

## **Enduring Issues of Non-Governmental Organizations in International Law**

Anna-Karin Lindblom. *Non-Governmental Organizations in International Law*. Cambridge: Cambridge University Press, 2005. Pp. 559. £72.00. ISBN: 9780521850889.

Sergey Ripinsky and Peter Van den Bossche. *NGO Involvement in International Organizations*. London: British Institute of International and Comparative Law, 2007. Pp. 362. £65. ISBN: 9781905221196.

Edited by Anton Vedder. *NGO Involvement in International Governance and Policy: Sources of Legitimacy*. Leiden: Martinus Nijhoff Publishers, 2007. Pp. 234. € 84.00. ISBN: 9789004158467.

Pierre-Marie Dupuy and Luisa Vierucci. *NGOs in International Law: Efficiency in Flexibility?* Cheltenham: Edward Elgar Publishing, 2008. Pp. 281. £75.00. ISBN: 9781847205605.

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### **Introduction**

There is little doubt that non-governmental organizations (NGOs) are an enduring phenomenon in international law. The formal involvement of NGOs with the United Nations (UN) system has longevity, tracing back to provisions for the consultative status of NGOs with the UN Economic and Social Council (ECOSOC) provided by Article 71 of the UN Charter. Discourses of globalization have, in addition, promised much for the involvement of NGOs in international law under the broad church of ‘global civil society,’ and have given added impetus to their presence in international law. The Chair of the recent Panel of Eminent Persons on United Nations-Civil Society Relations set up to examine the relationship of NGOs with the UN system characterised the rise of civil society as one of the ‘landmark events of our times.’<sup>1</sup> Their contemporary visibility in almost every area of the international legal and political system has thus increasingly become the focus of the international gaze.

Observations by both international legal practitioners and scholars about the involvement of NGOs in international law tend to fall into two opposing camps, with different views emerging about the significance and desirability of this participation. On the one hand, some commentators welcome the participation of NGOs in international legal and political processes, presenting a positive picture of the contribution that civil society actors have made to different international law and policy making exercises and global governance more generally. Others express unease about the involvement of NGOs within the international system, and question the legitimacy of this presence and the extent to which NGOs are able to influence what remain essentially state-based decision-making processes. The involvement of NGOs in international law thus remains contested, and key issues about the extent and nature of their participation, their legal status, effectiveness and legitimacy as actors in international law are unresolved. The four volumes

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<sup>1</sup> Cardoso ‘Transmittal Letter from the Chair’ in *We the peoples: civil society, the United Nations and global governance. Report of the Panel of Eminent Persons on United Nations - Civil Society Relations* UN Doc. A/58/817 (11 June 2004), at 3.

under review take us some steps further along in understanding the present and potential roles and involvement of NGOs in international law in a number of ways.

Firstly, these volumes provide a comprehensive picture of how the presence of NGOs in the international legal and political systems has evolved from Article 71 of the UN Charter into the many varying arrangements and legal status that NGOs have with different international organizations. As I note below, the legal analysis provided in these volumes is useful for our understanding of how NGOs presently contribute to the work of these organizations, the extent of their involvement and influence and how models of participation and recognition of their legal status might differ depending on their role and the organisational context. It is clear that NGOs are able to participate in international law in a myriad of ways and roles. However, the ways in which NGOs participate in international law are shifting more rapidly than the structures in which they seek to act are changing. These analyses therefore also add a useful dimension to our understanding of the potential roles NGOs might have in international law as the present arrangements continue to evolve.

Secondly, the volumes also seek to engage with some of the more intractable issues surrounding the involvement of NGOs in international law that contribute to the underlying tensions in the literature. In many cases drawing upon their analysis of the legal status of NGOs, these volumes explore the challenging questions about the legitimacy of NGOs as actors in international law. Issues of legitimacy are one of the most common points of disagreement about the presence of NGOs in international law, and arise because of differing assumptions about which actors are legitimate participants in the structures and processes of international law. Because international law privileges state control over the structures, processes and content of international law, the presence of NGOs does not fit easily into the resulting state-centric frameworks. Tensions therefore exist between the aspirations of NGOs and the formal structures of international law. I outline below how the authors to the present volumes have tackled the issue of legitimacy from a number of different perspectives, both in terms of the legitimacy of NGOs as actors and in terms of the overall legitimacy of the international legal system itself.

Finally, these volumes highlight that this inquiry is a fundamentally inter-disciplinary exercise. Going beyond legal analysis, it is important to consider the basis on which the legal status of NGOs rests. That is, the broader inter-disciplinary literature to which these volumes contribute suggests the necessity of viewing the presence of NGOs in international law as part of the fundamental social processes of which the international legal system is constituted. I end by exploring some of the ways in which the legal analysis presented by these volumes might open up questions for further, inter-disciplinary enquiry.

### **Overview of the Volumes**

A strong feature of all of the volumes considered here is the focus on sketching the specific legal arrangements and recognition provided for NGOs in international law. This focus on legal arrangements and legal status presents a slightly different analysis to that which has characterised much of the literature on NGOs at the international level.<sup>2</sup> The general literature on NGOs is

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<sup>2</sup> Some exceptions include R Hofmann *Non-State Actors as New Subjects of International Law* (1999); and Nowrot 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law' 6 *Indiana Journal of Global Legal Studies* (1999), 579. See Lindblom, at 4, for further discussion.

vast, multi-disciplinary and wide-ranging. Much of the previous literature presents either a discussion of the phenomenon of NGOs at the international level in terms of the concept and increasing presence and visibility of 'global civil society' in global governance discourses,<sup>3</sup> or undertakes analyses of the roles of NGOs in international law-making exercises or in particular areas of international law.<sup>4</sup> The volumes under review argue that further analysis of the legal arrangements for NGOs' participation in international law adds a useful dimension to our understanding of the potential of NGOs and might help move the debate beyond the contestation that currently characterises the literature.

The first of these volumes to be published, *Non-Governmental Organisations in International Law*, by Anna-Karin Lindblom, aims to consider the present legal status of NGOs in international law, and to examine this in the context of the functioning and legitimacy of the international legal system. The volume draws upon existing laws and practice to define NGOs as non-governmental, not-for-profit organizations that do not use or promote violence and that have some form of formal existence and representative structures and processes.<sup>5</sup> Lindblom presents a

<sup>3</sup> The examples are too numerous to list here, however some useful examples are: Hartwick 'Non-Governmental Organisations at United Nations-sponsored World Conferences: a Framework for Participation Reform' 26 *Loyola of Los Angeles International and Comparative Law Review* (2003), 217; Wapner 'Defending accountability in NGOs' 3 *Chicago Journal of International Law* (2002), 197; Ottaway 'Corporatism Goes Global: International Organizations, Nongovernmental Organization Networks, and Transnational Business' 7 *Global Governance* (2001), 265; Cullen and Morrow 'International civil society in international law: The growth of NGO participation' 1 *Non-State Actors and International Law* (2001) 7; Mertus 'Considering Nonstate Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application' 32 *New York University Journal of International Law and Politics* (2000), 537; Willetts 'From "Consultative Arrangements" to "Partnership": The Changing Status of NGOs in Diplomacy at the UN' 6 *Global Governance* (2000), 191; Anderson 'The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations, and the Idea of International Civil Society' 11 *European Journal of International Law* (2000), 91; Boli and Thomas (eds) *Constructing World Culture. International Nongovernmental Organizations since 1875* (1999); Smith, Pagnucco and Lopez 'Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s' 20 *Human Rights Quarterly* (1998) 379; M Keck and K Sikkink *Activists Beyond Borders: Advocacy Networks in International Politics* (1998); Charnovitz 'Two Centuries of Participation: NGOs and International Governance' 18 *Michigan Journal of International Law* (1997), 183; Willetts (ed) *The Conscience of the World: The Influence of Non-Governmental Organisations in the UN System* (1996); Otto 'NGOs in the UN System: the Emerging Role of International Civil Society' 18 *Human Rights Quarterly* (1996), 107.

<sup>4</sup> Some examples include: Pearson 'Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law' 39 *Cornell International Law Journal* (2006) 243; Wexler 'The international deployment of shame, second-best responses and norm entrepreneurship: the campaign to ban landmines and the landmine ban treaty' 20 *Arizona Journal of International and Comparative Law* (2003), 561; Glasius 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court' in M Glasius, M Kaldor and H Anheier (eds) *Global Civil Society* (2002); Rutherford 'The Evolving Arms Control Agenda: Implication of the Role of NGOs in Banning Antipersonnel Landmines' 53 *World Politics* (2000), 74; Spectar 'Saving the Ice Princess: NGOs, Antarctica and International Law in the New Millennium' 23 *Suffolk Transnational Law Review* (1999), 57; Pace 'The Relationship between the International Criminal Court and Non-Governmental Organizations' in H von Hebel, J Lammers and J Schukking (eds) *Reflections on the International Criminal Court* (1999); M Cameron, R Lawson and B Tomlin (eds) *To Walk Without Fear: The Global Movement to Ban Landmines* (1998); Clark, Friedman and Hochstetler 'The Sovereign Limits of Global Civil Society: A Comparison of NGO Participation in UN World Conferences on the Environment, Human Rights, and Women' 51 *World Politics* (1998) 1; Otto 'Holding Up Half the Sky, But for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women' 6 *Australian Feminist Law Journal* (1996), 7; Cohen 'The Role of Nongovernmental Organizations in the Drafting of the Convention on the Rights of the Child' 12 *Human Rights Quarterly* (1990), 137.

<sup>5</sup> Lindblom, at 46-52.

doctrinal and empirical survey of the international legal rules and practices that relate to NGOs, focusing primarily on the area of international human rights. The volume considers NGOs' standing before international organizations, international judicial and quasi-judicial international and regional bodies through analysis of the provisions that various legal instruments (including international treaties, agreements, and rules of procedure) make for NGO involvement.<sup>6</sup> The participation of NGOs as non- or third-parties or *amici curiae* before these bodies is also considered. One of the most visible aspects of NGO engagement with international law, that of their relationships with intergovernmental organizations and their participation in international standard setting conferences, is examined in some detail. The volume includes an extensive discussion on the rights and obligations of non-state actors, both conceptually and empirically, in terms of the recognition afforded to NGOs as rights and duties bearers at the international level. Lindblom's study of both the doctrinal provisions and empirical practices of NGOs involvement with international organizations, and the legal recognition given to the rights and duties of NGOs in international law more generally, endeavours to contribute further detail to our understanding of the diversity that there is in the roles and work of NGOs at the international level.<sup>7</sup> Furthermore, Lindblom rightly notes that questions about the role and status of NGOs in international law are also necessarily broader theoretical and philosophical questions of the functioning of international law. To this end, there is some examination of the way in which international legal and political theories have considered the phenomenon of non-state actors in international law, though the author does not find any single one of these helpful by itself. Rather, Lindblom uses an inductive method, which seems to draw upon socio-legal traditions, to draw together a sense of the legal status of NGOs in international law from the empirical observations made of the different practices and provisions that exist.<sup>8</sup> She argues that the participation and representation of different groups in international law are, in fact, systemic questions about the legitimacy of the international legal system. Lindblom concludes that the legitimacy of the international legal system can be strengthened by the participation of NGOs in international fora.

The second of these volumes, *NGO Involvement in International Organizations. A Legal Analysis*, by Sergey Ripinsky and Peter Van den Bossche, also considers the legal arrangements for NGO involvement in the activities of international organizations, contending that while the political issues of NGOs' involvement in international organizations have received a lot of attention, the legal arrangements have not. This volume concentrates on international organizations with a high international profile.<sup>9</sup> Separate chapters are devoted to each of these

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<sup>6</sup> Ibid. Lindblom notes the focus on human rights law at 117. The issue of NGOs involvement in international courts and tribunals is an interesting and discrete one for consideration. Note that because the issue of NGO standing before courts and tribunals is considered only at length in Lindblom's volume (a further two chapters are contributed in Dupuy's volume as outlined below), and due to considerations of space, I will not discuss this aspect of NGOs involvement in detail in this review.

<sup>7</sup> Ibid, at 4.

<sup>8</sup> Ibid, at 115: 'This can be described as an inductive method, or approach, to international law, in the sense that the actual provisions, relations and practices on the 'ground' is law itself and that, at least sometimes, general rules can be induced from many separate rules.'

<sup>9</sup> These include ECOSOC, the United Nations Conference on Trade and Development (UNCTAD), the International Labour Organisation (ILO), the World Health Organisation (WHO), the United Nations Environment Programme (UNEP), the United Nations Development Programme (UNDP), the International Monetary Fund (IMF), the International Bank for Reconstruction and Development (World Bank), the World Intellectual Property Organisation (WIPO) and the World Trade Organisation (WTO).

organizations, chosen because their work has a worldwide impact on essential issues such as economic development, labour, health and the environment (the volume intentionally does not include consideration of human rights institutions). The volume presents an outline of the legal bases for NGO involvement in these organizations, the form that this takes and the criteria and processes used to accredit NGOs. It also provides substantial appendices that contain documents outlining the legal provisions of the relationships each international organisation has with NGOs. The authors note that as the work is fact-specific and descriptive rather than analytical, it presents a picture of the variety of types of arrangements, and the different degrees of engagement that NGOs have with various international organizations, to serve as a basis for future analysis and development. It concludes that while differing legal arrangements for NGOs may continue to be appropriate because of the different nature of the international organizations, further legalisation of NGO relationships would be beneficial. This volume argues that such a development would allow the international community to maximise the benefits of NGO participation (enhancing the quality, accountability and transparency of decision-making through diversity of participation and representation of views) and minimise the drawbacks of their involvement (such as impeding the decision-making processes through the dominance of unrepresentative groups, marginalisation of some states that might result, and managing potentially large numbers of participants).

Chapters in the third of these volumes, *NGO Involvement in International Governance and Policy. Sources of Legitimacy*, edited by Anton Vedder, consider the challenging issue of the legitimacy of the involvement of NGOs in global governance and policy formation, concentrating on developing an analysis of the principles by which NGOs might be considered to be legitimate participants in global governance. The volume presents a conceptual analysis of the notion of legitimacy, borrowing from political theories of the state, to focus on legitimacy as ‘a thoroughly normative notion associated with public moral justification, legality, and representativeness’.<sup>10</sup> It supplements this conceptual analysis with empirical research into the perceptions NGOs have about the legitimacy of their activities, including an examination of representativeness, accountability and transparency that may be considered to be different sources of legitimacy, and the ways that NGOs are themselves tackling these important issues. Further chapters reflect on the different activities of NGOs, particularly the use of the internet as an information tool and as a medium to facilitate communication, and how this use might affect issues of legitimacy, particularly in terms of transparency and identification of NGOs that operate through the internet. The legitimacy of NGOs is further explored with an analysis of the legal status of NGOs, both domestically and within international organizations and the regulatory legitimacy that this confers, particularly in the eyes of states. The final chapter brings together these empirical observations with the volume’s broad conception of legitimacy as involving social, regulatory and moral dimensions, and presents conclusions that emphasise the complexity of the task of determining the legitimacy of NGO participation in global governance.

The final volume reviewed here, *NGOs in International Law. Efficiency in Flexibility?* edited by Pierre-Marie Dupuy and Luisa Vierucci, aims to consider the question ‘is there a need for a revised legal status for NGOs in international law?’, in particular focusing on the question whether formal recognition by general international law would be useful or whether the

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<sup>10</sup> Vedder, at x.

flexibility of the current NGO recognition is the most effective basis for participation.<sup>11</sup> The first part of the volume considers the relationships between NGOs and international organizations and provides an analysis of the legal provisions that regulate the position of NGO activity. The contributions here indicate that while the traditional relationships between NGOs and international organizations would benefit from revision, it remains open as to whether a new legal regime to structure these relationships would be more useful than the informality that is currently characteristic. The second part of the volume considers forms of participation of NGOs before courts and quasi-judicial bodies, considering NGOs' participation and standing before these bodies. The analysis here indicates that increased regulation of NGOs' participation in international legal proceedings, both directly and indirectly through the role of *amici curiae*, would be appropriate and perhaps inevitable given the nature of legal proceedings. The concluding chapter reflects on the sorts of questions being asked in the debate, and whether the question of increased legal recognition of NGOs is the right focus for our inquiries. While making clear the importance of a distinction between legal analyses and socio-political ones in this area, Dupuy argues that international lawyers must not be so focused on the legal status and 'pre-defined capacity' of NGOs so as to ignore their roles in the creation and implementation of new international norms.

The four volumes then, present different methodological and conceptual approaches to the questions raised about NGO involvement in international law. It is useful to explore these approaches in line with the three themes identified above, namely a comparison of the analyses of the legal recognition of NGOs in international law; an examination of the different conceptions and approaches to the notion of the legitimacy of NGO participation in international law; and the question of the necessary methodologies employed in these enquiries. I touch upon the key aspects of each volume and draw out their similarities and differences in relation to these themes; there is clearly much more in the volumes that readers will discover for themselves than can be covered here.

## **Legal Recognition of NGOs**

### *Participation in International Organizations*

It is clear from the analyses that there is much diversity in legal and institutional arrangements for NGO engagement with international organizations. These arrangements are usually broad and unspecific and allow a degree of discretion. These arrangements are often set out in the constitutional documents of the organisation; sometimes they are set out in secondary documents adopted by the organisation.<sup>12</sup> Differences in institutional structures regarding NGOs is also clear, in terms of whether the institution has a particular unit or focal point for NGO involvement, whether these arrangements allow for permanent or ad hoc NGO involvement with the organisation and the different relationships that NGOs have with the Secretariat as opposed to the intergovernmental body of the organisation.<sup>13</sup> Ripinsky and Van den Bossche however, make the interesting observation that having provisions for engagement with NGOs in the constitutional documents does not necessarily reflect on the intensity of such engagement. They

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<sup>11</sup> Dupuy and Vierucci, at 8.

<sup>12</sup> Ripinsky and Van den Bossche, at 207-8. Also see Van den Bossche 'Regulatory legitimacy of the role of NGOs in global governance: legal status and accreditation' in Vedder, at 135-73.

<sup>13</sup> Ripinsky and Van den Bossche, at 210-13.

compare the provisions for NGO involvement in the constitutional documents of the WTO and the UN, which are broadly similar in wording but vastly different in practice.<sup>14</sup> However, they argue that these provisions in constitutional documents are nevertheless important for conferring a degree of legitimacy about the participation of NGOs in that organisation.<sup>15</sup> Indeed, the increased number of NGOs applying for accreditation with international organizations demonstrates the perceived value and interest that NGOs have in opportunities for formal participation.<sup>16</sup>

The studies show that the processes and bases of accreditation by which these rights are granted to NGOs vary between and within organizations. Ripinsky and Van den Bossche's study highlights the correlation between organizations that grant substantial participation rights to NGOs and the extensiveness of their accreditation processes; the more rights granted, the more elaborate the processes used to determine which NGOs will be granted these rights of accreditation.<sup>17</sup> They summarise the accreditation criteria as generally consisting of a consideration of the non-governmental nature of the organisation, relevance of its activities to the organisation concerned, geographical scope of the NGO, standing and recognition of the NGO, internal democratic practices of the NGO and whether it meets the formal requirements regarding establishment and existence of the country where registered.<sup>18</sup> They note that the criteria are often imprecisely applied, and vary between organizations.<sup>19</sup> Rebasti characterises these criteria as acting as a 'political filter', to allow international organizations to exclude NGOs from participation when political circumstances require it.<sup>20</sup> The criteria used and the access given will depend on the reasons why NGO involvement is seen as desirable in the international organisation. Ripinsky and Van den Bossche observe that there is typically more formal regulation of NGO activities in relation to the policy-making processes of international organizations, and in relation to their involvement in dispute settlement procedures, and less regulation and presence of NGOs in operational matters.<sup>21</sup>

The different ways in which NGOs are able to participate in meetings of international

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<sup>14</sup> See discussion, *ibid*, at 208. They note that while similar broad provisions exist in the constituent instruments of both the UN and the WTO for NGO participation, in the WTO these have been interpreted in a restrictive way, 'effectively barring NGOs from participation in the policy-deliberation and decision-making activities of WTO bodies'. By contrast, UN ECOSOC has provided NGOs with much greater participatory rights allowing for a much higher degree of NGO participation in the work of this body. Also see Van den Bossche, *supra* n 12.

<sup>15</sup> Ripinsky and Van den Bossche, *ibid*, at 207-8.

<sup>16</sup> Rebasti 'Beyond consultative status: which legal framework for an enhanced interaction between NGOs and intergovernmental organizations?' in Dupuy and Vierucci, at 25. Also see Collingwood and Logister 'Perceptions of the legitimacy of international NGOs' in Vedder, at 41-43 for discussion of the perceptions of NGOs that recognition by governments or networks of partnerships is important to their legitimacy and status. Note also the comments by Kamminga regarding the possibility that NGOs denied accreditation with international organisations may enjoy more legitimacy in the eyes of the public than those accredited, Kamminga 'What makes an NGO 'legitimate' in the eyes of states?' in Vedder, at 194.

<sup>17</sup> Ripinsky and Van den Bossche, at 216-8

<sup>18</sup> *Ibid*, at 218-9.

<sup>19</sup> *Ibid*, at 218-20. Also see Van den Bossche, *supra* n 12. Note also the recommendations in the *Report of the Panel of Eminent Persons on United Nations - Civil Society Relations*, *supra* n 1, at 50 regarding streamlining and depoliticizing accreditation and access of NGOs within the UN system.

<sup>20</sup> Rebasti, *supra* n 16, at 25.

<sup>21</sup> Ripinsky and Van den Bossche, at 210-6. Also see Lindblom for interesting discussion of the different arrangements for NGOs within the UN, at 366-410, 445-6.

organizations is also highlighted by these volumes. Ripinsky and Van den Bossche note that this participation can consist of the right to attend or observe meetings, to make oral statements, to circulate written statements, to propose agenda items and to receive and comment on working documents of the meeting. They note that these rights vary significantly between organizations, and the participation is limited in many cases to preserve the operation of the state-based decision-making mechanisms.<sup>22</sup> NGO participation then, is the right to make NGO views heard, so that they can be taken into account by the decision-makers.<sup>23</sup> Rebasti notes that this consultative status is more correctly referred to as NGOs playing the role as observers rather than participants, though Lindblom notes the shift in language from ‘consultation’ to ‘participation’.<sup>24</sup> Rebasti notes the strategic use of consultation with NGOs by international organizations to assist to ensure the successful development and implementation of their policies and programmes.<sup>25</sup>

There is considerable reflection in the volumes about the utility of formal, binding rules of engagement versus the flexibility of informal arrangements or practices for NGO involvement. The contributions in the Dupuy/Vierucci volume indicate that while some revision is needed to relationships between NGOs and international organizations, it remains open as to whether a new legal regime to structure these relationships would be more useful than the informality and flexibility that is currently characteristic.<sup>26</sup> On the other hand, while recognising that informal arrangements can be advantageous to flexible, evolving opportunities for NGO participation in organizations where formal arrangements are not politically feasible, Ripinsky and Van den Bossche conclude that such arrangements are generally disadvantageous to NGOs because they render their involvement uncertain and unpredictable, dependent on the discretion of officials.<sup>27</sup> They, therefore, conclude that international organizations would benefit from more formal arrangements with NGOs, which would enhance the predictability and legitimacy of such arrangements and provide a base from which to maximise the benefits of involvement and minimise the drawbacks. They note however, that this should not mean harmonisation of legal arrangements and note throughout their study the different needs of international organizations that lead to the differences in engagement with NGOs.<sup>28</sup>

### *Legal Personality*

<sup>22</sup> Ripinsky and Van den Bossche, at 214-6.

<sup>23</sup> The exception to this is the ILO, with its tripartite decision-making structure involving government, employer and worker representatives. See *ibid*, at 67-82 for a discussion of this; also Lindblom, at 410-16.

<sup>24</sup> Rebasti, *supra* n 16, at 25; Lindblom, at 445. Also see Willetts (2000), *supra* n 3, on this issue.

<sup>25</sup> Rebasti, *ibid*.

<sup>26</sup> Rebasti, *ibid*, at 62-70; Bettin ‘NGOs and the development policy of the European Union’ in Dupuy and Vierucci, at 133-4; Tanzi ‘Controversial developments in the field of public participation in the international environmental law process’ in Dupuy and Vierucci, at 152. Note however the discussions in Vierucci ‘NGOs before international courts and tribunals’ in Dupuy and Vierucci, at 155-80 and Pitea ‘The legal status of NGOs in environmental non-compliance procedures: an assessment of law and practice’ in Dupuy and Vierucci, at 181-203 regarding NGOs participation in courts and tribunals. The general consensus here is that there are different concerns raised about NGO involvement in these institutions, and that further formalised provisions that evolve (partly through judicial practice) may well be useful. Also see Lindblom’s discussion of these issues, at 218-99 and 300-65.

<sup>27</sup> Ripinsky and Van den Bossche, at 209. Also Bakker and Vierucci ‘Introduction: a normative or pragmatic definition of NGOs?’ in Dupuy and Vierucci, at 7. Also Pitea, *ibid*, at 200.

<sup>28</sup> Ripinsky and Van den Bossche, at 224. Also see comments regarding the difficulty of establishing an international legal regime in the face of real diversity of NGOs’ interactions with international organisations in Dupuy, ‘Conclusion: return on the legal status of NGOs and on the methodological problems which arise for legal scholarship’ in Dupuy and Vierucci, at 212-5; Lindblom, at 521-3.

As is well recognised in the literature, the dominance of states as the key legal subjects possessing full legal personality under the traditional positivist account of international law has limited the recognition of NGOs and other ‘non-state’ actors. While it might seem tautological, these ‘non-state’ actors are seen as lacking the necessary personality and therefore fail to become acknowledged as legal subjects in international law with the corresponding rights and duties.<sup>29</sup> While some authors have characterised this as the ‘non-status’ of NGOs in international law,<sup>30</sup> these volumes rather seek to outline what legal status, albeit limited, NGOs do have in international law. They explore, as outlined in the details above, the concept and practice of legal status, not in terms of NGOs as discrete legal subjects of international law, but in terms of the status that is granted to these organizations by states. Van den Bossche characterises this legal status as the ‘rules providing a legal basis for the involvement of NGOs and rules setting out the various forms this involvement may take.’<sup>31</sup> Legal status in the Vedder volume is linked strongly to the idea of regulatory legitimacy, an important aspect of the overall legitimacy of the involvement of NGOs in international law.<sup>32</sup> Indeed, in that volume, Van den Bossche identifies a number of instances where international organizations’ engagement with NGOs falls outside the established legal rules; he concludes that this is problematic for regulatory legitimacy.<sup>33</sup> By considering the legal status that is accorded to present NGO participation, there is perhaps some hope that this empirical knowledge may yet contribute to the establishment of some form of a minimal formal international legal regime for the participation of NGOs in international law, to provide a basic framework while allowing room for the diversity of arrangements the volumes identify.<sup>34</sup>

Lindblom goes a little further in terms of exploring the utility of the traditional concept of legal personality in relation to modern international law. Lindblom presents a thorough historical and theoretical analysis of legal personality in international law, which outlines that while the traditional state-centric doctrine still manages to dominate the discourse, there is at the same time growing recognition by international legal scholars and practitioners that this narrow legal framework no longer provides the only useful explanations of how international law functions. Increasingly sophisticated and interdisciplinary tools are needed to understand and describe the different actors present and active in international law. Both Dupuy and Lindblom argue that there is a need to move beyond predetermined categories and concepts such as ‘legal subject’ if we are to understand the evolving role of different actors, because of the limitations inherent in these concepts.<sup>35</sup> In making these arguments, the volumes echo Higgins’ and others’ work in relation to the value of a move towards identifying participants of international law, rather than the subject-object binary inherent in positivist and textbook accounts of international law.<sup>36</sup>

<sup>29</sup> As Lindblom notes, this is reflected in key international law texts such as I Brownlie *Principles of Public International Law* (2008, 5th ed) and DJ Harris *Cases and Materials on International Law* (2003, 6th ed). Lindblom, at 5.

<sup>30</sup> Martens ‘Examining the (non)-status of NGOs in International Law’ 10 *Indiana Journal of Global Legal Studies* (2003) 1, at 2.

<sup>31</sup> Van den Bossche, supra n 12, at 137.

<sup>32</sup> Ibid, at 135-7; Vedder, at 6-10. These authors note that as well as regulatory legitimacy, the moral and sociological dimensions of legitimacy must also be explored. See further discussion below.

<sup>33</sup> Van den Bossche, supra n 12, at 154-5, 172-3.

<sup>34</sup> Though, as the volumes indicate, it remains unclear whether this is desirable. See particularly Ripinsky and Van den Bossche, at 6-7, 15, 224; Lindblom, at 521-3; Dupuy, supra n 28, at 212-5.

<sup>35</sup> Lindblom, at 116; Dupuy, *ibid*, at 213-5.

<sup>36</sup> R Higgins *Problems and Process. International Law and How We Use It* (1994), at 50.

Lindblom develops the concept of ‘legal status’ to describe the position of NGOs in international law, which is later used in the Dupuy/Vierucci volume.<sup>37</sup> It seems this term is used slightly more broadly than in the Vedder and the Ripinsky/Van den Bossche volumes. Lindblom delineates the term ‘legal status’ to embrace ‘all kinds of provisions and practices which explicitly take account of NGOs or which can be used by these organizations for acting in the international legal context, irrespective of which field of international law the material belongs to.’<sup>38</sup>

This concept of ‘legal status’ is one that is useful to interrogate further. On the one hand, Lindblom makes it clear that by ‘provisions and practices,’ she means those established by states and international organizations to govern their interactions with NGOs, and ‘any more general norms that can possibly be induced.’<sup>39</sup> Lindblom presents careful legal analysis of the provisions governing NGOs engagement with international organizations and with international judicial bodies. In this way, the analysis makes it clear that, while we should be ready to move on from discussions about legal subjects and legal personality that limit our gaze to states, the concept of legal status of NGOs remains firmly rooted in state consent and state-based practices. I am not sure how much this focus on legal status does progress the discussion from the traditional focus on legal subjects of international law; it seems rather in danger of reinforcing it. Yes, states, through their participation in international institutions, have endowed NGOs with some form of legal status and this is developed through various rules and practices. But whether this process of inclusion has changed the architecture of international law significantly will be discussed below.

On the other hand, some of Lindblom’s analysis, particularly that of NGOs’ participation in multilateral negotiations and conferences, suggests a broader conception and understanding of the roles that NGOs play in international law than one that is centred on legal status. The way in which NGOs’ participation is examined here seems to offer some chance to step beyond the narrow, state constructed formal legal arrangements. It seems to suggest an opportunity to broaden our conceptions of the one-dimensional understandings of international law that focus solely on state and state based interactions, structures and processes. In the case study of the International Criminal Court (ICC), for example, where she examines this possible broader concept of NGOs’ participation in practice, Lindblom draws upon qualitative interviews to explore the different ways in which NGOs were present and active during these negotiations.<sup>40</sup> These sorts of analyses examine not only what formal rights of attendance etc NGOs were given, but also other ways in which informal activities of NGOs facilitated their presence and influence; some of which would no doubt fall into Van den Bossche’s category of *sine legem*.<sup>41</sup> Lindblom notes that qualitative research methods are useful to highlight aspects of NGOs’ involvement and the dynamic nature of international law-making conferences that illustrate a much broader understanding of NGO presence than the formal legal status, but that are not necessarily visible in formal NGO accreditation and consultation arrangements or the resultant legal texts. In this way, this part of Lindblom’s analysis seems to tentatively suggest the value of a broader, socio-legal understanding of NGOs’ legal presence in international law. However, her analysis does not

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<sup>37</sup> Lindblom, at 116; Bakker and Vierucci, *supra* n 27, at 1-2.

<sup>38</sup> Lindblom, at 116.

<sup>39</sup> *Ibid*, at 514.

<sup>40</sup> See discussion *ibid*, at 465-7.

<sup>41</sup> Van den Bossche, *supra* n 12, at 138. See discussion of the ways in which NGOs worked throughout the ICC negotiations in Lindblom, at 471-9. Also Pearson, *supra* n 4 for further analysis on this particular point.

take this much further nor does it explain the relationship of informal mechanisms of NGO engagement she uncovers in the example of the ICC with formal means of engagement that are ultimately envisaged by 'legal status.'

The focus of these volumes on legal status then, leaves me feeling a little conflicted. On the one hand, the goals of these volumes are well met, in terms of sketching the specific legal arrangements and recognition provided for NGOs in international law. They contribute a great deal of useful detail to our understandings of the diversity of interaction that there is in the roles and work of NGOs at the international level. This doctrinal and empirical work, then, firstly serves to provide us with description and analysis of current NGO presence in international law, which helps shape our understanding of both the actual present and potential roles of NGOs, as well as influencing the tools and concepts used to explain and explore this presence. One particularly interesting feature of the findings is the direct comparison possible between different institutional arrangements for NGO participation. These differences have long been criticised in relation to the participation of NGOs in human rights institutions versus their participation in the World Trade Organisation, for example. However, the narrow focus on legal status, and on institutional structures and procedures, presents perhaps a different angle from which to approach these issues, an objective platform from which to consider whether these differences can justifiably exist.<sup>42</sup> Another useful aspect of the volumes is to highlight the diversity of roles that NGOs undertake in international law, and the value that is accorded these roles by international institutions, as indicated by the presence afforded them in institutional arrangements.

In focusing on the legal arrangements and recognition of NGOs in international law these volumes also serve to highlight the importance of interrogating the role of the law here in terms of the power of international law as discourse.<sup>43</sup> Lindblom, for example, highlights that while an increasing number of books and articles explore various aspects of NGO involvement in international law, ranging from humanitarian assistance to international law making exercises, the major international legal textbooks continue to marginalise the presence of NGOs in international law, and restate the traditional focus of international law as the relationships between states.<sup>44</sup> The focus on the legal provisions for NGOs in international law is therefore important in relation to making clear the legitimacy that this recognition provides, in an environment where the position of NGOs remains contested; the volumes act as somewhat of a counterweight against the dismissal of examinations of NGOs in international law as 'starry eyed'.<sup>45</sup>

So, on the other hand, by providing details of the extent and arrangements for NGO participation in international law, these volumes also implicitly consolidate an understanding of how the structures of international law continue to shape and constrain these roles, highlighting the power that the hegemonic state-as-subject still holds over the practice of international law. This means that even approaches that seek to explore broader ways in which NGOs act in norm formation in

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<sup>42</sup> See the conclusions in Van den Bossche, *ibid*, at 171-3; Lindblom, at 444-5; and Ripinsky and Van den Bossche, at 207-224, which highlight the differences in legal arrangements for NGOs between organisations.

<sup>43</sup> Kritsiotis 'The Power of International Law as Language' 34 *California Western Law Review* (1998), 397.

<sup>44</sup> Lindblom, at 5. One notable exception, while not a textbook per se, is A Boyle and C Chinkin *The Making of International Law* (2007), who explicitly consider the role of non-state actors, principally NGOs, in international law-making; see particularly 40-97.

<sup>45</sup> See discussion below. Also Ripinsky and Van den Bossche, at 208-9.

international law, Lindblom's analysis of the ICC negotiations for example, often uncover the constraints that state centric explanations and expectations create, which shape the ways that these actors act within the structures of international law, and the ways in which the academy presents analyses. So, some uneasiness remains for me about the constraints that are present in undertaking a 'neutral', doctrinal analysis of legal status of NGOs in international law, such as that in the Ripinsky/Van den Bossche volume in particular, but present to some extent, as outlined above, in all volumes here. Does it serve largely to reinforce the status quo in terms of the power of state centric explanations to create and shape the ways that NGOs are recognised within the structures of international law? I will explore these concerns a little more when thinking about methodologies.

### **Issues of Legitimacy of NGOs**

The legitimacy of NGOs' presence in international law is a recurring theme for much of the literature, and forms the basis of much of the contestation.<sup>46</sup> All of these volumes consider the issue of the legitimacy of participation of NGOs in international law in some way. Discussions of legitimacy are often seemingly inextricably linked with issues of the legal status of NGOs, in an almost stalemate position: legitimacy as an international actor depends on legal status; legal status is itself judged in terms of meeting pre-established criteria that define the legitimate actors of international law.<sup>47</sup> The detailed analysis of the legal provisions for NGO participation in international law provided by these volumes presents some opportunities for further reflection on these provisions as a proof of some form of legal status. While Ripinsky and Van den Bossche do not directly engage with the substantive issues regarding legitimacy, their study does seek to highlight how the rules and practices of international organizations in their engagement with NGOs may serve to confer some form of status on the presence of these organizations, thus contributing to the overall enhancement of the regulatory legitimacy of NGOs.<sup>48</sup> However, the other volumes demonstrate that there are many more complex issues to consider in relation to the legitimacy of NGOs in international law.

Vedder et al contribute to these debates with a careful exploration of legitimacy as encompassing social, regulatory and moral dimensions.<sup>49</sup> This study seeks to explore the legitimacy of NGOs as removed from the role of NGOs in contributing to the legitimacy of the global order; that is, the focus is on how to determine the legitimacy of individual NGOs.<sup>50</sup> This multidimensional notion of legitimacy is based on political theories that discuss the legitimacy of state governments. Vedder argues that these different notions of legitimacy can nevertheless be loosely used as criteria to explore the legitimacy of NGOs, although the basis on which this rests, in what respects 'NGOs tend to wield power in ways similar to governments' for example, could usefully be explained.<sup>51</sup> Using these three dimensions, Vedder defines legitimacy as 'a matter of

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<sup>46</sup> See, for example, the discussion in Boyle and Chinkin, supra n 44, particularly at 57-61,90-2; Anderson, supra n 3; Wapner, supra n 3; Wedgwood 'Legal Personality and the Role of Non-Governmental Organizations and Non-State Political Entities in the United Nations System' in R Hofmann, supra n 2; Anderson and Rieff "'Global Civil Society": A Sceptical View' in H Anheier, M Glasius and M Kaldor (eds) *Global Civil Society 2004/5* (2005), 26-39.

<sup>47</sup> See discussion in Bakker and Vierucci, supra n 27, at 2-7, outlining different approaches to legal status and legitimacy of NGO participation in the literature.

<sup>48</sup> Ripinsky and Van den Bossche, at 14.

<sup>49</sup> Vedder, at 6-10; Vedder 'Towards a defensible conceptualization of the legitimacy of NGOs' in Vedder, at 197.

<sup>50</sup> Vedder, at 12.

<sup>51</sup> Ibid, at 7.

conformity to rules (regulatory aspect), justification in relation to moral norms and values (morally normative aspect), and consent or representation of those involved or affected (social aspect).<sup>52</sup> The bulk of the studies in the volume seek to explore this framework of legitimacy from a number of different perspectives – perceptions of legitimacy amongst the NGO community,<sup>53</sup> issues of legitimacy in regards to the use of the Internet by NGOs for information provision and interaction,<sup>54</sup> and the legal status of NGOs in national and international law.<sup>55</sup>

Vedder notes that the regulatory and social dimensions are largely procedural, involving questions of whether the NGO has adhered to rules or decision-making procedures. These two aspects must be subordinate to the moral dimension, he argues, because the criteria included in these dimensions are often utilised to protect moral values, such as accountability and transparency.<sup>56</sup> The moral dimension, he argues ‘boils down to the requirements that an NGO’s values and norms should be acceptable in principle for all and that those acceptable values and norms are integrated as fully as possible into the NGO’s organizational structures and activities.’<sup>57</sup> It is not entirely clear what ‘acceptable in principle to all’ means, though the discussion of the moral dimension includes both substantive and procedural aspects.<sup>58</sup> The volume does not attempt to come up with definitive criteria for NGO legitimacy, and notes the complexity of the task given the diversity of NGOs. Indeed, Vedder concludes that it is easier to identify NGOs with problematic legitimacy than to come up with strict criteria for legitimacy, because of the complexity of the different situations in which NGOs are active, a conclusion that may not be particularly satisfactory for NGOs in practice.<sup>59</sup> Collingwood and Logister’s useful chapter, which explores NGOs’ own perceptions of legitimacy, highlights that notions of legitimacy come from many different overlapping sources, and the importance of context for concepts of legitimacy.<sup>60</sup> I can see the utility of thinking in more depth about the issue of how individual NGOs can demonstrate their legitimacy as actors because of the recurring controversy on this issue. However, it is, I think, a difficult task that this volume seeks to fulfil – I am not convinced that it is helpful or ultimately possible to separate the issues of NGO legitimacy in this way, or from the context of the international legal system as a whole. Indeed, ultimately the conclusion of the volume is that while it might be useful to explore the three different criteria in depth, legitimacy is a complex and multidimensional issue, and it proves difficult to isolate the criteria from each other, or to decide when they are achieved.<sup>61</sup>

Lindblom, on the other hand, links issues of legitimacy of NGOs directly to the legitimacy of the international legal system itself. She begins with three observations regarding the links between the individual and international law. Firstly, she notes that large sections of the world’s population are unrepresented at the international level because democratic governance at the

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<sup>52</sup> Ibid, at 7.

<sup>53</sup> Collingwood and Logister, supra n 16, at 21-57.

<sup>54</sup> Van Gorp ‘Internet activities of NGOs and legitimacy’ in Vedder, at 59-110; Prins ‘A step beyond: Technologically enhanced interactivity and legitimacy’ in Vedder, at 111-34.

<sup>55</sup> Van den Bossche, supra n 12.

<sup>56</sup> Vedder, at 9.

<sup>57</sup> Vedder, supra n 49, at 207.

<sup>58</sup> Vedder, 8-9.

<sup>59</sup> Vedder, supra n 49, 208.

<sup>60</sup> Collingwood and Logister, supra n 16, at 56-7. Also Vedder, *ibid*, 208.

<sup>61</sup> Vedder, *ibid*, at 207-8.

national level is not required by international law. Secondly, she outlines concerns about the diffusion of state power and the transformation of the relationships between state and society as a result of globalization. Finally, she observes that there appears to be a transnationalization of civil society brought about by growth in NGO presence, visibility and influence; a phenomenon that seems to be leading to a transformation of the ways in which identities and loyalties are shaped through the creation of new social spaces.<sup>62</sup> In a wide ranging discussion she argues that the results of these trends are that the democratic links between the individual and international law are often weak or missing.<sup>63</sup> This, she argues, has serious implications for the legitimacy of international law as a system. Lindblom then draws upon Franck, Buchanan, Held and Habermas in particular to explore the concept of the individual as the ultimate source of legal legitimacy, and to argue for the importance of legitimacy for the international legal system.<sup>64</sup> Legitimacy in this discussion has a strong procedural focus that draws strongly upon Habermas: the law can be seen as legitimate ‘only if it can meet with the assent of all possibly affected persons in a discursive process of legislation that it turn has been legally constituted.’<sup>65</sup>

Lindblom sees a role for NGOs in addressing the legitimacy deficits of the international legal system caused by weak connections between the individual and international law.<sup>66</sup> Utilising Habermas’ theories of deliberative political processes, she explores the application of discourse theory to the international realm. She argues that using the deliberative model of democracy helps explain the role and function of NGOs and civil society in international law. This does not involve replacing the traditional procedures for political representation and decision-making at the level of the state; the international system remains state-centric.<sup>67</sup> Rather, it involves consideration of the procedural demands of deliberative decision-making, such as discussion, accessibility, influence, and participation, and how these might be applied to the international system through the involvement of non-state actors. This is where NGOs are important: ‘the legitimacy of international law can be strengthened if international fora are made more transparent and open for participation from a wide range of groupings and interests from different sectors and segments of society, such as indigenous peoples, minorities with cultural, linguistic or religious characteristics, academic, trade unions, religious associations, other NGOs, etc.’<sup>68</sup>

Lindblom avoids engagement with the common criticisms about the legitimacy, transparency and accountability of NGOs themselves by focusing on the argument that the democratic deficit in international law demands a focus instead on ‘diverse and conflicting information, opinions and concerns of different groups’ being present and participating in international legal and political fora.<sup>69</sup> So the focus of the study is on participation: the ‘question whether international law should provide and protect a form of political participation through non-governmental organisation’ rather than which NGOs should be allowed to participate in particular

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<sup>62</sup> Lindblom, at 6.

<sup>63</sup> Ibid, at 6-22.

<sup>64</sup> Ibid, at 22-30.

<sup>65</sup> Ibid, 27.

<sup>66</sup> Ibid, at 23.

<sup>67</sup> Ibid, 30.

<sup>68</sup> Ibid, at 32.

<sup>69</sup> Ibid, at 34.

circumstances or whether NGOs are necessarily representative of any particular groups.<sup>70</sup> The role envisaged for NGOs is one of ‘public participation’. In this, she endorses Susan Marks’ views that the principle of democratic inclusion is important for the elaboration of international law: the ‘regulated participation of NGOs as informants and partners of dialogue in intergovernmental fora is a phenomenon that is healthy for the overall functioning of international law.’<sup>71</sup> This focus on participative democracy is echoed in the *Report of the Panel of Eminent Persons on United Nations - Civil Society Relations*. The Report noted the effect of globalization on perceptions of representative forms of government, and the role of civil society to contribute to a deliberative process that would enhance the intergovernmental processes of the UN.<sup>72</sup>

With her focus on the legitimacy of the international legal system, and the ameliorative role NGOs can play here in terms of the ‘democratic deficit’, Lindblom explicitly does not engage in the arguments about what might be required from NGOs to allow them to be seen as legitimate ‘participants’ in international law, such as the tripartite regulatory, moral and social legitimacy criteria set out by Vedder et al. However, her study implicitly does so in the sorts of roles that she uncovers for NGOs in international law through the doctrinal and empirical survey of NGOs she undertakes. Her study examines the role of NGOs as ‘informants’, as ‘partners of dialogue’, as information experts. These characteristics of NGOs have been constructed by international law to justify their standing in international and national tribunals and quasi-judicial proceedings, their roles as monitors of domestic implementation of international standards, and in terms of the task of information provision to international organizations and multilateral conferences envisaged by their consultative role; roles similarly emphasised in the Ripinsky/Van den Bossche volume, and indeed, in the UN report.<sup>73</sup> As long as NGOs remain in these roles, their presence is legitimate, tolerated. As soon as they are seen to move outside these roles as knowledge experts and into activities as advocates, their presence is more controversial.<sup>74</sup> NGOs tread a fine line in their roles as knowledge experts; having a particular focus and area of expertise may attract criticism for being too narrow in focus if the intensity of their lobbying is seen as counterproductive, aggressive or unrealistic by states.<sup>75</sup> Legitimacy and participation then, are contingent, and less to do with the inherent characteristics of NGOs and more to do with the expectations of their roles as participants created by the international system.

I have expressed concerns above about how such studies may serve to reaffirm the status quo in the way that state centric explanations and expectations create and shape the ways that these actors are included within the structures of international law. The question of whether NGO participation is important for the legitimacy of international law is, I agree, a fundamentally separate question from those about the character and criteria by which NGOs might be allowed to participate, as the Lindblom and the Vedder volume argue. However, the two enquiries also seem inextricably linked. The extent to which they are so perhaps depends on what is envisaged by participation and the deliberative model of democracy in this context. Participation, in the

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<sup>70</sup> Idem.

<sup>71</sup> Ibid, at 35. Also see S Marks *The Riddle of all Constitutions* (2000), at 113-4.

<sup>72</sup> *Report of the Panel of Eminent Persons on United Nations - Civil Society Relations*, supra n 1, at 23-31.

<sup>73</sup> Ibid, at 27, 58.

<sup>74</sup> Lindblom, at 472-8 discussing strategies and working methods of NGOs. Also see Pearson, supra n 4, at 271-84.

<sup>75</sup> Pearson, *ibid*, at 279.

way used in Lindblom's volume, seems not to depend on NGOs being seen as 'representatives' of the 'wide range of groupings and interests from different sectors and segments of society'<sup>76</sup>, but rather, as I have highlighted above, on the desirability of drawing on NGOs roles as knowledge experts to assist states in making legitimate, well-informed decisions.<sup>77</sup> If there is no contestation over the roles for NGOs as limited to knowledge experts, information provision, consultative partners etc (legitimate), then work that shows the depth and breadth of NGO participation in these roles certainly might serve to reinforce calls for a framework for NGO participation in international legal discourse as a way of strengthening the legitimacy of international law.

However, does the legitimacy of the international legal system then depend on participation of NGOs only to the extent that this participation falls within the parameters envisaged for it; NGOs as 'knowledge experts' for the states to draw upon in their decision-making? Or does legitimacy of the system depend on a model that remains open to the participation of all, irrespective of any criteria set, with the dangers that Vedder highlights of 'morally objectionable NGOs disseminating information and voicing opinions',<sup>78</sup> or the dangers of NGOs' advocacy crossing the fine line between information provision and lobbying? There is a danger I think, that such studies that show the existing arrangements for NGO presence in international law might be in danger of constructing or reinforcing the parameters for their 'participation'. That is, in deciding how to regulate NGOs' participation, a process that draws upon existing arrangements for their participation seems in danger of becoming circular despite any good intentions that seek to reimagine the process as 'participation'. This seems to me to be far from the latter of the two interpretations above of an open deliberative decision-making process.

There is, I would suggest, a need to consider such issues carefully. In seeking to explore the ways in which NGOs are accommodated within international organizations' practice and procedures, these studies reinforce the state centric nature of international law and further strengthen the legitimacy of and the commitment to the very system that the involvement of NGOs seeks to challenge or at least improve. This happens partly through a process of inclusion, by which the boundaries of what are seen as legitimate participants in international law are seen to gradually shift to include 'non-state' actors in particular roles.<sup>79</sup> Of course, these empirical studies that outline the recognition of some form of legitimate legal status of NGOs are largely pragmatic. State centrism remains the 'foundation stone' of the international legal order in international legal discourse; other actors have to be content to be accommodated within this structure on its terms and in accordance with the capacity and needs of the existing structures.<sup>80</sup> However, I

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<sup>76</sup> Lindblom, at 32.

<sup>77</sup> Ibid, at 35. This finds support from several authors. See for example, Charnovitz 'Comment: The Relevance of Non-State Actors to International Law' in R Wolfrum and V Röben (eds) *Developments of International Law in Treaty Making* (2005), at 550; Thürer 'The Emergence of Non-Governmental Organisations and Transnational Enterprises in International Law and the Changing Role of the State' in R Hofmann, supra n 2, at 40, 57-8. This is also echoed in the *Report of the Panel of Eminent Persons on United Nations - Civil Society Relations*, supra n 1, at 26-8.

<sup>78</sup> Vedder, supra n 49, at 209.

<sup>79</sup> Buss 'Austerlitz and International Law: A Feminist Reading at the Boundaries' in D Buss and A Manji (eds) *International Law. Modern Feminist Approaches* (2005), at 96.

<sup>80</sup> Ripinsky and Van den Bossche, at 16. See also Higgins, supra n 36, at 39; Boyle and Chinkin, supra n 44, at 2; *Report of the Panel of Eminent Persons on United Nations - Civil Society Relations*, supra n 1.

remain uneasy about the result of this analysis that seems to limit the enquiry to the formal legal arrangements for NGOs' participation. How does this analysis constrain our visions of the legitimacy of different actors in the international system and the roles that they might play? Does it limit our understanding of the possible ways in which non-state actors such as NGOs might act that are outside the constraints and roles imposed by international law (and thus, act in ways that are not 'legitimate') but nevertheless have some impact on norm creation? How the international legal system can deal with issues of legitimacy in relation to the diversity and plurality inherent in a deliberative decision-making process is a fundamental enquiry that I suggest needs to be made when considering participative frameworks for NGO involvement in international law, and it is one that is necessarily an interdisciplinary one.

### **Methodologies**

In offering a snapshot of the current arrangements for NGOs with international institutions, the doctrinal and empirical analyses presented by these volumes are useful contributions to our understandings of the participation of NGOs in international law. This picture establishes a basis from which to not only track the evolution of NGO engagement, but to consider the ways in which this engagement might develop, whether this is through more formal arrangements or whether the flexibility offered by current arrangements might be preferable in some circumstances. The comparative analysis undertaken of the different arrangements for NGO participation in international organizations is useful to highlight the diversity of opportunities for engagement and multifaceted roles that NGOs play in the international legal system. They offer important reflections on the practice and theory of legitimacy as it relates to NGOs and to the international legal system as a whole. The focus on the legal provisions for NGOs in international law is also important for highlighting the power of the international legal discourse. The volumes make clear that the law is an important site for analysis, in the way that the structures of international law continue to recognise, legitimate and shape the presence of NGOs. In doing so, the legal analysis makes important contributions to the vast diversity of literature on NGOs in national and international legal and political systems.

The questions that I have raised above in relation to the legal status and the issues of legitimacy of NGOs should be seen then as less of a comment on the scope or the content of these volumes, but rather more of a reflection on the international legal literature on NGOs and possible future directions and methodologies. I am uneasy about an international legal analysis of NGOs that largely concentrates on the formal legal provisions for NGO participation in the international legal system because of the way that such analysis seems to reinforce the constraints of international legal doctrine, in an area where much has been done to expand our understandings. There is no doubt, as others have observed, that the involvement of international legal scholars in questions of how non-state actors should be identified and managed in international law is necessary and desirable.<sup>81</sup> What I find unclear in these volumes is the connections to be made between a legal analysis of NGO status in international law, necessarily firmly located within the international legal doctrine and structure, and the broader multidisciplinary literature on NGOs in international law and politics that outlines the many and varied ways in which non-state actors are able to act both within and outside of these structures.

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<sup>81</sup> Spiro 'Review Essay: Non-State Actors in Global Politics' 92 *American Journal of International Law* (1998) 808, 811.

A trawl through the vast multidisciplinary literature on NGOs highlights rich and varied understandings of the role and presence of NGOs in the international legal and political systems. It suggests the necessity of viewing the presence of NGOs in international law as part of the social processes that underlie the international legal system. This is because of the way that transnational actors such as NGOs have been shown to influence not only state policy and behaviour at domestic and international levels, but contribute more broadly to norm creation outside the state that can be nevertheless be conceived of as a form of governance.<sup>82</sup> Lindblom herself notes that these ‘normative “grey zones”’ break the necessary connection between law and state, both by suggesting that non-state actors can produce ‘law’, and by creating regulation on a transnational scale, i.e. irrespective of national borders.’<sup>83</sup> Mertus makes the point that such contributions, by actors characterised as ‘interpretative communities’, to changing norms and behaviour cannot be traced in formal documents or outputs from conferences or to formal provisions for NGO participation in organizations.<sup>84</sup> This multidisciplinary literature argues that global regulatory change is dependent on the interactions of many actors in many spaces, identifies the extent to which their actions are not governed by international legal regulation, and the broader ways in which ‘regulation’ therefore might need to be conceived.<sup>85</sup> It seems to me that these observations sit a little uneasily with the renewed vigour in the international community for regulation of NGOs’ relationships with international institutions. It therefore seems to suggest that a solely legal analysis might not be sufficient to capture these dynamics.

Now, the question is, does this matter? Various scholars have argued that the key role for NGOs in international law, acting in their roles of bearers of specialised knowledge, is to assist states and international organizations such as the UN to make decisions that achieve the goals of those organizations and strengthen international law.<sup>86</sup> Establishing a regulatory framework to govern the interactions of NGOs in this manner is surely necessary to achieve this, and I have noted above the benefits of the volumes reviewed here that provide a solid basis for understanding the current framework and its potential evolution. But I wonder if a regulatory framework that governs the processes of international law formation and implementation and the involvement of NGOs in the relevant fora is really the end we seek. Put another way, is there a desire to regulate NGO involvement to improve the ways in which states and international organizations work, or is the end that we seek more about the substance of international law and possible contributions to NGOs to the evolution of this? The two issues are interlinked, of course, but they are also conceptually separate. And if the evolution of the substance of international law is the end, then do we approach the question of NGOs in international law any differently? Does such an enquiry take us beyond the structuring binaries of international law of state/non-state, legitimate/illegitimate, legal/non-legal to consider how best to develop an inclusive international law, in substance as well as in form? To some extent, this is implicit in Lindblom’s argument that decisions based on inclusive processes are of a better quality than those taken by more limited

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<sup>82</sup> The examples are too numerous to list here, however some useful examples are: Spiro, *ibid.*, at 808; Mertus, *supra* n 3; Boli and Thomas, *supra* n 3; Smith, Pagnucco and Lopez, *supra* n 3; Keck and Sikkink; *supra* n 3; Charnovitz, *supra* n 3; Willetts, *supra* n 3; Otto *supra* n 3.

<sup>83</sup> Lindblom, at 22.

<sup>84</sup> Mertus, *supra* n 3, at 543. Ripinsky and Van den Bossche, at 211, note that informal practices of NGO involvement are more difficult to discern than formal arrangements.

<sup>85</sup> Spiro, *supra* n 81, at 809; Braithwaite and Drahos *Global Business Regulation* (2000), at 608, 612.

<sup>86</sup> See discussion above. Lindblom, at 35; Charnovitz, *supra* n 77, at 550; Thürer, *supra* n 77, at 40, 57-8. Also see *Report of the Panel of Eminent Persons on United Nations - Civil Society Relations*, *supra* n 1, at 26-8.

and unrepresentative groups of people, a method that ‘is not rational within a legal system which embraces a whole world, with everything that this implies in terms of plurality, differences and inequalities.’<sup>87</sup> Schweitz usefully explains the possible task when she argues:

We need to find some intelligent way to deal with these challenges, to discover principles upon which to found claims of legitimacy or illegitimacy. This is not the story of good NGOs confronting evil governments. ... This is the story of humanity assuming responsibility for its own future, through increasingly representative forms of political organisation and through a fully engaged civil society. From the perspective of world order, it is about finding the proper level (local through supranational) at which to make different sorts of decisions, and who (among government, business and the so-called “third sector”) should make them. It is the story of promoting the unity of humankind while at the same time cherishing its diversity.<sup>88</sup>

As the final chapter in the Dupuy and Vierucci volume argues, this would seem to indicate that a continuing broadening of the legal enquiry to encompass the socio-political contexts of international law in which NGOs work would be useful. Dupuy reflects on the sorts of questions being asked in the debate, and whether the question of increased legal recognition of NGOs is the right focus for our inquiries. While making clear the importance of a distinction between legal analyses and socio-political ones in this area, Dupuy argues that international lawyers must not be so focused on the legal status and ‘pre-defined capacity’ of NGOs so as to be blind to the study of their participation in the creation and implementation of new international norms.<sup>89</sup> Having said this, he notes however, the limitations of the lawyer’s role, and exhorts international lawyers to stay within their expertise; concentrating on the elaboration, implementation and application of norms, and ‘the procedural and technical modalities’ of the relationships between states and NGOs.<sup>90</sup> While I would support his thoughts about the value of disciplinary speciality in elucidating particular aspects of NGO participation in international law to some extent, I think that this disciplinary divide might be overstated. Many scholars have noted the value of closer dialogue and sharing of knowledge between ‘artificially separated disciplines’ concerned with the international legal and political systems.<sup>91</sup> Much critical international legal scholarship draws strongly upon critical insights from other disciplines, feminism, critical race theory, for example. And indeed scholarship on NGOs in international law from many international legal scholars already seeks to make these links – using insights from other disciplines to consider, from a critical international law perspective, questions like how NGOs might ‘do democracy differently.’<sup>92</sup> Inherent in these enquiries is a sense that what is happening outside of the formal legal structures of NGO participation in international law is as important for the elaboration of international law as what is happening within. It is the links, the dynamic and interaction of these

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<sup>87</sup> Lindblom, at 30.

<sup>88</sup> Schweitz ‘NGO participation in international governance: the question of legitimacy’ in *American Society of International Law Proceedings* (1995), 413, at 417.

<sup>89</sup> Dupuy, supra n 28, at 214-5.

<sup>90</sup> Ibid, at 215.

<sup>91</sup> H Charlesworth and C Chinkin *The boundaries of international law* (2000), at 51. Also Slaughter, Tulumello and Wood ‘International Law and International Relations Theory: A new generation of interdisciplinary scholarship’ 92 *American Journal of International Law* (1998) 367.

<sup>92</sup> See, for example, Mertus, supra n 3, at 555.

overlapping spaces of international law that represent interesting sites for further analysis by international lawyers.

### **Conclusion**

These four recent volumes take us some steps further along in understanding the present and potential roles and involvement of NGOs in international law in a number of ways. They provide thorough and comparative analyses of the many varying arrangements and legal status that NGOs have with different international organizations and provide reflection on the ways in which this might continue to evolve. The volumes present consideration of the challenging questions about the legitimacy of NGOs as actors in international law, both in terms of the legitimacy of NGOs as actors and in terms of the overall legitimacy of the international legal system itself. Finally, the focus on the legal status of NGOs is useful because, approached critically, it prompts reflection of the power of the international legal discourse and the inherent constraints of the international legal framework. As the Lindblom volume notes, questions about the role and status of NGOs in international law are also fundamentally broader theoretical and philosophical questions of the functioning of international law and the legitimacy of the international legal system. Without an engagement with these essential questions in our analyses, our understanding of how non-state actors such as NGOs might contribute to norm creation in international law in ways that are outside the constraints and roles imposed by international law are not recognised. Legal analyses are therefore only one part of what is a fundamentally interdisciplinary exercise, where the presence of NGOs in international law might be viewed as part of the social process that the international legal system ultimately rests on.

### *Individual Contributions*

#### **Anton Vedder (ed.). *NGO Involvement in International Governance and Policy: Sources of Legitimacy***

*Anton Vedder*, Introduction;

*Anton Vedder*, Questioning the Legitimacy of Non-Governmental Organizations;

*Vivien Collingwood and Louis Logister*, Perceptions of the Legitimacy of International NGOs;

*Anke van Gorp*, Internet Activities of NGOs and Legitimacy;

*Corien Prins*, A Step Beyond: Technologically Enhanced Interactivity and Legitimacy; *Peter van den Bossche*, Regulatory Legitimacy of the Role of NGOs in Global Governance: Legal Status and Accreditation;

*Menno T. Kamminga*, What Makes an NGO 'Legitimate' in the Eyes of States?;

*Anton Vedder*, Towards a Defensible Conceptualization of the Legitimacy of NGOs.

#### **Pierre-Marie Dupuy and Luisa Vierucci (eds). *NGOs in International Law: Efficiency in Flexibility?***

*Christine Bakker and Luisa Vierucci*, Introduction: A Normative or Pragmatic Definition of NGOs

*Emanuele Rebasti*, Beyond Consultative Status: Which Legal Framework for an Enhanced Interaction between NGOs and Intergovernmental Organizations?

*Olivier de Frouville*, Domesticating Civil Society at the United Nations;

*Valentina Bettin*, NGOs and the Development Policy of the European Union;

*Attila Tanzi*, Controversial Developments in the Field of Public Participation in the International Environmental Law Process;

*Luisa Vierucci*, NGOs Before International Courts and Tribunals;

*Cesare Pitea*, The Legal Status of NGOs in Environmental Non-compliance Procedures: An Assessment of Law and Practice;

*Pierre-Marie Dupuy*, Conclusion: Return on the Legal Status of NGOs and on the Methodological Problems which Arise for Legal Scholarship.