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Introduction: Governing Civil Society

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INTRODUCTION: GOVERNING CIVIL SOCIETY

Dana Brakman Reiser & Claire R. Kelly[*]

Globalization challenges an array of international actors to confront myriad problems. Increasingly, non-governmental organizations ("NGOs") take up this challenge by themselves or in coordination with other actors. *Governing Civil Society: NGO Accountability, Legitimacy and Influence* brought together prominent scholars and experts in a range of subject matters and disciplines to address how improving NGOs as institutions relates to the legitimacy of their role in civil society. NGO scholars consider the legitimacy of NGO action on the ground, among the constituencies affected by their efforts as they operate within international institutions that make law. Nonprofit law scholars address similar issues, but often focus on the internal workings and external regulation of NGOs and how their missions can be accomplished most accountably and effectively. This symposium brought together these disparate, but linked, disciplines for an important conversation on enhancing these essential institutions.

Our first panel, Assessing the Influence of NGOs on International Organizations confronted the work of NGOs in International Organizations ("IOs"). In *The Impact of NGOs on International Organizations: Complexities and Considerations*, Professor Shamima Ahmed notes the perception that nonprofits are succeeding in connection with their work either on the ground or in IOs, but also questions the lack of rigorous scholarship regarding NGOs' impact. Admittedly, examining this impact will be complex. Any examination should consider whether the NGO made the norm making process more accessible or democratic and whether the NGO succeeded in changing the status quo. Any framework that measures NGO impact also should consider structural and contextual factors. The size, nature of issues, scope of operations, political opportunity structure, and the ability of the NGO to speak with one voice all affect NGOs' impact. The subject matter that an NGO addresses (e.g. technical matters) also affects how we measure an NGO's impact. Professor Shamima's article guides us through three case studies that illustrate these factors, confirming the claim that NGO impact is complex and the need for further study.

In *"Accountability" as "Legitimacy": Global Governance, Global Civil Society and the United Nations*, Kenneth Anderson calls attention to the danger that the self-legitimizing relationships between IOs and NGOs presents to accountability. Examining external accountability, he

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considers whether "international NGOs, and transborder social movements more generally, have any special governance role to play."[1] After tracking the evolution of NGOs pre- and post-9/11, he distinguishes between civil society having a role to play as experts versus as representatives. He argues that NGOs should embrace a role as experts and "even as enthusiasts and advocates for their causes"[2] and forego claims to represent anyone.

In *The Illegitimacy of Preventing NGO Participation*, Steve Charnovitz constructs three frames by which we may view NGO participation in international organizations: State positivism, IO functionalism, and community. The State positivism frame would limit the NGO participation in IOs to that specifically provided by the states that establish the IO. Under the functional view, it is the IO that would consult NGOs as it deemed appropriate. He notes that NGO participation may have its costs, but from a functional standpoint it should also promote "the long-term effectiveness of the IO."[3] The community frame views the IO as "a place where a community of actors debates and makes decisions."[4] This community has the individual, not the state, at its center. Each framework suggests a different answer to the question posed by Professor Charnovitz: whether it is illegitimate to exclude NGOs from IOs. The positive view would leave the question up to the member states (although a minority view of the positive approach would impose some limitations on the state's ability to exclude NGOs). The functionalist approach sees the IO as having a personality and defers to each IO to decide if NGO involvement would "promote the IO's purposes."[5] The community approach sees the IO as a community, of which NGOs must be a part.

Professor Lloyd Hitoshi Mayer's *NGO Standing and Influence in International Human Rights Courts and Commissions* examines NGO involvement in the development and implementation of international human rights law. He undertakes regional analysis considering Europe, the Americas, and Africa. First, he examines the existing provisions for NGO involvement in the human rights courts in each region. NGOs play a variety of roles from applicants, to counsel, to intervenors. Professor Hitoshi Mayer then undertakes an analysis of these roles by reviewing tribunal decisions from these systems over a ten year period. After con-

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1. Kenneth Anderson, *"Accountability" as "Legitimacy": Global Governance, Global Civil Society and the United Nations*, 36 BROOK. J. INT'L L. 841, 845 (2011).

2. *Id.* at 888.

3. Steve Charnovitz, *The Illegitimacy of Preventing NGO Participation*, 36 BROOK. J. INT'L L. 891, 902 (2011).

4. *Id.* at 904.

5. *Id.* at 910.

sidering the differences and similarities among the three systems, he then considers the ramifications of NGO involvement. Ultimately he concludes that "the development and support of human rights NGOs should [] be targeted in different ways in these different systems."[6] He also examines NGO accountability in the regional human rights enforcement system. Admittedly, there are relatively few NGOs who are given a disproportionate role in the process. Nevertheless, he finds that there is "significant oversight" from "reputable individuals and groups from both within and outside the relevant member states."[7]

The second panel of the day considered Models for Governance and Regulation of NGOs. In her paper *Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy and Regulation*, Oonagh B. Breen looks at the regulation of nonprofits through a European lens. First, Professor Breen outlines EU Regulation and considers the evolution of European policy. She recounts how the events of 9/11 triggered concern over nonprofit finances, leading to the Financial Action Task Force ("FATF")–Special Recommendation VIII, focusing on the activities of nonprofits, Member State implementation of the FATF recommendations, and the European Commission's 2005 Communication on the Prevention of and Fight Against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-profit Sector. Three important reports issued between 2007 and 2009 caused the EU to re-assess its strategy and consider a more contextual approach that took account of empirical evidence, proportionality, as well as sensitivity to national regimes and needed flexibility for humanitarian organizations. She argues, in conclusion, for a more balanced approach that would "focus on improving non-profit governance in those areas that raise concern at EU level or that may particularly benefit from a concerted European (as opposed to an ad hoc Member State) policy solution."[8]

In *Wait! That's Not What We Meant By Civil Society: Questioning The NGO Orthodoxy In West Africa*, Thomas A. Kelley looks at NGOs on the ground and in particular, development organizations' efforts to promote civil society in Africa and in particular West Africa. Starting from the premise that a stable civil society fosters democratic governance, stability and prosperity, international development workers sought to engender civil society. As he explains, "the aid industry presumed a causal connec-

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6. Lloyd Hitoshi Mayer, *NGO Standing and Influence in Regional Human Rights Courts and Commissions*, 36 BROOK. J. INT'L L. 911, 914 (2011).

7. *Id.* at 939.

8. Oonagh Breen, *Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy and Regulation*, 36 BROOK. J. INT'L L. 947, 949 (2011).

tion between a thriving civil society, democratization, and economic prosperity."[9] Most northern or donor countries envision that civil society in developing countries would look much as it does in those donor countries. But as Kelley points out, the experience in West Africa has shown that while law reformers might be successful in creating a space for civil society, they cannot dictate the inhabitants of that space. In West Africa, Muslim social reformers have stepped into the space and espoused their own beliefs and traditions. Professor Kelley concludes "that there is little that western governments and aid organizations can do to prevent the civil society sphere in West Africa from evolving in its own direction."[10]

We were honored to present our *Linking NGO Accountability and the Legitimacy of Global Governance* for discussion in the symposium's final panel. In it, we consider how global regulators can help improve NGO accountability as well as the legitimacy of global regulation. After considering the roles the NGOs play in global governance, the article describes the various legitimacy frameworks used to assess IOs and how NGO involvement plays an important role in them. It then reviews NGO accountability regimes supplied by domestic nonprofit law and reveals that these regimes will fall short in ensuring legitimacy for NGOs efforts internationally. Next, the article evaluates the accreditation, monitoring, and enforcement efforts IOs use to ensure and maintain the accountability of the NGOs upon whom they rely. Ultimately, we argue for improvements in these systems, to improve the legitimacy of NGO participation and allow global regulators to better "serve as gatekeepers and [] better utilize NGOs as part of their legitimacy strategies."[11]

Governing Civil Society: NGO Accountability, Legitimacy and Influence made a valuable contribution to encouraging the dialogue between NGO and nonprofit legal scholars. As NGOs continue to play a significant role within and among States and IOs, this critical conversation and the research it has spurred will no doubt continue. We thank the scholars whose work appears in these pages, as well as the other panelists and participants at the symposium, for their efforts.

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9. Thomas Kelley, *Wait! That's Not What We Meant By Civil Society!; Questioning the NGO Orthodoxy in West Africa*, 36 BROOK. J. INT'L L. 993, 997 (2011).

10. *Id.* at 1009.

11. Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 BROOK. J. INT'L L. 1011, 1011 (2011).