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THE ILLEGITIMACY OF PREVENTING NGO PARTICIPATION

Steve Charnovitz*

Nongovernmental organizations (“NGOs”) have exerted a profound influence on international action. Although NGOs go back to antiquity,¹ the influence of transnational or international-minded NGOs began in the 1770s.² Historically, NGOs have been important catalysts in the promotion of the goals of peace and disarmament,³ antislavery,⁴ women’s rights,⁵ humanitarian law,⁶ environmental law,⁷ human rights,⁸

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1. See, e.g., JACK C. ROSS, AN ASSEMBLY OF GOOD FELLOWS: VOLUNTARY ASSOCIATIONS IN HISTORY (1976). There is also a large literature on the topic of “civil society.” See, e.g., JOHN EHRENBERG, CIVIL SOCIETY: THE CRITICAL HISTORY OF AN IDEA (1999). Some of this literature discusses civil society organizations as participants and some does not.

2. See Steve Charnovitz, *Two Centuries of Participation: NGOs and International Governance*, 18 MICH. J. INT’L L. 183, 190–92 (1997) [hereinafter Charnovitz, *Centuries of Participation*]; see also CONSTRUCTING WORLD CULTURE: INTERNATIONAL NONGOVERNMENTAL ORGANIZATIONS SINCE 1875 (John Boli & George M. Thomas eds., 1999) (discussing the proliferation and influence of international NGOs since 1875).

3. See, e.g., DAVID CORTRIGHT, PEACE: A HISTORY OF MOVEMENTS AND IDEAS (2008); THOMAS RICHARD DAVIES, THE POSSIBILITIES OF TRANSNATIONAL ACTIVISM: THE CAMPAIGN FOR DISARMAMENT BETWEEN THE TWO WORLD WARS (2007).

4. See, e.g., ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE’S SLAVES (2005); JIM POWELL, GREATEST EMANCIPATIONS (2008).

5. See, e.g., BONNIE S. ANDERSON, JOYOUS GREETINGS: THE FIRST INTERNATIONAL WOMEN’S MOVEMENT, 1830–1860 (2000); NITZA BERKOVITCH, FROM MOTHERHOOD TO CITIZENSHIP: WOMEN’S RIGHTS AND INTERNATIONAL ORGANIZATIONS (1999); DAVID S. PATTERSON, THE SEARCH FOR NEGOTIATED PEACE: WOMEN’S ACTIVISM AND CITIZEN DIPLOMACY IN WORLD WAR I (2008); HILKKA PIETILÄ, ENGENDERING THE GLOBAL AGENDA: THE STORY OF WOMEN AND THE UNITED NATIONS (2002); LEILA J. RUPP, WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN’S MOVEMENT (1997); LINDA K. SCHOTT, RECONSTRUCTING WOMEN’S THOUGHTS: THE WOMEN’S INTERNATIONAL LEAGUE FOR PEACE AND FREEDOM BEFORE WORLD WAR II (1997).

6. See, e.g., JOHN F. HUTCHINSON, CHAMPIONS OF CHARITY: WAR AND THE RISE OF THE RED CROSS (1996).

7. See, e.g., SHERMAN STRONG HAYDEN, THE INTERNATIONAL PROTECTION OF WILD LIFE (1942); ROBERT BOARDMAN, INTERNATIONAL ORGANIZATION AND THE CONSERVATION OF NATURE (1981); SARAH ABBEVAYA STEIN, PLUMES: OSTRICH FEATHERS, JEWS, AND A LOST WORLD OF GLOBAL COMMERCE (2008); Steve Charnovitz, *Learning from Early NGO Activity*, 92 AM. SOC’Y INT’L L. PROC. 338 (1998).

8. See, e.g., PAUL GORDON LAUREN, THE EVOLUTION OF INTERNATIONAL HUMAN RIGHTS (1998); LINDA RABBen, FIERCE LEGION OF FRIENDS: A HISTORY OF HUMAN RIGHTS CAMPAIGNS AND CAMPAIGNERS (2002).

worker rights,⁹ and international economic law.¹⁰ Indeed, to quote José Alvarez in his masterful treatise on international organizations, “no one questions today the fact that international law—both its content and its impact—has been forever changed by the empowerment of NGOs.”¹¹ Although there may be disagreement as to when NGO influence commenced, few would deny the contemporary influence of NGOs on the international plane.¹²

The importance of NGOs has led to a spirited debate about their status in international law. Some scholars, such as Pierre-Marie Dupuy, have noted a “paradox” wherein NGOs “do a lot . . . in the functioning of international institutions and the implementation of the law created in their midst,” even though “de jure, these entities have no existence or a very narrowly defined one”¹³ Other scholars, such as Anna-Karin Lindblom, agree that NGOs are influential, but are more optimistic about

9. See, e.g., JOHN W. FOLLOWS, ANTECEDENTS OF THE INTERNATIONAL LABOUR ORGANIZATION (1951); ERNST B. HAAS, BEYOND THE NATION-STATE (1964).

10. See, e.g., GEORGE L. RIDGEWAY, MERCHANTS OF PEACE: TWENTY YEARS OF BUSINESS DIPLOMACY THROUGH THE INTERNATIONAL CHAMBER OF COMMERCE (1938); CATHERINE SEVILLE, THE INTERNATIONALISATION OF COPYRIGHT LAW (2006) (discussing the role of associations).

11. JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 611 (2005).

12. See, e.g., Tullio Treves, *Introduction to CIVIL SOCIETY, INTERNATIONAL COURTS AND COMPLIANCE BODIES* 1, 7 (Tullio Treves et al. eds., 2005) (noting that “the role of NGOs is becoming an important chapter of the growing field of the law of international courts and tribunals”); CRAIG WARKENTIN, *RESHAPING WORLD POLITICS: NGOs, THE INTERNET AND GLOBAL CIVIL SOCIETY* (2001); SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* (2005); *THE THIRD FORCE: THE RISE OF TRANSNATIONAL CIVIL SOCIETY* (Ann M. Florini ed., 2000); AKIRA IRIYE, *GLOBAL COMMUNITY* (2002) (esp. chaps. 1, 5); JULIE FISHER, *NONGOVERNMENTS: NGOs AND THE POLITICAL DEVELOPMENT OF THE THIRD WORLD* (1998); Peter J. Spiro, *New Global Potentates: Nongovernmental Organizations and the “Unregulated” Marketplace*, 18 CARDOZO L. REV. 957 (1996); Holly Cullen & Karen Morrow, *International Civil Society in International Law: The Growth of NGO Participation*, 1 NON-ST. ACTORS & INT’L L. 7 (2001); THE ASHGATE RESEARCH COMPANION TO NON-STATE ACTORS (Bob Reinalda ed., 2011); BARBARA K. WOODWARD, *GLOBAL CIVIL SOCIETY IN INTERNATIONAL LAWMAKING AND GLOBAL GOVERNANCE* (2010). Woodward chronicles the history of NGOs as starting in the nineteenth century, then covers the League of Nations period, and then points to three generations of NGOs, beginning with the first generation (1945–91), second generation (1992–96), and third generation (post–1996). *Id.* at 81–102. For another view of periodicity in NGO influence, see Charnovitz, *Centuries of Participation*, *supra* note 2, at 190.

13. Pierre-Marie Dupuy, *Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems Which Arise for Legal Scholarship*, in *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?* 204, 214 (Pierre-Marie Dupuy & Luisa Vierucci eds., 2008).

their legal status within the international plane.¹⁴ Considerable writing exists on the issue of whether NGO activism is legitimate and whether NGO activities are accountable.¹⁵ Some of this scholarship is largely theoretical;¹⁶ some of it largely empirical;¹⁷ and much in between.¹⁸ Moreover, there is a parallel literature on the legitimacy of intergovernmental organizations.¹⁹

Considerable writing also exists on the benefits gained by the international system from NGO participation.²⁰ The stream of benefits differs

14. ANNA-KARIN LINDBLOM, *NON-GOVERNMENTAL ORGANISATIONS IN INTERNATIONAL LAW* 15–22 (2005) (noting the increasing role of NGOs); *see also id.* at 519 (noting the frequency of use of the term NGO “participation” at the expense of “consultation”).

15. On accountability, *see, e.g.*, Patrick Kilby, *Nongovernmental Organizations and Accountability in an Era of Global Anxiety*, 5 *SETON HALL J. DIPL. & INT’L REL.* 67 (2004); Robert Charles Blitt, *Who Will Watch the Watchdogs? Human Rights Nongovernmental Organizations and the Case for Regulation*, 10 *BUFF. HUM. RTS. L. REV.* 261 (2004); Erik B. Bluemel, *Overcoming NGO Accountability Concerns in International Governance*, 31 *BROOK. J. INT’L L.* 139 (2005); NGO ACCOUNTABILITY (Lisa Jordan & Peter van Tuijl eds., 2006); Michael Szporluk, *A Framework for Understanding Accountability of International NGOs and Global Good Governance*, 16 *IND. J. GLOBAL LEGAL STUD.* 339 (2009); Diana Hortsch, *The Paradox of Partnership: Amnesty International, Responsible Advocacy, and NGO Accountability*, 42 *COLUM. HUM. RTS. L. REV.* 119 (2010); ANNE HERZBERG, *NGO MONITOR, NGO “LAWFARE”: EXPLOITATION OF COURTS IN THE ARAB-ISRAELI CONFLICT* (2d ed. 2010); Kenneth Anderson, “Accountability” as “Legitimacy”: *Global Governance, Global Civil Society, and the United Nations*, 36 *BROOK. J. INT’L L.* 841 (2011); Dana Brakman Reiser & Claire R. Kelly, *Linking NGO Accountability and the Legitimacy of Global Governance*, 36 *BROOK. J. INT’L L.* 1011 (2011); Oonagh Breen, *Through the Looking Glass: European Perspectives on Non-profit Vulnerability, Legitimacy, and Regulation*, 36 *BROOK. J. INT’L L.* 947 (2011).

16. The best of that genre may be TERRY MACDONALD, *GLOBAL STAKEHOLDER DEMOCRACY* (2008).

17. *See, e.g.*, CIVIL SOCIETY PARTICIPATION IN EUROPEAN AND GLOBAL GOVERNANCE: A CURE FOR THE DEMOCRATIC DEFICIT? (Jens Steffek et al. eds., 2008); ANTON VEDDER ET AL., *NGO INVOLVEMENT IN INTERNATIONAL GOVERNANCE AND POLICY: SOURCES OF LEGITIMACY* (Anton Vedder ed., 2007).

18. *See, e.g.*, J. J. LADOR-LEDERER, *INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS AND ECONOMIC ENTITIES* (1963); LINDBLOM, *supra* note 14.

19. *See, e.g.*, *THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS* (Jean-Marc Coicaud & Veijo Heiskanen eds., 2001).

20. *See, e.g.*, George E. Edwards, *Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs*, 18 *MICH. ST. J. INT’L L.* 165 (2010); Monica Schurtman, *The Challenges of Evaluating NGO “Success” in Cross-Border Rights Initiatives: The Examples of the International Campaign to Ban Landmines and the Autotrim/Customtrim Initiative Under the NAFTA Labor Side Agreement*, in *PROGRESS IN INTERNATIONAL LAW* 357 (Russell A. Miller & Rebecca M.

between the service-delivery NGOs and the advocacy NGOs. (Some NGOs encompass both categories.) Service delivery NGOs, sometimes called private voluntary organizations, carry out relief and other charitable activities on behalf of donor governments, international organizations ("IOs"), foundations, or individuals.²¹ The Red Cross is an early example of this NGO style. The advocacy NGOs (e.g., Amnesty International and the International Chamber of Commerce) seek to influence governments and IOs. Of course, whether any particular NGO contributes something useful requires analysis of specific facts.

In my view, the value-added from NGOs on the international plane is that they correct for the pathologies of governments and IOs.²² First, in having a transnational orientation, NGOs provide a counterweight to the nationalism of governments, particularly economic nationalism. States seek to impose costs on other states and NGOs can counter such actions by exposing them to public attention and arguing against them. Second, NGOs can help governments and IOs address problems of market failure, particularly those crossing borders. Often, government regulators are slow to recognize a problem, uncreative in finding positive-sum solutions to the problem, and stymied in addressing a problem because intergovernmental cooperation is impeded by a foot-dragging nation. NGOs ameliorate this predicament by bringing in data and expertise to show that a problem exists, by putting potential new solutions on the table, and by putting pressure of uncooperative governments. NGOs are said to help generate "political will" by governments, meaning that NGOs use discursive methods to influence public opinion. Third, and related, NGOs are especially adept at addressing problems of the global commons, such as the atmosphere, the oceans, and biodiversity. Governments can set up IOs to address these problems, but the catalyst to do so is often the civic NGOs who then go on to help energize international decisionmaking.

Fourth, NGOs can address the problem of government failure either at the national or international level. Whenever there are failed states,

Bratspies eds., 2008); Steve Charnovitz, *How Nongovernmental Actors Vitalize International Law*, in *LOOKING TO THE FUTURE* 135 (Mahmoud H. Arsanjani et al. eds., 2011).

21. See, e.g., Lara Stemple, *The AIDS Funding Crisis: International Commitments, Global Donors and the Role of NGOs*, ASIL INSIGHTS (Am. Soc'y Int'l Law, Washington, D.C.), Dec. 14, 2010, available at http://www.asil.org/files/2010/insights/insights_101213.pdf.

22. In contrast to NGOs which are spontaneous, self-directed initiatives, independent commissions are another long-utilized approach of harvesting new ideas for international debates. The legal scholar Ernst H. Feilchenfeld was an early advocate of utilizing a "non-governmental board" to supply "impartial and reliable investigations, reports and recommendations." ERNST H. FEILCHENFELD, *THE NEXT STEP: A PLAIN MAN'S GUIDE TO INTERNATIONAL PRINCIPLES* 46, 52 (1938).

NGOs spontaneously ramp up their efforts to fill in for hollow governments.²³ When there are failures in IOs, such as policy insularity when IOs fail to coordinate norms with each other, NGOs can serve as competitors to international and national bureaucrats in debates before elected or ministerial-level national government officials who make decisions at IOs. NGOs can also call attention to situations when IOs get captured by authoritarian governments. This happened, for example, with the United Nations (“U.N.”) Commission on Human Rights.²⁴ Fifth, NGOs bring in their individual passions to international governance and seek to add new rules that governments might not champion on their own. Human rights is probably the best example. Even as early as the Congress of Vienna in 1815, there were NGOs and crusading individuals who championed the introduction of human rights guarantees into international accords.²⁵ Sixth, as enduring organizations, NGOs are in a position to stand up for the needs of future generations. This is not to argue that NGOs are uniquely qualified for that task, but they can manifest greater concern for posterity than politicians and business enterprises. Seventh, NGOs also work to improve the market by providing more information to consumers about products and companies.

The question taken up in this Article is not whether it is legitimate to allow NGOs into international governance, but rather the opposite: is it legitimate to keep NGOs out? In particular, the Article explores whether IOs, autonomous institutional arrangements, or other transgovernmental organizations have a duty to provide opportunities for NGOs to observe, consult, and participate. Or, to put it another way, do NGOs have a right to participate in all forms of international governance?

The traditional view is that IOs have no inherent duty to provide deliberative space for NGOs. When IOs do so, and they do so regularly and with increasing frequency, this practice is viewed as a consequence of the positive law of the particular IO as written by its member states.²⁶ In other words, an IO may be open to NGO participation if states so legislate or may be closed to NGOs if member states prefer that insular arrangement. This first view can be termed the *positive* approach.

23. For example, there are many NGOs working hard on problems in Somalia, Sudan, and Haiti.

24. *The Shame of the United Nations*, N.Y. TIMES, Feb. 26, 2006, at C11. The new U.N. Human Rights Council has been criticized on the same grounds. *The U.N.’s Human Rights’ Council*, WASH. POST, Mar. 27, 2011, at A18.

25. Charnovitz, *Centuries of Participation*, *supra* note 2, at 195–96.

26. See Emanuele Rebasti, *Beyond Consultative Status: Which Legal Framework for Enhanced Interaction Between NGOs and Intergovernmental Organizations?*, in *NGOS IN INTERNATIONAL LAW: EFFICIENCY IN FLEXIBILITY?*, *supra* note 13, at 21, 24–25.

A second view is that an IO, as an organization with its own legal personality, has independent authority and volition to decide how to communicate with NGOs and furthermore that a rational IO would select the optimal NGO participation to achieve the IO's distinct functional mission. Scholars differ on what benefits NGOs convey to an IO. A very favorable view is that NGOs can help to confer legitimacy on the international system,²⁷ or that NGOs can reduce the democratic deficit of IOs.²⁸ The perspective of the autonomous, NGO-friendly IO can be termed the *functional* approach.²⁹

A third view starts with a different assumption about the nature of IOs. Instead of seeing them as persons with an individual, independent personality, this perspective sees IOs as a community of participants. At the center of the community is the individual. Other participants include government diplomats, other IOs and NGOs, business entities, and international civil servants. Not all participants have equal powers within the IO, but the community of the IO should be as open and inclusive as possible. The participants in the community might seek to exclude uncivil society, such as terrorists, but the IO itself would not be viewed as a decisionmaker. This perspective can be termed the *community* approach.

This Article proceeds in four parts: Part I explains the frame of state positivism, that is, the idea that states determine the openness of IOs toward NGO participation. Part II explains the frame of IO functionalism, the idea that IOs have the autonomy to calibrate how much NGO participation to permit. This Part further argues that a rational IO would permit NGO participation as needed to help the IO achieve its functional mission. Part III explains the frame of community, the idea that an IO is a community composed of individuals, NGOs, states, business entities, and international officials. Part IV concludes.

27. See Menno T. Kamminga, *The Evolving Status of NGOs Under International Law: A Threat to the Inter-State System?*, in NON-STATE ACTORS AND HUMAN RIGHTS 93, 110 (Philip Alston ed., 2005).

28. See James Crawford & Susan Marks, *The Global Democracy Deficit: an Essay in International Law and its Limits*, in RE-IMAGINING POLITICAL COMMUNITY 72, 83 (Daniele Archibugi, David Held & Martin Köhler eds., 1998) (“[T]he vastly enhanced participation in recent years of non-governmental organizations at the international level is one indication of the pressures and possibilities for democracy in global decision-making.”); DANIELE ARCHIBUGI, *THE GLOBAL COMMONWEALTH OF CITIZENS* 82 (2008).

29. Of course, another logical possibility is for an autonomous NGO-unfriendly IO to decide that involvement in NGOs is antithetical to achieving the IO's function.

I. FRAME ONE: STATE POSITIVISM

The positive³⁰ approach posits that the role of NGOs in a particular IO is determined by that IO's founding treaty as written by states. If states do not provide for NGO participation in the IO's charter or procedural rules, then the IO has no duty to, and should not, welcome in NGOs. Correspondingly, an NGO has no inherent legal right to participate in an IO. The status of the NGO within an IO is solely a function of the rules for participation legislated for the IO by states members.

Until recently, this view was widely accepted in the doctrines of international law. Even now, it surely states the majority view. For instance, consider Cedric Ryngaert's recent study finding that "Non-state actor participation in international norm-setting processes remains a 'discretionary' decision of relevant bodies and institutions."³¹ Additionally, Alan Boyle and Christine Chinkin's study on the making of international law observes that "it seems premature to assert that there is a right to access and participation" of non-state actors.³² Another recent study by Anne Peters finds that "a customary right of NGOs to participate freely in the international legal process does not yet exist."³³

The view that IOs have limited autonomy to make policy decisions on their own is reflected in the decision of the International Court of Justice ("ICJ") in the case involving the request by the World Health Organization ("WHO") for an advisory opinion on nuclear weapons.³⁴ In its decision, the ICJ denied the WHO's request for an advisory opinion on the

30. In general, the move to positivism and voluntarism in international law was a movement away from natural and religious influences on the content of international law. As Georg Schwarzenberger explained over seventy years ago:

Formerly the law was a truth to be sought after, but now it becomes the equivalent of the will of those who give or refuse their consent. The relation between international law and spiritual and other standards of value ceases to be regulated by a process of subconscious growth, and becomes dependent on the will of those whose behavior is to be restrained or refined by the law.

Georg Schwarzenberger, *The Rule of Law and the Disintegration of the International Society*, 33 AM. J. INT'L L. 56, 65 (1939).

31. Cedric Ryngaert, *Imposing International Duties on Non-State Actors and the Legitimacy of International Law*, in NON-STATE ACTOR DYNAMICS IN INTERNATIONAL LAW: FROM LAW-TAKERS TO LAW-MAKERS 69, 81 (Math Noortmann & Cedric Ryngaert eds., 2010).

32. ALAN BOYLE & CHRISTINE CHINKIN, *THE MAKING OF INTERNATIONAL LAW* 57 (2007).

33. Anne Peters, *Membership in the Global Constitutional Community*, in *THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW* 153, 222 (2009).

34. *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66 (July 8).

grounds that the WHO lacked competence to request such an opinion because the topic was outside the scope of the WHO's Constitution and its functions.³⁵ In agreeing that the WHO request should be dismissed, Judge Shigeru Oda explained that it seemed clear to him from the WHO records that the request for an advisory opinion "was initiated by a few NGOs"³⁶ Although Judge Oda did not explain why NGO lobbying was relevant to the Court's decision as to the WHO's powers, his judgment seems to indicate that the limited capacity of an IO to make its own decisions can be diminished even more when the IO chooses to follow the advice of NGOs.

On the other hand, there is a minority view that NGOs do have some inherent rights to participate in international processes. In other words, although it is states that decide whether an IO should admit NGO participation, states are constrained in that choice by customary practice that prevents them from excluding NGOs. Few have championed this view as boldly as just stated, but there are many scholars who suggest that a participation right for NGOs is emerging. For example, Lindblom reaches the conclusion that "the question can be raised if the international legal system will reach a point when NGOs have a general right to participate in international legal discourse. I suggest that, as of today, they have at least a legitimate expectation."³⁷ Peters' article, quoted above,³⁸ also offers more nuanced views. For example, she asserts that "NGOs have the right to apply for an accreditation and be duly considered. Such a principle of openness has not yet fully crystallized into law, but is nascent."³⁹ Furthermore, she argues that "NGOs already enjoy a *legitimate expectation* that—when accredited—the participatory conditions will entail four components: prior notification of meetings and agenda items, automatic and continuous admission to meetings, the option to distribute documents, and being allowed to address the conference upon explicit permission."⁴⁰ Peters also calls for "recognizing a presumption of admissibility of *amicus curiae* briefs" by NGOs to international organizations.⁴¹

In my own scholarship, I have suggested that state practice is moving "toward a duty to consult NGOs" in the "activities of IOs and in multi-

35. *Id.* ¶¶ 31–32.

36. *Id.* at 96, ¶ 16 (separate opinion of Judge Oda).

37. LINDBLOM, *supra* note 14, at 526.

38. *See supra* note 33 and accompanying text.

39. Peters, *supra* note 33, at 222.

40. *Id.* at 226.

41. *Id.* at 232.

lateral negotiations.”⁴² I reached this conclusion by examining actual practice, treaty law, and the views of highly qualified publicists.⁴³ In particular, I found support in Immanuel Kant’s 1795 essay *Perpetual Peace*⁴⁴ and Nathan Feinberg’s 1932 Hague Academy lecture on *The Petition in International Law*.⁴⁵ In *Perpetual Peace*, Kant posited that “every nation should seek advice from philosophers concerning the principles on which it should act toward other nations.”⁴⁶ He then argued that “The arrangement between states, on this point, does not require that a special agreement should be made, merely for this purpose; for it is already involved in the obligation imposed by the universal reason of man which gives the moral law.”⁴⁷ Over a century later, Feinberg, in a Hague Academy lecture, explained that NGO petitioning to international assemblies of governments began as a pattern of usage, but over time developed into “an obligatory norm.”⁴⁸ He described the norm as the “obligation incumbent on international authorities not to refuse to receive [petitions] and to follow up on them.”⁴⁹ Feinberg’s essay gives numerous examples of state practice in early international assemblies to accept and take action on NGO petitions.⁵⁰

42. Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 368 (2006) [hereinafter Charnovitz, *Nongovernmental Organizations*].

43. For references to the views of contemporary international law scholars, see *id.* at 371 n.161.

44. IMMANUEL KANT, *PERPETUAL PEACE: A PHILOSOPHICAL ESSAY* (M. Campbell Smith trans., George Allen & Unwin Ltd. 1903) (1795).

45. Charnovitz, *Nongovernmental Organizations*, *supra* note 42, at 371–72; Nathan Feinberg, *La Pétition en Droit International*, 40 RECUEIL DES COURS 529, 628 (1932). Feinberg’s essay is in French and the translations herein are mine.

46. Charnovitz, *Nongovernmental Organizations*, *supra* note 42, at 371; see KANT, *supra* note 44, at 158–59. The role of the philosopher is discussed in Ian Hunter, *Kant’s Regional Cosmopolitanism*, 12 J. HIST. INT’L L. 165, 182–83 (2010).

47. KANT, *supra* note 44, at 159.

48. Feinberg, *supra* note 45, at 631.

49. *Id.* at 632; see also Charnovitz, *Nongovernmental Organizations*, *supra* note 42, at 371–72.

50. Feinberg, *supra* note 45; see also Charnovitz, *Centuries of Participation*, *supra* note 2, at 192 (discussing the Webster-Ashburton negotiations of 1842), 193 (discussing the Peace Treaty of Paris of 1856 ending the Crimean War), 195 (discussing the Congress of Vienna of 1815), 196 (discussing the Congress of Berlin of 1878 and the Brussels Congress of 1889–90 on ending the slave trade), 196–97 (discussing the First Hague Peace Conference of 1899).

II. FRAME TWO: FUNCTIONALISM

The functional view is that the inclusion of NGOs is up to the IO itself and that the IO should embrace NGOs to the extent that it promotes the purpose of the IO. The vision of the IO as a person with legal personality and autonomy goes back to the late nineteenth century.⁵¹ Today, international scholars typically view the IO as an independent actor having its own identity and will.⁵² If an IO has some autonomy, then it has at least some discretion to act without authorization by governments. One early exponent of this frame was the Austrian legal scholar Karl Zemanek who, in a book on international organizations written in 1957,⁵³ addressed the “contracts on ‘consultation’ between [IOs] and private international organizations.”⁵⁴ This field of law was considered new and “fragmentary,” and the “norms [were], at [that] time, unilaterally posited by the international organizations.”⁵⁵

ICJ decisions seem to embrace the view that IOs can exercise powers not explicitly delegated by its founding treaty. In the *Reparations* case, the ICJ states with respect to the United Nations that “Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.”⁵⁶ The same sentiment appears in the ICJ *Nuclear Weapons* advisory opinion referenced above.⁵⁷ The Court explains that “the necessities of international life may point to the need for organizations, in order to

51. See CATHERINE BRÖLMANN, *THE INSTITUTIONAL VIEW IN PUBLIC INTERNATIONAL LAW* 44–48 (2007); see also ALVAREZ, *supra* note 11, at 129–39. For further discussion of IO personality, see David J. Bederman, *The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel*, 36 VA. J. INT'L L. 275 (1996); Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000).

52. See generally DAN SAROOSHI, *INTERNATIONAL ORGANIZATIONS AND THEIR EXERCISE OF SOVEREIGN POWERS* (Ian Brownlie & Vaughan Lowe eds., 2005).

53. KARL ZEMANEK, *DAS VERTRAGSRECHT DER INTERNATIONALEN ORGANISATIONEN* (1957).

54. Josef L. Kunz, Book Review, 52 AM. J. INT'L L. 565, 566 (1958) (reviewing KARL ZEMANEK, *DAS VERTRAGSRECHT DER INTERNATIONALEN ORGANISATIONEN* (1957)).

55. *Id.*

56. *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 182 (Apr. 11). The Opinion also states that the United Nations is not “merely a centre for harmonizing” national actions because the United Nations has also been “equipped . . . with organs . . . [with] special tasks.” *Id.* at 178 (internal quotation marks omitted).

57. See *Legality of the Use by a State of Nuclear Weapons in Armed Conflict*, Advisory Opinion, 1996 I.C.J. 66, ¶ 25 (July 8).

achieve their objectives, to possess subsidiary powers which are not expressly provided for in the basic instruments which govern their activities.”⁵⁸ In neither opinion does the Court state that an IO could act in disregard of a collective dictate from member governments. Yet the ICJ opinions do suggest that IOs have some autonomous decisionmaking authority. One theory of IOs goes even further to suggest that IOs have “inherent powers to perform . . . those acts which they need to perform to attain their aims,” and that the source of this authority comes from organizationhood.⁵⁹

In contrast to the Positive frame, which holds that states determine whether NGOs can participate in an IO, the Functional frame holds that the IO itself has some authority for deciding whether to invite and utilize NGO participation. Viewing the IO as a person with discretion leads to the normative question of how the IO should decide what amount of NGO participation is appropriate. My own answer to that question is that a rational IO would choose the amount of NGO participation most appropriate for achieving its functions and no more. Conceivably for some functions, the degree of optimal NGO participation might be zero. But for all (or nearly all) IO functions, NGO participation (including business NGOs) would appear to help the IO achieve its purposes.⁶⁰ For example, UNAIDS is governed by a Programme Coordinating Board that includes five representatives from NGOs.⁶¹

Why would an IO need NGO participation when the IO already has the benefit of national officials and international civil servants? The question almost answers itself. National officials and international civil servants alone are too parochial, cautious, and unimaginative to get much done. Skeptics of greater international governance point out that there can be an unholy alliance between IOs and international NGOs who share a common interest in more lawmaking.⁶² Although the critics may sometimes be wrong in opposing certain global rules, they are surely right in

58. *Id.*

59. JAN KLABBERS, *AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW* 75 (2002) (discussing Finn Seyersted’s work of 1963).

60. This author knows of no area of functional intergovernmental cooperation in which NGOs have not already made a signal contribution.

61. *UNAIDS Programme Coordinating Board*, UNAIDS, <http://www.unaids.org/en/aboutunaids/unaidsprogrammecoordinatingboard/> (last visited Apr. 9, 2011).

62. *See, e.g.*, MARGUERITE A. PEETERS, *HIJACKING DEMOCRACY: THE POWER SHIFT TO THE UNELECTED* (AEI ed., 2001); JAMES M. SHEEHAN, *GLOBAL GREENS: INSIDE THE INTERNATIONAL ENVIRONMENTAL ESTABLISHMENT* (1998).

seeing a symbiotic relationship between IOs and NGOs.⁶³ My own scholarship shows that this symbiosis began in the nineteenth century and has gotten much stronger in the last 30 years.⁶⁴

IOs operate at considerable distance from democratic processes such as elections. This challenge of distance has led political theorists, such as Robert Dahl, to question whether IOs can ever be democratic.⁶⁵ As I have elsewhere stated, I am not as pessimistic as Dahl on that point,⁶⁶ nor do I subscribe to the oft-stated criticism⁶⁷ that the distance between the IO and the public necessarily detracts from its legitimacy. But I think it is clear that the distance from the public undermines the effectiveness of many IOs, as does the claim that IOs have a democratic deficit. Thus, IOs should promote NGO participation not merely to gratify NGOs, but also to promote the long-term effectiveness of the IO itself.

What is the cost to the IO of allowing in NGOs? There are several. If NGOs participate, the IO will inevitably have to increase its disclosure and transparency.⁶⁸ If the IO has policies or practices that factions of the public would disagree with if they became known, then NGO participation might lead to greater pressure from outside to change those policies or practices. Second, once NGOs participate, they are sure to discover conflicts between the IO's policies and the NGO's vision of a good world order. For example, it is not universally known that the International Monetary Fund ("IMF") prohibits governments from using a gold

63. See Kenneth Anderson, Review Essay, *What NGO Accountability Means—And Does Not Mean*, 103 AM. J. INT'L L. 170, 171–72 (2009) (quoting then-Secretary General Kofi Annan as saying “that ‘global people power’ was the ‘best thing for [the] United Nations’ in a ‘long time’”).

64. See generally Charnovitz, *Centuries of Participation*, *supra* note 2.

65. Robert A. Dahl, *Can International Organizations Be Democratic?*, in DEMOCRACY'S EDGES 19, 19 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

66. Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 IND. J. GLOBAL LEGAL STUD. 45, 57 (2003).

67. See, e.g., Pascal Lamy, Director-General, WTO, Address at Bocconi University: Global Governance: Lessons from Europe (Nov. 9, 2009) (transcript available at http://www.wto.org/english/news_e/sppl_e/sppl142_e.htm) (“Since legitimacy depends on the closeness of the relationship between the individual and the decision-making process, the challenge of global governance is distance.”).

68. Laurence Boisson de Chazournes, *Changing Roles of International Organizations: Global Administrative Law and the Interplay of Legitimacies*, 6 INT'L ORG. L. REV. 655, 660 (2009) (“Transparency may be achieved by greater proximity between international organizations, non-State actors and individuals. . . . [A]llowing non-State actors to participate in decisionmaking processes can be seen as a form of transparency.”).

standard in an exchange agreement.⁶⁹ At present, the IMF provides little opportunity for NGO participation. If there were greater awareness of the way that the IMF limits the sovereignty of governments regarding a gold standard, some NGOs would likely lobby to emancipate governments and to allow gold to serve as a counterweight against reckless monetary and fiscal expansion. Third, as NGO participation can enhance the accountability of an IO,⁷⁰ such participation is costly to the IO insiders to the extent that it cabins their discretion.

Experience over the past 20 years has shown that NGOs are especially good at pointing out the tensions between the norms of different international organizations and often work to promote more harmony between them. A leading example of this is the debate on trade and environment, in which NGOs called attention to international trade rules that seemed to jeopardize national environmental regulation. When this first happened in the early 1990s, the multilateral trading system was quite defensive about it and accused the NGOs of not understanding the benefits of trade.⁷¹ Eventually, however, the trading system came to embrace environmental quality and sustainable development as one of its own norms.⁷² So, the NGO pressure that might have been viewed as a cost in the beginning later came to be a benefit to the World Trade Organization (“WTO”).

In my view, a rational IO would want to avoid the problem of insular functionality. Such insularity occurs when an IO is too inward looking and does not think through its relationship with other IOs. A rational IO would want the assistance of NGOs that could help the IO develop greater harmony with the programs of other IOs. Of course, there is a difference between saying that an IO should welcome NGOs and that it has a legal obligation to do so. It is often said that IOs have an obligation to

69. Articles of Agreement of the International Monetary Fund art. IV, § 2(b), Dec. 27, 1945, 60 Stat. 1401, 2 U.N.T.S. 39 (as amended), available at <http://www.imf.org/external/pubs/ft/aa/index.htm>.

70. John Clark, *The Role of Transnational Civil Society in Promoting Transparency and Accountability in Global Governance*, in *ENGAGING CIVIL SOCIETY: EMERGING TRENDS IN DEMOCRATIC GOVERNANCE* 44 (G. Shabbir Cheema & Vesselin Popovski eds., 2010); Edith Brown Weiss, *International Law in a Kaleidoscopic World*, 1 *ASIAN J. INT'L L.* 21, 27 (2010) (“For international institutions, the bottom-up approach means that the institutions are accountable not only to the states that established them but, significantly, to the communities, groups, and individuals they are intended to serve.”).

71. See 1 *GEN. AGREEMENT ON TARIFFS & TRADE, INTERNATIONAL TRADE* 90–91, at 19–39 (1992) (special section on trade and the environment).

72. Michael M. Weinstein & Steve Charnovitz, *The Greening of the WTO*, *FOREIGN AFF.*, Nov.–Dec. 2001, at 147; see also *THE GREENING OF TRADE LAW* (Richard H. Steinberg ed., 2002).

obey international law, but whether international law provides NGOs with a right to participate is uncertain and contested, as noted above.⁷³ If NGOs do enjoy such a right, then arguably that right is opposable to IOs in the same way that it would be opposable to states.

The ongoing project by the International Law Commission (“ILC”) on the Responsibility of International Organizations details how an IO is to be held responsible for an internationally wrongful act.⁷⁴ Unfortunately, the draft articles do not detail which acts are wrongful. Perhaps in a future project, the ILC could delineate the IO responsibilities that are different from state responsibilities. Of course, it is doubtful that the ILC would ever say that IOs have a duty to allow NGO participation, because the ILC itself has resisted suggestions that it seek NGO participation and public comment.⁷⁵ On the other hand, the fact that there is a concurrent practice in nearly every IO to be open to NGO input may suggest the fruition of an international custom of openness that IOs may already perceive as a legal obligation.

III. FRAME THREE: COMMUNITY

Rather than viewing an IO anthropomorphically as a corporate person who operates according to her will, an alternative, more realistic, view is that an IO is a place where a community of actors debates and makes decisions. I call this the *community* frame because the IO operates as a community, or epistemic community, where experts focus on a particular range of public problems. I credit David Bederman with the insight that the modern IO is better conceived as a place rather than as a person, actor, or lawmaker.⁷⁶ Bederman, a fine legal historian, traces this idea back to Otto von Gierke, Paul Reinsch, Pierre Kazansky, and Donisio Anzilotti.⁷⁷

73. See *supra* text accompanying notes 31–33.

74. See Rep. of the Int'l Law Comm'n, 61st sess, May 4–June 5, July 6–Aug. 7, 2009, U.N. DOC. A/64/10; GAOR, 64th Sess, Supp. No. 10 (2009), available at <http://untreaty.un.org/ilc/reports/2009/2009report.htm>. This ILC project has not included NGOs under the rubric of international organization. See Andrew Clapham, *The Role of the Individual in International Law*, 21 EUR. J. INT'L L. 25, 28–29 (2010).

75. See generally Steve Charnovitz, *New Opportunities for Nongovernmental Actors in the International Law Commission* (George Wash. Univ. Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 508, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1616868.

76. Steve Charnovitz, *The Relevance of Non-State Actors to International Law, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING* 543, 547–48 (Rüdiger Wolfrum & Volker Röben eds., 2005).

77. Bederman, *supra* note 51, at 352–53, 371–72.

Metaphorically, I would situate the individual (rather than the state) at the center of that community.⁷⁸ Imagining an international community as state-centric is a contradiction in terms. The state may be the center of the national community, but it can hardly be the center of the international community when states hold themselves out to be sovereign and independent from each other.⁷⁹ In other words, an international community comprising only sovereign states has no center.

Thus, the core of the IO can be modeled as an individual engaged in multiple legal orders. The nineteenth-century Scottish legal philosopher James Lorimer was one of the first to appreciate this modern reality. In his *Institutes of the Law of Nations*, Lorimer explained:

If there is not an international man, neither is there a national man. So long as there are two nations in the world, every citizen of each of them must *eo ipso* be an international man, and cannot *eo ipso* be only an international man. In order that he may be either national or international, he must be both; and must be governed, or must govern himself, in both capacities.⁸⁰

Viewed in this way, a particular IO is an arena where individuals address transborder problems through the use of overlapping legal orders. One of the key issues to be decided with respect to any problem is at what level the problem should be addressed. The doctrine of subsidiarity suggests that problems should be dealt with at the lowest level in which a solution may still be obtained.⁸¹

The arena of modern governance is more horizontal than vertical and de-emphasizes status and hierarchy. As World Bank President Robert Zoellick recently explained:

Modern multilateralism will not be a constricted club with more left outside than seated within. It will look more like the global sprawl of the Internet, interconnecting countries, companies, individuals, and NGOs through a flexible network. Legitimate and effective multilateral institutions, backed by resources and capable of delivering results, can

78. Recall in that regard the U.N. Charter which begins “We the Peoples of the United Nations . . .” U.N. Charter pmbl.

79. See Gregory H. Fox, *Internationalizing National Politics: Lessons for International Organizations*, 13 WIDENER L. REV. 265, 282 (2007) (“International organizations have only a tenuous call on state loyalty.”).

80. 2 JAMES LORIMER, *THE INSTITUTES OF THE LAW OF NATIONS* 261 (Edinburgh & London, W. Blackwood & Sons 1884). The quoted passage comes from a chapter titled, “Want of an International Nation.” *Id.*

81. See Dinah Shelton, *Subsidiarity, Democracy and Human Rights*, in BROADENING THE FRONTIERS OF HUMAN RIGHTS 43, 43–49 (Donna Gomien ed., 1993).

form an interconnecting tissue, reaching across the skeletal architecture of this dynamic, multi-polar system.⁸²

Individuals join with likeminded colleagues, forming NGOs to influence global plural legal orders.⁸³ Using NGOs makes it possible for an individual to delegate the function of representing himself. Social and economic NGOs are also efficient in that an individual interested in, say, environment and peace, can join two different NGO social networks, both of which will be specialized in its own area. Because NGOs are so important in allowing individuals to form and present their views, one might say that the core principle of international community is freedom of association.⁸⁴

A robust norm of freedom of association would forbid IOs or states from interfering with the legal capacity of an NGO to lobby for its interests. This point was postulated clearly in the late nineteenth century by Pope Leo XIII, who explained in the great encyclical *Rerum Novarum*:

[A]lthough they exist within the body politic, and are severally part of the commonwealth, [private societies] cannot nevertheless be absolutely, and as such, prohibited by public authority. For, to enter into a “society” of this kind is the natural right of man; and the State has for its office to protect natural rights, not to destroy them; and, if it forbid its citizens to form associations, it contradicts the very principle of its own existence, for both they and it exist in virtue of the like principle, namely, the natural tendency of man to dwell in society.⁸⁵

In 1944, a transnational committee tasked by the American Law Institute (“ALI”) developed the “Statement of Essential Human Rights” that became an important foundational document for the drafting of the Universal Declaration of Human Rights. The ALI Statement lists “the Freedom

82. Robert B. Zoellick, *The End of the Third World*, INT'L ECON., Spring 2010, at 40, 43.

83. See generally Josef L. Kunz, Editorial Comment, *Pluralism of Legal and Value Systems and International Law*, 49 AM. J. INT'L L. 370 (1955); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155 (2007); MACDONALD, *supra* note 16, at 163–92 (the chapter on “Theorizing Global Representative Agency: Non-Electoral Authorization and Accountability”).

84. See Greg Lebedev & John Sweeney, *On Free Association, Business and Labor Agree*, WALL ST. J., Sept. 17, 2010, at A19.

85. LEO XIII, RERUM NOVARUM: ENCYCLICAL OF POPE LEO XIII ON CAPITAL AND LABOR ¶ 51 (1891), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

to Form Associations” as an essential human right and posits that “The state has a duty to protect this freedom.”⁸⁶

Although traditional democratic theory imagines that individuals delegate their will to elected representatives, a more realistic view is that the individual is born into legal orders, such as family, church, local government, national government, and international government, and then in the process of socialization learns how to obey, evade, and/or to work to change such legal orders. To argue that the elected official is the better representative of the individual than the NGO is to miss the point that the individual voluntarily chooses what NGO she joins but does not, merely by voting, get to choose the elected officials that make decisions for her. One should not assume that on any particular issue, such as climate change, an individual has delegated more decisionmaking to an elected politician rather than to a NGO. Indeed, the individual may have voted against the politician who claims to represent her in Congress.

Although international action can be promoted by nongovernmental individuals (e.g., Raphael Lempkin), the more common methodology is that reform proposals from individuals get taken up by a group. As Professor Feilchenfeld explained in 1938:

The most common reform method in world affairs in our age has been this: Individuals advance suggestions for a particular reform. These suggestions, quite frequently, are then taken up by organisations concerned with reform work of various kinds. The organisation concerned may be a private one, such as the Institut de Droit International, composed of international lawyers selected for membership by an international academy. Or, it may be a public one, such as the International Labour Office.⁸⁷

He further noted that “Much reform work has been done in this way, and it is difficult to see how reform work might, under present conditions, be started otherwise.”⁸⁸ This insight is strikingly similar to the observation attributed to Margaret Mead: “Never doubt that a small group of thoughtful, committed people can change the world. Indeed, it is the only thing that ever has.”

Viewing the IO as a community also provides a solution to the conundrum of the nature of the role played by actors within the IO. For example, the WTO contains a court-like dispute settlement system (indeed the strongest court in any IO), a parliament-like Ministerial Conference, and

86. Am. L. Inst., *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 20, art. 5 (1946).

87. FEILCHENFELD, *supra* note 22, at 68.

88. *Id.*

an executive-like Director-General.⁸⁹ Clearly, the WTO Appellate Body and the Director-General have separate wills, but how do these wills relate to the purported will of the WTO? In my view, there is no aggregate will or volition of the WTO itself. “Willness,” so to speak, exists only in the volition of the individuals who act out different roles, such as judges, government negotiators, and WTO bureaucrats. For example, if the urgently needed Doha Trade round is concluded in 2011, it is not because the WTO itself decides to go forward, but because a critical mass of the WTO’s actors jointly agrees to go forward.

The core activity in the IO as a community is deliberation.⁹⁰ Lawmaking too may occur, but it does so only as an end product of cosmopolitan conversation. While NGOs can be kept on the sidelines when so-called lawmaking occurs within an IO, there can hardly be any grounds for excluding NGOs from the conversation that precedes lawmaking.

Herbert Shenton was an early theorist of how conversation sparked by private associations has the capacity to change international outcomes.⁹¹ Although Shenton’s particular interest was the interplay of different languages spoken by NGOs at international conferences, Shenton, writing in 1933, was also one of the earliest scholars tracking private participation in international affairs.⁹² As he explains:

When people from all over the world come together thus to confer on matters of general interest, this intercourse takes on the nature of cosmopolitan conversation. . . . This new habit of cosmopolitan conversation is in a sense a new folkway At least, it is a new way of doing things in the world, and it is fraught with limitless possibilities, in terms of mutual understanding that may lead to a more intelligent public opinion on matters affecting the various nations of the world.⁹³

. . . .

89. See JAN WOUTERS & BART DE MEESTER, *THE WORLD TRADE ORGANIZATION: A LEGAL AND INSTITUTIONAL ANALYSIS* 187–88, 220–21, 226–51 (2007).

90. See generally Faina Milman-Sivan, *The Virtuous Cycle: A New Paradigm for Democratizing Global Governance through Deliberation*, 30 *COMP. LAB. L. & POL’Y* 801 (2009).

91. See generally HERBERT NEWHARD SHENTON, *COSMOPOLITAN CONVERSATION: THE LANGUAGE PROBLEMS OF INTERNATIONAL CONFERENCES* (1933). For a good discussion of the meaning of cosmopolitanism in an international law context, see Brian F. Havel & Gabriel S. Sanchez, *Restoring Global Aviation’s “Cosmopolitan Mentalité,”* 29 *B.U. INT’L L.J.* 1, 5–11 (2011).

92. See generally SHENTON, *supra* note 91. Lyman Cromwell White also wrote a pioneering book about NGOs in 1933. See LYMAN CROMWELL WHITE, *THE STRUCTURE OF PRIVATE INTERNATIONAL ORGANIZATIONS* (1933).

93. SHENTON, *supra* note 91, at 12–13.

. . . It should be noted also that many private conferences were followed by formal public conferences, which established international agreements and conventions recommended by the private conferences. Thus, and in other ways, have these private concourses generated new international stateways.⁹⁴

Although Shenton, a sociologist, did not draw any legal conclusions about the normativity of the “new international stateways,” his theory highlighted the importance of conversation in international decisionmaking. Shenton recognized that such discourse is cosmopolitan in nature and that private folkways were changing state-to-state ways.⁹⁵

IV. CONCLUSION

This Article considers the question of whether it is legitimate for an international organization to refuse NGO participation. As background to that question, the Article provides an overview of the literature on the role, status, and legitimacy of international NGOs. Next, the Article postulates seven ways in which NGOs add value to the international system. Then, the Article pioneers a new approach to the study of IOs by introducing and utilizing three frames as to the ontology of international organizations.

In the first frame, denoted as state positivism, the duty of the IO toward NGOs is decomposed into the duties of the member states of the IO. In other words, this frame suggests that the IO itself is not really an autonomous actor and so decisions about NGO participation are made by the member states for the IO. In exploring this frame, the article contrasts the majority and the minority views. The majority view is that states do not have an obligation under international law to allow NGO contestation within the IO. The minority view is that such a right may exist. My own scholarship associates with the minority view and suggests that state practice is moving toward a duty to consult NGOs in the activities of IOs.

In the second frame, denoted as IO functionalism, the IO, as a legal person, is seen as manifesting its own will as to whether to consult NGOs. The Article analyzes the advantages and disadvantages for the IO in consulting with NGOs, and then offers a theory that a rational IO would willingly decide to involve NGOs in its work. The more difficult question is whether the IO has a legal duty to consult NGOs. This Article

94. *Id.* at 452.

95. Shenton died in 1937 and thus did not live to see or chronicle the expansion of NGO activity in the United Nations.

suggests that the IO has a duty to consult NGOs if doing so would promote the IO's purpose.

In the third frame, denoted as community, the IO is viewed not as a being with personality, but rather as an arena where the true participants deliberate. The key participant in each international community is the individual, and the Article explains why the individual is the true basic unit for the international system. Since human individuals by nature are sociable, freedom of association has to be seen as the core principle of international law and community. Although this idea is sometimes characterized as being a byproduct of the postwar twentieth century human rights movement, the Article points out that the centrality of freedom of association and individual agency were recognized no later than the nineteenth century, particularly in the Papal encyclical *Rerum Novarum* and in Lorimer's *Institutes of the Law of Nations*.

By the early 1930s, the activism by NGOs in international conferences had inspired the Columbia University sociologist Herbert Shenton to coin the term "cosmopolitan conversation," which he used to describe the discourse with IOs and other conferences. Most notably, Shenton recognized the patterns of NGO participation as representing new "international stateways." Contemporary NGO scholars should better appreciate Shenton's work for its many cogent insights as to how practice in international conferences had been changing to accommodate contributions by NGOs. And perhaps, in detecting new international stateways, Shenton was also recording the birth of a new legal obligation to welcome NGOs into the world community.