they have certain specific roles, tasks and duties, e.g. with regard to human rights fulfillment and promotion?

Such questions tie in to an emerging interest in such questions in the NGO community itself –as testified by, for example, the NGO Accountability Charter that was adopted by a number of prominent NGOs in 2005—, as well as in the field of law, where the concentration on states as the exclusive duty-bearers in relation to human

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1 The emerging literature on global justice does sometimes deal explicitly with NGOs and normative questions, but few authors in this field have NGOs as their main focus (cf. Collingwood and Logister, 2005).
When asking what human rights and humanitarian NGOs may and must do, we will in this article concentrate on conflict- and post-conflict situations – which are one of the most important types of situations where such NGOs are currently involved.

Our method of work is explorative. We take it that the question of NGO permissions and requirements – of NGO legitimacy and human-rights duties – can (1) never meaningfully be developed and answered without detailed knowledge of the relevant empirical circumstances; that (2) this question can be understood and answered in a legal way; but that (3) ultimately, the kind of answer we are looking for takes us to a level which may be called the moral or ethical level, that is to say, a level that lies beyond the legal level and that tells us why there ought or ought not to be certain legal permissions and requirements.

In accordance with the above way of working, the present article will proceed as follows: in the first section we clarify what we mean by human rights and humanitarian NGOs and we discuss what various kinds of NGOs exist. We also discuss some weak and strong points of NGO involvement, particularly in conflict- and post-conflict contexts. Thus, this first section of the article provides the needed empirical background for the discussion of our (normative) research question.

Section two then discusses the normative question of what human rights and humanitarian NGOs are permitted and required to do – or, of their legitimacy and their duties. This section begins by discussing the legal background (treaties, declarations, covenants etc.) against which NGOs work, as well as discussing an apparent normative case for NGO involvement in conflict- and post-conflict situations that is suggested by this legal background: in many conflict and post-conflict situations, NGOs are the only agencies that can enforce human rights and thereby prevent such agreements from becoming dead letters.

The section then goes on to consider normative considerations for NGO involvement that lie beyond legal considerations. We point out that there are different types and sources of legitimacy, which may all have a bearing on what NGOs are permitted and required to do. Our analysis of legitimacy suggests one consideration in particular that claims that NGOs are not permissible agents in conflict and post-conflict situations: their involvement may be in competition with essential state functions and decrease state legitimacy and state capabilities to act. In the course of section two, we thus end up with two fundamental but conflicting considerations concerning the legitimacy and duties of NGO involvement in conflict and post-conflict situations: on the one hand their involvement seems imperative, in so far as NGOs are often the only agents who can uphold and safeguard human rights in situations of conflict and post-conflict; on the other hand, NGO involvement may drain state legitimacy and state capabilities and therefore seems illegitimate. The last parts of section two are devoted to further analyzing and complicating this fundamental conflict. We do this by drawing on the NGO Accountability Charter and by drawing on insights from moral philosophy. In other words, we draw both on more practical and more theoretical resources that can enhance our understanding of the fundamental conflict between NGOs as apparent and imperative duty-bearers and NGOs as illegitimate and impermissible agents in conflict and post-conflict societies.

NGOS AND NGO INVOLVEMENT: A FIRST LOOK

NGOs and varieties of NGOs

Without aiming to exhaustively define the subject here, some delimitations are necessary. Most NGOs are locally or domestically organized, sponsored by private donors, international organizations and/or even governments. They often carry self-imposed mandates in which they refer to international human rights standards or law. Many of these organizations and NGOs are based in the Northern and Western Hemispheres. Smaller and more local ones are most often located in the Southern Hemisphere.

Over the last 40 years, since the first human rights NGOs started in the peace movement during the height of the Cold War, their definition and role has changed significantly. They vary widely and thus we have to focus on specific NGOs that have human rights and/or humanitarian aid in their mandate while acting in conflict or post-conflict societies. These NGOs are non-profit organizations. They are based on voluntary engagement by individuals and groups and depend at least partially on donations from private citizens (Vedder, 2007).

Furthermore, they rely either on donations, funds or charity money and possess a consistent degree of organization to be able to be active in the field. We do not distinguish in the definition whether an NGO claims to be transnational or international. Transnational NGOs work primarily beyond the borders of their own countries, e.g. ActionAid or Oxfam. International NGOs (INGOs) also work beyond their borders but work as well within their countries of residence, as Amnesty International or Human Rights Watch do. In addition, many charity organizations or foundations act as NGOs in the human rights and humanitarian fields. They financially support, cooperate or help other NGOs or work together with state and local authorities. Such NGOs as the Ford Foundation, Ted Turner Foundation, Aga Khan Foundation, Soros Foundation, the Friedrich-Ebert Foundation as well as church or other religious-based organizations are the largest non-profit donors in these fields.

They usually have specific agendas or mandates of what activities they support and what they do not.
Nevertheless, all of them carry some aspect of human rights promotion in them. Private actors or short-term and single-issue initiatives, for example initiatives that ask for the release of individual prisoners or the improvement of particular situations (e.g., the initiative for the abducted and released prisoner Ingrid Betancourt Pulecio in Colombia until 2008) or private initiatives that help human rights defenders or people in need (e.g., the 2010 Chinese Nobel Peace Prize winner, Liu Xiaobo in China who claims more democracy and the human right to housing or health). Those NGOs all qualify under the definition as they claim to act beyond state control. They also claim to take international human rights standards at their normative-ethical or moral legitimacy in order to act on behalf of people in need whom they claim to be their real stakeholders.²

**Strong points of NGO involvement**

What are strong points of NGO involvement in conflict and post-conflict situations? NGOs have the advantage of often reacting quicker than state agencies or the international governmental organization, such as the UN. Moreover, they often have easier access to parties to the conflict and the people that need their help.

Furthermore, the large majority of NGOs base their work on the support of several millions of private donors or members that actively support or finance professional activities in conflict or post-conflict societies. And, their supporters, volunteers or leaders are often experts in a particular area who aim to work for the benevolence and human rights of others.

These observations do not settle the question to what extent NGOs can at all be seen as legitimate actors in human rights and humanitarian fields, in particular in conflict and post-conflict societies. But one fact can be noted: without the expertise, advice, and practical help of NGOs on the ground, many international missions would not be completed.

A final very strong point of NGO involvement in conflict and post-conflict situations is that NGOs are, in situations where states are absent during periods of conflict or shortly after. In these situations they are often the only agencies that can prevent human rights from becoming a dead letter. We will return to this point extensively below (in section 2.2), but already briefly elaborate on it here:

NGOs have (often reluctantly) adapted to the post Cold War world in which armed conflicts are predominantly initiated by non-state actors, such as warlord and rebels (Cases in point are the Democratic Republic of Congo, Somalia, the Philippines and Colombia.) In such contexts, states are often absent and the people in need are in the hands of warlords, rebel leaders, guerrilla forces or fighting parties that are not party to any inter-state agreement on human rights, treaty body or commission.

Now the international community (e.g. the International Criminal Court) does often apply international customary law and thus aspects of international human rights law to these warlords etc. However, these de facto leaders have zero legal or formal obligation and duty to protect people. If they do, it is often for other reasons, e.g. traditions, culture, external pressure or due to customary rules. In fact, many rebel or tribal leaders do neither respect nor refer to or comply with international human rights standards; think of the Taliban in Pakistan, the Hutu rebels in the Democratic Republic of Congo or the FARC in Colombia. In such contexts, NGOs, through mediation and first aid, often aim at convincing these leaders to respect at least a minimum set of human rights, such as women and children’s rights as well as the right to food, shelter, water or education.³ NGOs confront rebel or tribal leaders that control large areas, and strike deals and draft agreements with them to enter their territory; and they report and are actively involved in activities such as capacity building, advice or first aid. In short, in many places where states are weak or absent, NGOs are about the only agents that work for making human rights real.

**Weak points of NGO involvement**

While much of the literature appraises NGO involvement in a positive way (e.g. Vedder, 2007; Horton and Roche, 2010), critical questions have also been asked, for some decades now, about, for example, the dominance of Western normative values in NGO work, and about NGO accountability and neutrality (Edwards, 1999, 2009). In this line, we will now discuss several weaknesses and/or problems of NGO involvement in conflict and post-conflict situations.

First, critical questions can be asked about the humanitarian vision, mission or self-imposed mandate that NGOs follow. Who are their donors, members, volunteers or staff, who are their stakeholders and on whose behalf do they claim to act? And perhaps foremost: NGOs generally subscribe to a very strong normative human rights or humanitarian discourse. In their reports and on their web pages they widely refer to international human rights treaties and agreements on which they claim to work accordingly (see, for example, the case of Human Rights Watch or Action Aid, the Aga Khan Foundation or Oxfam). This human rights discourse is often perceived to be Western or at least state-centric, although these NGOs today act worldwide and claim that

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² International or transnational cooperation and business companies do not qualify as human rights and humanitarian NGOs by this definition. Although they can be important actors in the field of human rights and humanitarian aid, both positive and negative, they do not fall under this definition. It is true, however, that many of them have set up foundations that either promote charity, research or other forms of humanitarian aid in the same regions in which they conduct business e.g. Mercedes Benz Foundation in South Africa; Shell Foundation in Nigeria as well as Volkswagen and Ford Foundations in terms of research, education and capacity building around the world.

³ For example the activities of Geneva Call; http://www.genevacall.org/ Last accessed 11 March 2010.
none of the many human rights norms are seriously denied by any of the cultures in the world. However, people and governments—and in particular rebel groups—in the global South do not necessarily share the main tenets of the normative framework of Western NGOs that undertake activities there. At least, these NGOs have to 'translate' international human rights norms and law into the 'local language,' that is to say to domestic and local needs, customs, traditions and ways of lives of those in need.

On the other hand, human rights usually only become an issue of denial, and may get a reception of cultural relativism, if they interfere in political or traditional power structures (e.g., China, Saudi Arabia or Nigeria). So the debate is often not so much about whether these human rights norms would or would not apply to the cultures and societies of Asia, Africa or Europe, but rather about who are the actors that promote them. If these are Western-dominated NGOs—which is most often the case—then human rights can also be seen as Western and thus hostile or alien.

A second weakness or problem of NGO involvement in conflict and post-conflict societies is that NGOs may lack professionalism. In particular small and local NGOs are frequently understaffed, they lack professional capacity, knowledge and equipment and they run the risk of being 'bought' through sponsoring and donations by parties, foundations or even governments of all sides that are somehow involved in the conflict. Many of these NGOs are beyond public control and scrutiny, their reports are often of dubious quality and their actions biased, depending on whose interests they serve.

Lack of professionalism thus already gets us, thirdly, to further potential weaknesses of NGO involvement, namely problems having to do with (lack of) accountability as well as (lack of) independence; and with (lack of) transparency.

It is often not clear from the websites or other publications of NGOs who are the entities that support or stand behind them. Many of them depend on private or even governmental or dubious donors, to whom they are accountable. These may have a particular single or political interest which they hide behind the wording of 'international human rights promotion.' This dependence can make NGOs willing agents of political or private interests that may not serve the public interest.

To remedy this situation some of the largest and worldwide active human rights NGOs recently agreed on a NGO Accountability Charter. It refers to a code of conduct for NGOs that act independently and for the general wellbeing of human rights, humanitarian or environmental issues. Transparency, accountability and a clear reference to their stakeholders form the basis of their actions, according to the Charter, to which we will come back later.

Not every human rights or humanitarian NGO is, however, ready or capable to sign this Charter. The threshold and self-imposed duties are high. For some it would challenge internal policies and practice. Becoming more transparent and truly independent from state authorities is not necessarily the way for certain NGOs to survive (Slim, 2002a, 2002b). Because most NGOs, either domestic or international, receive at least some portion of their funds from state agencies, such as foreign ministries or development agencies, their claim of independence is at stake. Furthermore, the issue of accountability has become crucial over the years. In a 'market' where there are countless NGOs, one very important question concerns how NGOs assess or measure their impact and success. What are their criteria or indicators according to their mandate or mission? Do they actually impact change for those they claim to be helping and supporting?

This gets us to a last and fundamental point that was already briefly touched on above and will be taken up again in the next section: there is debate about the extent to which NGOs can really ever take over the role and tasks of states. The scope of NGOs is often limited due to their resources, capacities, mandates or methods. Because of this, one can argue that they can never fully replace state or governmental power. Indeed, the scope of NGOs' action is in general limited to reporting on governmental shortcomings or human rights abuses, giving recommendations, and supplying quick humanitarian help. Governments, one may argue, have more duties and responsibilities in terms of human rights and well-being of their citizens than NGOs can ever fulfill. This may point to, if not a weakness, then at least to a limitation of NGO involvement, and one that will concern us further.

TOWARDS A NORMATIVE ACCOUNT OF NGO AGENCY IN CONFLICT AND POST-CONFLICT SOCIETIES

Legal points of reference

Up to this point, we have outlined strengths and weaknesses of the involvement of human rights and humanitarian NGOs in situations of conflict and post-conflict. We will now approach the question of what NGOs are permitted and required to do more systematically from both the legal and ethical viewpoints. We start by a brief look at the legal background (treaties, declarations, covenants etc.) from which NGOs work. This not only points to certain norms and standards to which NGOs might be justifiable held, but it also suggests an apparent case for NGO involvement being required in certain conflict- and post-conflict situations. This case was already adumbrated above and will be further developed here: in many conflict and post-conflict situations, NGOs are the only agencies that can enforce human rights agreements and thereby prevent such

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agreements from becoming empty talk.

We turn to the international legally binding human rights treaties, covenants, conventions as well as the politically or morally binding declarations and accords. It would fill pages to name them all (Donnelly, 2003; Steiner, Alston, and Goodman, 2007). They are legally binding for all those states that have ratified them either at the international regime level, such as the UN or at the regional level, that is to say within the Council of Europe, the EU, the AU or the OAS. Hundreds of informal and political binding agreements and documents could be added to which states as well as NGOs often refer while working in particular fields (such as the Millennium Development Goals (MDGs) or the informal Charter on the Right to live in Cities, etc.).

These legally binding documents are strengthened by the presence of monitoring bodies or international courts and tribunals, like the International Criminal Court (ICC) or the Yugoslavia tribunal (ICTY), the Special Court for Sierra Leone or the Ad-hoc Court for East Timor. These mechanisms are part of the international or regional human rights regime (Krasner, 1995; Donnelly, 2003). These regimes are often the basis for the vision, mission and mandates of NGOs while they act on behalf of people in need.

However, the international human rights regime aims at the responsibility of states to comply, and to fulfill their duties to protect and promote human rights in particular in conflict and post-conflict regions, and this regime hardly points to any international or national agents to protect and promote human rights. Thus, such protection and promotion in serious conflict areas in which the state is absent, like in Somalia or Afghanistan, is very difficult and beyond the possibility of the Geneva Conventions or any treaty.

A case for NGO involvement being required: NGOs as enforcement agencies

The above shows the importance of NGO involvement in conflict and post-conflict societies with weak or absent states; in such societies, NGOs are about the only agents that can prevent human rights from becoming meaningless words. Indeed, this case for NGOs remaining or getting involved in such contexts is so strong that it is appropriate to speak of a requirement or duty.

The importance of NGO engagement in conflict or post-conflict contexts where states are weak or absent, can be brought out further once we realize the sheer numbers that we are concerned with here: today’s majority of violent conflicts around the world are non-state armed conflicts (Centeno, 2003; Holsti, 1996). It is with good reason, then, that human rights NGOs no longer concentrate their human rights and lobbyist work on stable—even though often authoritarian—regimes but instead claim access to areas outside of state control and

where international human rights or even humanitarian law has no direct legal consequence, although it does apply in normative, ethical or moral terms (Greenwood, 2008).

However, there is a question as to whether NGOs can ever totally replace governments. Most authors and observers think they cannot (cf. the NGO Accountability Charter; Forsythe, 2006; Horton and Roche, 2010). Consider human-rights abuses: even though NGOs can and do (often very thoroughly) report such abuses, policing, prosecution and other legal consequences can only follow if governmental institutions have managed to gain access to the region. This suggests that, regardless of NGOs’ increasing role in promoting and safeguarding human rights and regardless of how they adapt and change their strategies, the long term success will depend on the fact how much these contributions impact on functioning state institutions such as courts, governments and police to prosecute, imprison, and take political and ethical measures to avoid human rights abuses in the future. Furthermore, according to international law the state is the sole duty bearer and consequently it is the state’s responsibility to implement and safeguard human rights in the territory under its control. Even though states delegate more and more power and responsibility to IGOs, such as the EU or UN, to international tribunals, courts or economic organizations, they remain the dominant powers. For the time being, it will depend on the political will of state governments to what extent they submit themselves to IGOs and delegate power to local levels, where they meet the work of NGOs and other humanitarian agencies (Hafner-Burton, Tsutsui, and Meyer, 2008; Hathaway, 2007).

On the other hand one may say, and here enters a different chorus of authors and observers (Kuper, 2004; Pogge, 2008; Cabrera, 2006), that states remain the dominant powers indeed — for the moment. Governance beyond state borders has become a serious field of investigation and will be all the more so in the years to come. International forms of governance will play a major role in the twenty first century, more so than any time before.

In any case, the point remains that, in the absence of fully functioning state institutions, humanitarian and human rights NGOs are often the only actors in conflict and post-conflict territories to observe and report on human rights, to provide humanitarian help, education and maintain a minimum standard of public order. Thus, they uphold and safeguard human rights at least at a minimum standard. It can be added that conflict and post-conflict periods can last years and that the regions in question remain areas of constant turmoil and human rights violations as long as some leaders and groups in these regions do not agree upon contracts or follow through on agreements. It seems that the reasons for NGOs to get involved or remain in such conflict and post-
conflict societies are so strong that they have requirements or duties here.

**Various kinds of NGO legitimacy**

In exploring our question of what humanitarian and human rights NGOs are permitted and required to do, especially in conflict and post-conflict societies, we are now going to move beyond the legal aspects. To begin with, we are going to look at perceived legitimacy and at the various sources of it (section 2.3). This discussion will suggest a strong reason (discussed in section 2.4) as to why NGOs may not be permitted to act in conflict and post-conflict societies: their involvement may drain government capabilities to act.

So, what is *legitimacy*? Being legitimate can, if we rely on the dictionary’s explanation, refer to being ‘allowed by law’ or to being ‘reasonable and acceptable’. Presently, we are, as said, not concerned with the legal meaning; rather, it is the second meaning that concerns us. This meaning, in turn, is rather broad and it is common to distinguish here between a *descriptive* and a *ethical* sense of legitimacy (both with their own varieties, as will become clear). In the present section, we explore legitimacy of NGOs in the descriptive sense (which we will also call ‘perceived legitimacy’). We ask what it takes for humanitarian and human-rights NGOs to be *perceived as acceptable agents* in conflict- and post-conflict societies (for the ethical meaning of legitimacy, see section 2.6 below). In other words, we explore the sources – and the problems connected with those sources – that NGOs rely on in order to be perceived as acceptable agents.

In practice, the existence of (perceived) legitimacy is confirmed by the presence of certain ideas and beliefs and importantly also certain behavior and actions. The legitimacy of the Western democratic state, for example, can be read from the fact that citizens exercise their right to vote and pay taxes (Weber, 1978; Beetham, 1991; Blau, 1963). Legitimacy can thus be seen as a relational concept.

When we apply these ideas of legitimacy to NGOs in (post-)conflict situations, it is important to recognize that post-conflict societies often find themselves in a process of state formation. Important questions are: who will attain power, via which channels, and how can state power and authority be consolidated (i.e., how it can be perceived as legitimate) by the population it aims to serve? In traditional state building theory (Tilly, 1992; Leander, 2004; Taylor and Botea, 2008), the concept of state building hinges on the acquisition of a monopoly of force. Once this is attained, the actor controlling exclusive force can exercise power and establish a safe and secure environment, which is conducive to the development of legitimate rule. NGOs active in this environment require legitimacy as well. The legitimacy they receive from their ‘Northern’ constituents is not enough among other things, for making them effective actors in conflict- and post-conflict environments of the ‘global South’. So, how do NGOs acquire (perceived) legitimacy, to which categories do they refer and how does it translate to authoritative power which permits them to operate?

Even though organizations like Amnesty International, the Ford Foundation or Oxfam might already consider themselves legitimate on the basis of their nature and essential characteristics which is supported by member or donors, they need to find and continue their (perceived) legitimacy through the constituency they represent, but also importantly vis-à-vis the target (mostly the population of the target state) of their activities. In this connection, earlier literature has pointed to several kinds of (perceived) legitimacy (Lister, 2003; Scott, 1995), which are distinguished by the sources that they rely on.

First, regulatory legitimacy is acquired via regulatory institutions and legal frameworks that can exist in a society to enforce order. Second, normative legitimacy relies on norms and values that pre-exist in society, which can be tapped into by the actor seeking legitimacy. Third, cognitive legitimacy is based on cognitive structures that exist, often referred to as ‘taken for granted’ ideas, which can be used to acquire legitimacy.

A problem that now emerges is that the different sources of legitimacy might not be compatible with one another – as opposed to what is suggested by the 2005 NGO Accountability Charter (section 2.5 below). For example, taken-for-granted ideas that exist in a certain society might be in tension with the norms and values that certain NGO constituencies (such as donors or field workers) hold dear. NGOs have to make up their minds how to navigate such situations.

**A case for NGO involvement being impermissible: NGOs and the sidelining of states**

For the moment being, we want to focus on one consequence that our discussion of (perceived) legitimacy suggests concerning the permissibility of NGO involvement in (post-) conflict societies.

Our point concerns what may be called a problem of competition. Some NGOs working at a national level in post-conflict societies suffer from a deficit of (perceived) legitimacy. However, the sources from which such legitimacy can be obtained, for example the promotion of respect for human rights and the provision of basic health care, are also the main focal points—and should rightly be so—of the central government. In other words, the legitimacy of NGOs can get in the way of the legitimacy of governments (Duyvesteyn, 2009; Angstrom, 2008; Lake, 2007). This is so despite the fact that some NGOs may aim at preventing this from happening. By providing essential services and carrying out tasks that traditionally belong to the domain of the central state, NGO legitimacy
undermines the state building efforts of the newly formed government. When the state is seen as not in control of basic services, it does not serve the needs of its citizens and will therefore be obstructed in the execution of its essential tasks.

The more common account, to be sure, has it that while states are (semi-)absent and until they (re-)gain full control of the specific territories or parts of their society, NGOs are either their ‘willing helpers,’ as ‘gap-fillers,’ or rather less welcome ‘pressure groups.’ However, in the line of thought suggested by our observations about (perceived) legitimacy, it may be more correct that—in the words of Barajas—NGOs undermine state authority if they ‘appear to replace it as the primary provider of services and resources’ (Barajas et al., 2006). The NGO can then harm the exact process it intended to support: it can do harm by doing good.

It is true that NGOs may claim that they do not have a problem of competition with states, because generally, they never claim to replace the state, neither according to their vision or mandate nor due to their generally limited resources and capacities. Furthermore, problems of state incapability—which may arguably be enhanced by NGO involvement—are often, on a closer look, more adequately characterized as a lack of political will to protect people from violence, abuse and injustice. Where this is the case, and also in a number of other situations, states may be said to deliberately ‘outsource’ their responsibility for protecting and promoting human rights to NGOs (and to IGOs).

However, such deliberate outsourcing—which can last between a few years and decades, during which the concerned territories are basically under control of NGOs and IGOs—is also problematic, even if it is beneficial in the short run. For NGOs cannot really replace or take over state activities such as policing, governance or equal distribution of resources or access to justice, which would also compound the issue of accountability. Thus, where NGO involvement and NGOs’ acquiring (perceived) legitimacy, it comes at the expense of the opportunities for states to acquire legitimacy, there remains a strong case that NGO involvement is impermissible.

**NGO requirements and permissions: considerations from the practice of NGOs**

In this section, we have so far ended up with two important but conflicting considerations with regard to NGO requirements and permissions to get or remain involved in conflict and post-conflict societies: on the one hand, NGOs seem required to get so involved, because they are the only agents that are capable of protecting and promoting human rights and humanitarian goals; but on the other hand, NGO involvement in conflict and post-conflict societies seems impermissible, because it gets in the way of state capabilities to act. We will now further analyze these two conflicting considerations by referring to NGO practice (in the present section) and to moral theory (in section 2.6).

More particularly, in the present section we look at the NGO Accountability Charter, which was already briefly mentioned in sections 1.4 and 2.3 above. The first thing to note with regard to potential competition between NGOs and states, is that the undersigned NGOs (Amnesty International, Oxfam, and CARE, among others), explicitly do not want to sideline states. They clearly state that they neither can replace governmental responsibility nor claim to do so. They can, on their own account, only complement state activities or act whenever the state is unable to fulfill its duties—as in the case of societies in conflict (see the Charter, Section ‘How we work’). The concerned NGOs base their ‘right to act’ on recognized freedom and civil rights as based in the Covenant on Civil and Political Rights (ICCPR). And they claim their legitimacy from the quality of their work, and the recognition and support of the people with and for whom they work as well as their members, donors, the wider public and governmental or other organizations around the world.

Thus, we may say that the NGOs undersigning the NGO Accountability Charter are aware of their role—and potential requirements—where states are weak or absent, and that they are also aware of and wish to avoid potential competition with states. However, it seems that they are not very conscious that their very human rights-related and humanitarian activities in contexts with weak or absent states, can undermine the (perceived) legitimacy and capabilities of these states (Mihr, 2011).

That there may be a lack of awareness here, can be brought out if we look at the parties that these NGOs consider as their stakeholders, i.e., as those who have a stake or an interest in their activities. The range of stakeholders that these NGOs refer to is extremely wide and potentially includes everybody who needs their help or to whom they feel accountable: governments if they are absent or need to be complemented; people, if they are voiceless or in need; donors, if they support them; IGOs, if they need NGO expertise; and members and volunteers, if they commit themselves to the vision and mission of the NGOs. Even the media are considered NGO stakeholders, and consequently the widest possible public (see the Charter, Section ‘Our stakeholders’). Such a definition of stakeholders means, in terms of practical legitimacy, that NGOs claim full legitimacy whenever and  

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6 In situations where this is a correct depiction of reality, and where NGOs get full support from governments, and act on their behalf and as their ‘agents’, these NGOs face other problems: they cannot be sure whether and to what extent they really help the people in need rather than fulfilling a state agenda.

7 However, our focus in this section is limited. We do not, for example, analyze the concept of accountability.

8 It is beyond the scope of this section to provide an analysis of the concept of a stakeholder.
wherever they act according to international human rights standards on behalf of people whom they think need support, aid, rescue, training or information.

True, on this very broad and inclusive account of NGO legitimacy, such legitimacy may perhaps shrink where governments continue NGO work or take up the demands and requests and implement them statewide (e.g., providing housing for refugees, releasing prisoners, bringing war criminals to justice, protecting women and children, provide state wide free primary education, implement fair and just trials and even introduce forms of democratic governance). However, in the NGO Accountability Charter, there seems to be little awareness of tensions – between the interests and claims of different stakeholders, between the short run and the long run, between different possible institutional arrangements, and between sources and subjects of legitimacy, etc. In particular, the possibility that NGO involvement may, despite their intentions to the contrary, end up undermining states’ capabilities and legitimacy in conflict and post-conflict societies, is insufficiently recognized.

**NGO requirements and permissions: considerations from moral theory**

In this section, we turn to the contribution that moral philosophy can make to the debates about NGO requirements and permissions. We explore a contribution of basically two kinds. First, moral philosophy can offer conceptual clarification as well as enlarging our understanding of what is at stake in questions concerning NGO requirements and permissions. Second, and more particularly concerning the conflicting suggestions that we identified above – namely, that NGO involvement in conflict- and post-conflict situations seems on the one hand imperative while on the other hand it seems illegitimate-- we will (in an illustrative and evidently non-exhaustive way) discuss theoretical insights and approaches in moral philosophy that can help us to adequately deal with the mentioned conflicting suggestions.

We start with conceptual clarification. Moral (or, in other words, ethical) requirements and permissions are distinct from legal requirements and permissions. There are a number of differences, which cannot and need not all be discussed here. The most important difference may be that moral requirements and permissions go beyond legal requirements and permissions, and that they can tell us why there ought or ought not to be certain legal requirements and permissions.

Similarly, moral requirements and permissions have to do with ethical legitimacy. Ethical legitimacy is distinct from descriptive (or, in other words, perceived) legitimacy. Ethical legitimacy does, to be sure, involve descriptive elements. For example, ethical legitimacy, too, may make NGO legitimacy hinge importantly on whether or not certain agents involved with an NGO, perceive it as legitimate. However, there is a difference: unlike descriptive legitimacy, ethical legitimacy will not in the end depend on the perceptions of certain groups, but rather on considerations in moral/ethical theory.

So much by way of distinction of the ethical/moral perspective from the legal and descriptive perspectives. Connected to these distinctions, there is often the thought that the moral perspective on requirements and permissions is in a sense the most fundamental: ultimately, what we want to know is whether legal arrangements are justified (by considerations that themselves are no longer legal) and whether people’s perceptions of an entity (a government, an NGO) as legitimate or as an admissible agent, are right. Moral theory has as its subject exactly questions like these: Is a certain legal regulation really justified? Are people justified in their perceptions that an NGO is legitimate? Do NGOs – once we ask beyond the legal regulations and perceptions and expectations with which NGOs are confronted– really face certain requirements and certain permissions to act? Moral theory tries to clarify and refine these questions and to offer approaches and criteria for answering them.

Let us, then, turn to a brief clarification of what ‘moral requirements and permissions’ are. Calling a requirement or permission moral means, according to many authors (e.g. Nagel, 1986; Singer, 1993; Williams, 1985), that such a requirement or permission exists from some impartial perspective: if an action is morally justified, it is justified from a perspective that transcends one’s own interests. Further, that there is a requirement to act in a certain way, means that there is decisive reason to so act; and where we face the opposite of a requirement, a prohibition, we have decisive reason not to act in a certain way. Finally, where we have a permission to act in a certain way, we have neither a decisive reason to act in that way nor a decisive reason to refrain from acting in that way.

Related to these distinctions – between requirements, prohibitions, etc.–, a distinction is often made between positive and negative moral requirements or – as we will say interchangeably– positive and negative duties (cf. recently, and influentially, Thomas Pogge (Pogge, 2008)). Positive duties are duties to do something, more particularly to provide help. They are, for example, addressed to NGOs as the only agents capable of helping out in many conflict- and post-conflict situations. Negative duties are duties to refrain from doing something, more particularly, duties not to harm. They may, for example, be involved where NGO work is called

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8 In what follows, we will not discuss (but leave for another occasion) question that concern different levels and types of NGO requirements and permissions. There are many such questions, like: are we talking about the permissibility etc. of one particular NGO activity (a token), or about certain types of NGO activities? Are we asking whether a particular NGO as a whole is a permissible agent, or whether certain types of NGOs as a whole are permissible agents? And, are we talking about permissibility of certain agents etc. in ideal situations, or in current (non-ideal) situations?
illegitimate because it gets in the way of governments’ capabilities to help.\(^9\) It is generally held that negative duties (duties not to harm) are weightier than positive duties (duties to help), if all else is equal. This ceteris paribus-clause is vital here; it prevents us from drawing easy conclusions about our earlier conflicting suggestions as to whether NGO involvement is imperative in so far as NGOs are the only agents capable of helping, or whether such involvement is illegitimate or forbidden, inasmuch as NGOs may get in the way of government capabilities.

We will now discuss two further forms of help that moral theory can offer to deal with these conflicting suggestions. The first form of help is to broaden the range of relevant considerations. (This is not help in the sense that it makes the analysis easier; but it makes the analysis more adequate.) Effects and effectiveness are the paramount considerations in many discussions of NGOs (Risse, Ropp and Sikkink, 2000). However, moral theory –and in particular the classical forms of such theory that are called ‘virtue ethics’ and ‘deontological ethics’– include much else, apart from effects: intentions, virtuous attitudes, special relations, and the distinction between harm that one causes vs. harm that one merely allows to happen. One implication of taking into account a range of considerations, of which effects are only one, is that it may turn out to be permissible—or even required—that an NGO tends to immediate needs even if doing so is likely to get in the way of, for example, a government’s long-term capabilities to help. In other words, emergency help may be permitted—and even required— even if the outcomes would, if one considers the whole picture, be better if this help were not provided.

This is not to say that moral theorists will treat considerations that concern effects and effectiveness with disdain. Indeed, not only does one dominant form of theory in ethics–so-called consequentialist theory– give the dominant place to effects; but every credible moral theory will take effects seriously. Thus the conclusions that can be drawn at this point are limited. They are, however, enough to complicate our analysis. Consider the observation that NGOs are in many conflict and post-conflict situations the only agents capable of acting, and that this speaks in favor of their being required to act. This point is put in terms of effects: if NGOs do not get involved, many people will suffer. But here one can ask: are effects really everything that matters? For example, is it not also important how a situation arose where only NGOs are capable of interfering? Who was responsible for this? Further, we can ask whether the mentioned line of thought—that NGOs have a requirement to act because only they are capable of doing so—takes effects sufficiently seriously. After all, it might in the long run be better that NGOs do not get involved.

Turning to the thought that NGO involvement in (post-) conflict societies may be impermissible inasmuch as it gets in the way of governments’ capabilities to act, it may be observed that this thought, too, primarily refers to effects. It is bad effects that make NGO involvement impermissible. However, we may again question whether effects are everything that matters. It seems plausible that certain agents (like states, IGOs, business companies etc.) have particular tasks and roles, which arise in ways that have little to do with effects: their being the agent of the people (as states purportedly are), their being guardians of international peace (as some IGOs may be regarded), or their having a special relationship with certain groups or individuals (as Shell with the Nigerians, because of its activities in the country). Furthermore, if we do want to make our point in terms of effects, does one take effects sufficiently seriously if one sacrifices immediate improvements for the sake of enhancing state capabilities in the longer run? After all, a capable state may never arise – or at least not in the foreseeable future, and there may be much suffering before it is in place.

Let us leave effects and other ethically relevant considerations here. We end by considering a second way in which moral theory may help when it comes to clarifying the requirements and permissions of NGOs. This may be done by pointing to different ways of approaching NGO requirements and permissions.\(^{10}\) NGOs are collective agents and, more particularly, voluntary citizens’ groups, and therefore at least two ways of approaching their requirements suggests themselves. Firstly, one may approach these requirements via the requirements that face the individuals that constitute these NGOs, i.e., via the requirements that face their founders, donors, or their staff, etc.. Secondly, one may approach these requirements by considering NGOs more directly, as collective agents capable of doing good as well as harm. It is quite conceivable that these different approaches do indeed make a difference. For example, take the idea that NGOs are required to help out in (post-) conflict societies where they are the only agents capable of doing so. This may be more plausible if one considers NGOs directly: they then appear as agents with great capacities and expertise. By contrast, if one considers the requirements that face for example their staff, it will be clear that a requirement to get involved in certain (post-) conflict situations can be very demanding indeed, and perhaps too much to demand.

There is a third way to approach NGO requirements and permissions, namely via the requirements and permissions of governments. Of course, the very name of NGOs (Non-Governmental Organizations) suggests that there is something odd about this approach, but the approach is nevertheless important, among other things because governments increasingly ‘outsourcing’ their

\(^{9}\) Negative duties of NGOs are hardly ever contested: while some doubt whether voluntary entities such as NGOs can have positive duties, it seems less controversial that they can have duties not to do harm.

\(^{10}\) These approaches may be in tension. However, it lies beyond our scope to extensively analyze these tensions.
responsibilities to other agents, such as NGOs (even if this development has many problematic sides, as amply discussed earlier in this article). The concerned approach may be developed by considering NGOs as agents that have a government as their principle and have something like a fiduciary duty to that government. If this should be credible, this would have implications for how to evaluate the thought that NGO involvement is impermissible in certain (post-) conflict societies, because it gets in the way of government capabilities to act. If NGOs are agents that have the government as their principle, it is not possible for NGO involvement to compete with government involvement. Rather, NGO involvement would be a way of government involvement. However, in the majority of cases this is probably not a very credible analysis. For example, NGOs would not so much be the agents of the now malfunctioning Congolese government, but rather the agents of other governments—say, Western governments that provide development aid through these NGOs. If so, the reasons for thinking NGO involvement to be impermissible may be strengthened once one sees NGOs as agents of governments... In any case, how one approaches NGOs—directly as collective agents, as entities that express the agency of certain individuals, or as entities that are agents for governments—is not inconsequential for the NGO requirements and permissions that one ends up with.

TO CONCLUDE: NGO REQUIREMENTS AND PERMISSIONS IN SITUATIONS OF CONFLICT AND POST-CONFLICT

This article has explored the requirements and permissions of humanitarian and human rights NGOs in situations of conflict and post-conflict. This topic is increasingly of interest not only to NGO practitioners but also to lawyers that recognize the limitations of states in the field of human rights. However, despite the huge amount that has been written about NGOs, the requirements and permissions of NGOs have received very little attention in the literature. Indeed, as we have seen, the specter of possible requirements and permissions of NGOs does, as things now stand, still run from their involvement being imperative to its being impermissible. More particularly, we have focused on one reason that may make it imperative, namely that in certain situations of conflict and post-conflict, NGOs are the only agents that can prevent humanitarian law and human rights from becoming dead letters. We have also given much attention to one reason for which NGO involvement may be illegitimate: NGO involvement may sometimes get in the way of the (perceived) legitimacy of states or governments, and of their capabilities to act.

No doubt there is much more to be said about the requirements and permissions of NGOs than we could address in the present article. The issue is not so much to decide whether their involvement is in the end imperative or impermissible. Rather, we must decide which of these options—or which third option—is right in which circumstances. Doing so involves not only 1) empirical complexities, many of which have been surveyed above; but it also involves 2) choices in normative matters, as articulated by moral theory and theory of related kinds. Although the kinds of theory relevant here lie beyond the legal, it is 3) vital to maintain the link with the legal field, which both theoretically and practically offers discourses which are very sophisticated and influential, and even indispensable; human rights, for example, require legal formulation, if only to get them enforced.

Thus studying the requirements and permissions of humanitarian and human rights NGOs involves empirical challenges as well as conceptual and normative challenges of an extra-legal and legal kind. Furthermore, all these aspects are interconnected and should inform one another. With the present article, even if it has resulted in few—if any—definite answers, we hope to have begun addressing these important challenges.

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11 Once we consider fiduciary duties, we may also consider other parties (possibly to be called ‘stakeholders’), to which an NGO could have fiduciary duties.
12 The discussion in this paragraph shows that it would be useful to distinguish between different types and sorts of NGOs. NGO requirements and permissions may be influenced by differences in, for example, national origins, missions and mandates of NGOs. The issues here may be very many and very deep (for example, for northern NGOs working in the South, all the familiar, vexed questions arise concerning whether moral claims have universal validity) and have to be left for another occasion.


