



Bridging the legitimacy gap

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BRIDGING THE LEGITIMACY GAP: A PROPOSAL FOR THE INTERNATIONAL LEGAL RECOGNITION OF INGOs

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Abstract

In this paper we argue that there is a gap between the *de facto* and *de jure* legitimacy of international non-governmental organizations (INGOs) that requires more consideration from scholars who study their role in the international system. The gradual acceptance of INGOs as *de facto* legitimate actors can be seen in the long-term expansion of their role in international norm deliberation. Despite this development, most INGOs still lack international legal recognition, and thus *de jure* legitimacy. We argue that this gap between *de facto* and *de jure* legitimacy creates problems for both INGOs and members of international society. In seeking to address this disjunction, we highlight the limits of the current literature in understanding legitimacy as primarily sociological phenomena through an examination of the accountability agenda. We then propose a template for INGO legal recognition based on the principles that underpin the regulation of charities in English law as a first step in a gradualist argument for the institution of their international *de jure* legitimacy.

Keywords: legitimacy, INGOs, accountability, international law and order, global governance, Charity Commission

INTRODUCTION

Since the end of the Cold War, the involvement of international non-governmental organizations (INGOs)¹ in international politics has increased dramatically both in ‘numbers and geographical spread’ (Davies, 2013:178). Initially holding a position as clear outsiders in the international system, INGOs have since increased both their participation in international forums and their influence in shaping international political debates. Many international organizations (IOs) now have official consultative positions for INGOs across a wide spectrum of political issues (Szazi, 2012:76). Thus, compared to many other actors, INGOs have privileged access to the processes that shape international policy (Steffek, 2010:4). This status and access reflects how INGOs are increasingly viewed as reliable global actors, both because they deliver credible reports and provide evidence on various global issues (Lindblom, 2005:pp) and because they help to legitimate global governance (Scholte, 2007). This, in turn, means that INGOs have become important actors in the battle over rightful conduct within international society, playing an active role in both creating and defending international law and norms (Clark, 2007; Boesenecker and Vinjamuri, 2011; Büthe, Major *et al* 2012; Kochevar, 2013).

With their increasing influence, scholars and national governments alike have begun to subject INGOs to scrutiny. This involves questions about whether INGOs play the positive role in the international system they claim to as conduits of global public opinion (United Nations, 2004: 24-26) and catalysts of public voice (Lang, 2012:222). The role of INGOs as messengers of global will is further being probed by the rising states within the international system, some of which have imposed restrictions on INGO activity over fears that they represent not universal values but the political agendas of foreign states and donors. In

general, while the rapid rise of INGO power indicates that they are treated as legitimate actors within the international system this rise, at the same time, has created controversy over whether or not they should be.

Given this backdrop, the INGO community has tried to bolster their position through various claims to legitimacy, mainly by making claims that they operate through accepted social practices (Taylor and Warburton, 2003; Saastamoinen and Gritten, 2010; Bernstein, 2011; Noortmann, 2015: 210). Of these claims, the accountability agenda has been particularly dominant. Here, INGO legitimacy is said to be gained through the implementation of transparency and audit devices created by global benchmarking regimes and standardisation practices (Brown, 2008; Hammer, Rooney *et al* 2010). This transparency, in theory, should ensure that INGOs are accountable to both their donors and the recipients of their aid.²

This paper argues that the current focus on sociological legitimacy in the academic literature, taking the accountability agenda as a prominent example of this focus, overlooks a dimension of legitimacy that needs to be more widely considered by scholars and practitioners alike. Following the legitimacy theory put forward by David Beetham (2013), we argue that legal validity is missing in most current evaluations of INGO legitimacy. This highlights an underexplored gap in our understanding and evaluation of INGO legitimacy. Scholars need to consider not only the sociological legitimacy of INGOs, but also the gap between the current *de facto* legitimacy INGOs have been granted in the international system and the lack of legal recognition of that power in international law that constitutes *de jure* legitimacy.

The purpose of this paper is threefold. First, it demonstrates the limitations of considering INGO legitimacy solely in terms of the accountability agenda. Second, it outlines the issues caused by the INGOs' *de facto* and *de jure* legitimacy gap that need further exploration.

Third, it puts forward a proposal on how this gap might begin to be narrowed. In accomplishing these three tasks, the paper aims to start a wider conversation about the potential for international legal frameworks to solve some of the problems that INGOs are facing in a changing world order that would benefit INGOs and international society alike.

Given the controversial nature of granting INGOs legal recognition but recognizing the problems of the legitimacy gap, we argue that the best means to proceed is to build on the principles and criteria that underpin charity regulation in English law. Though limited in scope, as the number of INGOs meeting these criteria is likely to be low, the goal of this proposal is to institutionalize the idea that INGOs should have legal recognition, from which the political debate can proceed to whether others should also have this status. Our proposal thus serves as a potential first step in the legal recognition of INGOs, not a final resting place.

The paper proceeds by first showing the limitations in the accountability literature as an example of the current focus on sociological legitimacy, it then introduces Beetham's theory of legitimacy to suggest why legal validity is important, thirdly it illustrates the problems associated with the INGO legitimacy gap, and finally it defends the use of a modified version of the English charity law principles to provide a first-step towards the bridging of the gap between the legal and social legitimacy of INGOs.

ACCOUNTABILITY AND THE PROBLEMS OF LEGITIMACY

The accountability agenda has been put forward, by INGOs and academics alike, as a major framework through which INGOs can gain or sustain their legitimacy. This not only takes the form of an extensive discussion in the academic literature on accountability and its costs and benefits, but is also evident in recent INGO conduct where organizations have committed

considerable expenses to implement codes of conduct that meet the demands of this framework. One example is the INGO Accountability Charter, a framework that was designed to respond to questions about their legitimacy and links directly to an industry-wide standards agency, the Global Reporting Initiative (INGO Accountability Charter, 2014; Global Reporting Initiative, 2011). The Charter is a peer-review based form of accountability that is intended to serve as a third sector equivalent to the better known principal-agent forms of accountability, namely elections and legally enforceable contracts, to boost the credibility of the sector (Brown, 2008:ch.6; Brown and Jagadanada, 2007:12). INGOs who commit to the Charter follow a number of principles, such as ensuring ‘independence from specific governments and the business sector, non-discrimination, responsible advocacy, good governance, and transparency’ (Steffek, 2010:2). Other initiatives such as Sphere and Humanitarian Accountability Partnership are industry responses to legitimacy pressures from donors that aim to provide similar accountability frameworks. These frameworks are also increasingly pushed by international organizations as a means to regulate INGOs (Council of Europe, 2007).³ What these widespread self-regulatory mechanisms all have in common is that they are accountability frameworks that serve, in theory, to increase the legitimacy of INGOs, albeit measured in terms of how they exercise their power. This, however, overlooks questions about the origin of their power.⁴

The issue we take with the accountability agenda is that it limits the way we evaluate legitimacy. Accountability frameworks tend to be technical and primarily concerned with appropriate institutional engineering (Steffek, 2010:8; Philip, 2009: 46), particularly the implementation of systems under which those in power justify their conduct towards an audience that has the ability to sanction them should the conduct be inappropriate (Bovens, 2007:450). It is somewhat understandable that accountability is preferred as a concept

because it is a measurable construct that is reducible to the direct observation of the INGO itself. But legitimacy is more than this. It has an explicitly normative dimension that links the pre-existing legal and social order to the power that these structures generate and maintain. Though INGO accountability may be an important aspect of legitimacy, legitimacy is not reducible to simple accountability. The conceptual distinction between legitimacy and accountability is an important one because many of the legitimacy problems INGOs face can be traced to misplaced definitions that examine a particular form of accountability, rather than the entire normative structure of their power. If we want to justify the power of INGOs within the international system, then we need to take legitimacy seriously. Otherwise we risk drifting into accepting accountability measures in lieu of legitimacy that explain only a limited aspect of INGOs' power as global actors.

Thus, the accountability agenda fails to comprehensively address the problems of INGO legitimacy in two significant ways. First, accountability is primarily concerned with measurements of exercise and adherence to rules. It thus avoids questions about origins of INGOs' political power that are essential for understanding their legitimacy. Whereas the accountability literature asks questions about whether and how INGOs are breaking or following rules, studying legitimacy as a broader concept incorporates questions about the sources, reproduction, and potential for crises of INGO power. This inclusion of questions about the origins of INGO power is vital for INGOs since, absent legitimacy, they generally do not have great potential to coerce or bribe other actors, which according to Reus-Smit (2007: 163) are the only other means of exercising power.

Second, legitimacy is a more useful concept than accountability for INGO scholars because it has the potential to connect disparate discussions in international law and international

politics by communicating two meanings: a legal meaning that implies authorization or conformance with law and a sociological meaning that implies credibility or authenticity. So whereas accountability focuses solely on one element of social credibility, legitimacy includes a wider range of legal and social sources of power that can explain both the rightfulness and credibility dimensions of INGOs' claims.

In order to understand the problems surrounding the legitimacy of INGOs within the international system, we need to move beyond accountability as a measurement of how INGOs exercise power, and consider the origins of their power as well. Particularly, we argue that in stressing INGOs' conformity to a specific type of sociological legitimacy most scholars fail to consider how the gap between INGOs' sociological and legal legitimacy might be a problem. It is to this underappreciated problem that we turn to next.

THE INGO LEGITIMACY GAP: BEETHAM AND THE IMPORTANCE OF LEGAL LEGITIMACY

The legitimacy gap between the *de facto* and *de jure* legitimacy of INGOs needs to be both considered and bridged because, following the work of David Beetham, legitimacy is not a complete concept unless it includes legal validity. That is, for power to be considered fully legitimate it needs to meet three criteria, to be legally valid, justifiable in terms of shared beliefs, and be publicly affirmed (Beetham, 2013: 19-20). This formulation is different from most scholars who view legitimacy as only a sociological phenomenon or the empirical fact of something being legitimate. Beetham conversely argues that legal validity is central to legitimacy, that is 'power can be said to be legitimate in the first instance if it is acquired and exercised in accordance with established rules' (Beetham, 2013:16). This particular type of incompleteness, and its consequential effects, needs to be more rigorously considered.

The negative effects that arise from the gap between INGOs' *de jure* and *de facto* legitimacy occur because legitimacy is not only about sociological justifications for *de facto* power. It is also about the rightfulness of power, what Beetham calls 'the first condition of legitimacy' (Beetham, 2013: 64), which involves the normative force of rules that define rights and entitlements. It is the legitimacy of the rules of inclusion and exclusion, of special rights and entitlements with respect to other actors, that allow INGOs to play the roles they do in the international system. As Beetham puts it, 'In as much as power is itself constituted by rules of exclusion ... it is also legitimated by them, since they confer the right on the powerful to require others to respect the exclusiveness which is the basis of their power' (Beetham, 2013:56)

Since INGOs depend on rules of exclusion to be able to operate, having legitimacy is central to their ability to function. Their lack of legal validity means that their role within the system is more at risk, since their legitimacy is to a large extent determined by whether other actors within the system believe they have sociological legitimacy. More importantly, other actors within the system might have political goals that lead them to undermine the social legitimacy INGOs.⁵ Furthermore, the institution of a legal validity that corresponds with the sociological legitimacy of INGOs is arguably good for international society as a whole. Legal validity will not only help INGOs secure their legitimate place within international society, but will set limits to their power through these rules (Beetham, 2013:35). There are thus potential benefits to current actors within international society and INGOs alike, in that legitimacy provides both order, through the codification of agreed upon rules, and effectiveness, in that it allows those with legitimacy to achieve their goals in an easier manner (Beetham, 2013:33).

It is important to recognise that INGOs have some legal acknowledgement of their role in the international system. The role that INGOs currently can play is defined by the UN Charter, which recognizes the existence of international non-governmental organizations under Article 71. This ensures that INGOs have a consultative status and, through various mechanisms, can be observers in UN bodies (Martens, 2003:15-16; Szazi, 2012:76).⁶ With these privileges also come certain obligations, as would be expected by the order-inducing role of legitimacy in Beetham's theory. INGOs must fulfil a number of criteria to gain access, including having a headquarters, an executive body, the determination of policy through a democratic body, authority to speak for the membership, and financial independence from other states (Martens, 2003:16-17). They must respect the principles of ECOSOC Resolution 1996/31, which states that they have to be politically independent, have democratic and transparent decision-making processes, and be representative of their members (Steffek, 2010:2).

Despite these gains, there are very few international organizations in which INGOs are either full members or affiliate members with voting rights,⁷ nor does international law recognize INGOs as legitimate actors with legal personality (Charnovitz, 1997; 2011). As Steffek and Nanz explain: 'interaction between IOs and CSOs has been marked by the predominance of informal practices, exceptions – such as the Economic and Social Council (ECOSOC) scheme in the UN – notwithstanding. These informal practices left a great deal of room for discretion for the IO to define the terms of interaction with non-state actors' (Steffek and Nanz, 2008:14). Claudia Kissling has further argued that even if INGOs are said to have legal personality through their sociological legitimacy, they are still not original subjects, but secondary or derived subjects given their personality is derived from original subjects, that is, states (Kissling, 2008:35). As such, current measures do not completely solve the *de facto* - *de jure* legitimacy gap that INGOs face.

In sum, Beetham's theory is useful because it points to a special type of legitimacy problem that often goes unrecognized in the literature.⁸ The severity of this problem has only increased given the complex roles INGOs play within international and domestic politics. The literature shares our view that INGOs have significant *de facto* power in the international system, whether as apolitical functional entities or as (semi-) political advocates for disempowered people (Thrandardottir, 2015). Beetham's theory opens up space to consider the effects of the gap between their *de facto* power derived from sociological legitimacy and the legal validity that comes with *de jure* recognition.

EXISTING PROBLEMS AND LIMITED SOLUTIONS TO INGOs' LACK OF LEGAL LEGITIMACY

The problems of the INGO legitimacy gap are not simply abstract. There are three concrete problems arising from this gap, both for INGOs and for other members of international society that involve how to put effective limits on INGO power, the relationship between states and INGOs, and the role INGOs play in IOs. In helping to solve these problems, our proposal contributes to an overall process of order-making that can benefit states and INGOs alike through the institutionalization of rules that both guarantee INGOs their position in the international system in exchange for being subject to regulative rules.

Effective limits on INGO power

Despite the recognition of INGOs' *de facto* legitimacy in the international system, the problem of power still remains, *i.e.* how can we put effective limits on the power of INGOs as global actors? The thesis of order-making can also be seen, albeit in a lesser form, in what Peter Spiro (2002:166) calls the 'inclusion paradox'. He argues that the reluctance of states to formally include INGOs in international decision-making is their fear of losing

‘monopoly...over international lawmaking’. Yet, as the paradox goes, the opposite may actually be true. That is, a formal legal inclusion of INGOs is just as likely to work as a restraint on INGOs’ power and prevent behaviours of ‘backroom lobbying’ where advocacy groups can ‘launder their influence through pliant front-states’ (Spiro, 2002:167). As Beetham notes (2013:35), the rule-bound nature of legal validity both enables and constrains the legitimate use of power for actors. This might be particularly useful for smaller states, for as Havrda and Kutliek (2010:163) put it, ‘[s]maller and weaker states of the South are often not able to oversee the NGOs operating on their territory’, as evident in cases where government decisions to curb INGOs’ powers are reversed due to pressure from influential donors. This highlights the political dimension in INGOs’ activities, and that the mandate for this power requires clarification.

States and INGOs

At the same time, providing INGOs with legal validity can benefit INGOs themselves. Although many states, particularly liberal democracies, have close ties and working relationships with INGOs, they also make rival claims to represent the same domestic constituencies, which can lead to tensions (Szazi, 2012: 75-76). In countries such as India, China, and Russia, governments are raising legal barriers to INGOs’ activities rather than facilitating and strengthening their legal status (Rutzen, 2015). The relationship between states and INGOs can be especially fraught in emerging democracies where INGOs are often perceived more as political opposition than a voice in civil society (Shivji, 2007:23-24). INGOs, as is, have few options to defend themselves against hostile domestic legislation.

This has prompted arguments in international law claiming that INGOs’ legal status and personality should not be dependent on states’ recognition of their right to exist as such, but

rather on the social sources of the role that they play in international society, since ‘[s]ome of these activities fall, or ought to fall, outside the ambit of a particular national legal system’ (Noortmann, 2015: 206). We agree, since the problems INGOs have recently faced in several major states demonstrates how their lack of *de jure* legitimacy is a pressing problem. Their legal recognition within international law, independent of the recognition of states, would be a step forward in alliviating this problem.⁹

IOs and INGOs

Granting legal recognition also allows for a mainstreaming of recognition across IOs, since the current lack of legal validity means that the status of INGOs with respect to IOs differs across each organization. Even if IOs were to give INGOs direct international personality through primarily international law that establishes them in the legal order, this does not automatically give them equal rights across other types of organizations (Kissling, 2008:36). The problems associated with differential and derived recognition can be seen empirically in the reaction of some INGOs to the purpose of their inclusion in international meetings where they end up having no real official role. For instance, Dhananjayan Sriskandarajah, the head of Civicus stated that after spending a year attending various UN meetings, NGO ‘consultations’ felt more like ‘insultations’ since the presence of INGOs seemed to be more of a ‘tick a box’ exercise by governmental representatives than it was an integrated part of global governance. In response, he called for a greater urgency regarding the role of INGOs and their participation in international decision-making processes (Civicus, 2014).

Arguments for including INGOs in IOs are quite common. However, the focus is often on the legitimacy deficit of IOs and how INGOs can correct this deficit as representatives of global civil society. Such arguments are typically set in the context of a wider argument about the

democratization of the international system, focusing on the management of the relationship between INGOs and IOs (Steffek, 2013; Reimann, 2006). Pushing the analysis further Anna-Karin Lindblom (2005) argues that because INGOs are already integrated as legitimate *de facto* actors across multiple intergovernmental institutions, we can conclude that even though they do not have legal personality now, INGOs can have ‘a legitimate expectation’ about acquiring one (Lindblom, 2005: 526). However, deriving the legal personality from the needs of IOs does not help answer questions about the legitimacy of INGOs.

The existing literature discussing the problems of INGOs’ lack of legal legitimacy falls short of proposing a solution that can account for how INGOs exercise their power and the origin of this power. The problem with sociological approaches that argue for legal personality, such as Willetts and Noortmann, is that they often depend on an understanding of an apolitical role of INGOs with a superior moral purpose to that of states (or even IOs). Such a minimalist approach to the legal personality problem of INGOs only asks questions about INGOs ability to operate in IOs (Willetts, 2011:152). However, such an approach overlooks the origin and mandate of INGOs’ power. The origin of their power, however, raises difficult political questions, especially in contexts that are either hostile to INGOs or where INGOs dominate a local community (Dodworth, 2014). We argue that it is therefore necessary to determine, independent of states and domestic legal control of INGOs, what possible common criteria define INGOs’ legal personality.

In sum, INGOs currently do not have primary legal recognition through a legal personality that would conform to Beetham's concept of legal validity, leaving a gap between their *de facto* and *de jure* legitimacy. The problems this causes, as outlined above, have not gone completely unnoticed. Although many scholars focus on how this affects the legitimacy of

international organizations; few focus on the INGOs themselves. In order to overcome this problem, we start by identifying criteria that could justify giving INGOs a legal personality in international law, thus allowing them to operate without fear of interference from states. As we are aware that granting INGOs legal personality is reasonably controversial, we propose a first step in an ongoing deliberation over INGOs' *de jure* legitimacy in international law.

A PROPOSAL ON BRINGING ABOUT *DE JURE* LEGITIMACY FOR INGOS AT THE INTERNATIONAL LEVEL: OVERCOMING THE GAP BETWEEN *DE FACTO* AND *DE JURE* LEGITIMACY

The most important goal in our proposal is to introduce a template based on charitable principals derived from English law as a way to institutionalize the concept of INGO *de jure* legitimacy in international law. The aim is to eventually move the debate from whether INGOs should have legal recognition to under what conditions they should be granted legal recognition. We believe this proposal is apt for the following four reasons.

First, one of the problems for existing members of international society that comes with the legal recognition of INGOs is the institutionalization of pluralism within international debates. INGOs who gain legal recognition will have opportunity to increase the scope of potential opposition to the political wishes of states because denying INGOs official status will become more difficult for states. In order to assuage the real fears of increased political competition, we suggest that INGOs who are to be considered for recognition must somehow reflect a type of global solidarism, minimising the potential for outright political conflict with essential values of international society. In this, we are not only talking about values that are generally held, but also that these values are held to apply to everyone, or those values that reflect some type of 'moral concern with welfare on a world scale' (Bull, 1977: 13). These represent the 'base floor' of what might be claimed to be shared human values (Bellamy, 14

2002: 474). The importance of this choice lies in the extent to which the choice is reasonably free of political contestation over the ethical value of the actions themselves.¹⁰

Second, it provides a limited expansion of recognition that will help to preserve order within the international system amidst systemic change. The number of organizations that can be defined as charitable will be a small percentage of the overall number of INGOs in the system. The recognition of these organizations will therefore not be a large shock to the overall international system, which should help to gain the support of those states that might be more suspicious of the possible unforeseen consequences of such a move.

Third, the focus on charity conforms to the characteristics of the principal INGO that currently has legal recognition; that is the International Committee of the Red Cross (ICRC). The ICRC is a hybrid organization that enjoys *de jure* legitimacy both under Swiss law and in international law, albeit a rare example as the only private entity that holds an international legal personality (Szazi, 2012: 160). Though the legitimacy of the ICRC is often presented in terms of independence and neutrality (Krähenbühl, 2004), the fact that it plays an overtly humanitarian role nearly universal in scope and acceptance is an unrecognized element in ensuring the legitimacy of the organization. ICRC is an example of how an INGO, that is primarily charitable in purpose, can achieve a measure of commonality between its *de jure* and *de facto* legitimacy at the international level. This example supports our proposal in the sense that ICRC represents current international practices of an INGO with *de jure* legitimacy in international law based on a reasonably non-controversial role that is almost universally accepted.

Lastly, prioritising the concept of charity is the least politically controversial way to institutionalise the notion that INGOs can be granted legal personality. Though our proposal

is limited in scope in terms of the number of INGOs who might be able to take advantage of it, the very fact of recognition can, over time, help to socialize international society into its appropriateness. It also helps both states and other INGOs identify the benefits and drawbacks of recognition, which can provide the impetus for further debate over potential expansions in the future.

We therefore believe that charity is a useful concept to be the centrepiece of considerations over the extent of legal recognition because of its solidarism, its limitedness in terms of numbers, and its potential to spur further debates through the institutionalisation of legal recognition itself. However, we still have to face the following question: what specific form might such a framework take? This is pressing since any suggestions might fall into Collingwood's observation that it is difficult to identify a set of commonly held values at the global level, which puts into question the validity of any claim to global values (Collingwood, 2006: 449-450).

Our solution is therefore to adapt the principles that guide charity law and regulation in England and Wales and use them as a template for ascertaining which INGOs might be granted international legal recognition. The system of charity regulation in English law is widely recognised as the most advanced regulatory regime for charities in the world (Callahan, 2015).¹¹ The Charity Commission, which is the main regulatory body of large charities, uses two principles to accept or reject requests for charitable status. The first principle is that organizations have to be exclusively charitable in their purpose. The second principle is a corollary of the first principle and requires organizations to demonstrate which 'public' benefits from their work (Charity Commission, 2014; 2013).

The definition of charitable purposes stipulates twelve criteria to determine whether an

organization qualifies, and can therefore register, as a charity (Meakin, 2008: 24). These criteria cover a wide range of causes, such as relief of poverty, education, arts, and human rights (Charities Act 2011, chapter 1, section 3 (1)). If an INGO wants to register and enjoy the rights and benefits of a legally registered charity, it has to demonstrate that its purpose falls under at least one of the twelve criteria. While the Charity Act gives an extensive list of potential reasons for NGO acceptance, given our goal of putting forward a proposal that meets with solidarist ideals within the global system, we suggest limiting these to two from the list: the prevention or relief of poverty and the advancement of health and saving of lives. These principles, more than the others listed in the Charity Act, arguably represent the ‘base floor’ of global public opinion, as it is unlikely that actors will make a culturally or politically-inspired argument against these principles in general, even if the means and priorities are debatable.

In order to determine charitable purpose, NGOs are also required to demonstrate that their purpose is for public benefit. This second principle has two aspects, one that explains the ‘benefit’ part and another that explains the ‘public’ part. The ‘benefit’ part, *i.e.* ‘there must be an identifiable benefit or benefits’, includes subsections on what the benefit is, how it relates to the aim of the charity, and that any benefit must be balanced against harm. The second is the ‘public’ part, *i.e.* ‘benefit must be to the public or a section of the public.’ This includes a match between the beneficiaries and the aims, reasonable opportunity for benefit should it be for a section of the public, inclusion of poor people, and that any private benefits must be incidental (Morgan and Fletcher, 2013; Morgan, Baker *et al*, 2013). The second principle can be harder to establish since some NGOs struggle to identify their beneficiaries, or strike a balance between private and public interest. At its core, the public benefit requirement means that ‘a charity must confer a benefit on the public or a sufficient section of the public’

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(Meakin, 2008:34) that is identifiable either as a specific targeted group, a universal definition, or a derived group (Morgan and Fletcher, 2013: 809-810). Also, there must be no personal bonds between donors and beneficiaries or other familial or blood relationships.

The two charitable principles and the associated criteria are a good starting point for a discussion about under what conditions INGOs could be granted *de jure* recognition in international law. These represent the base floor of shared human values for a potentially solidarist position of INGO *de jure* legitimacy. Importantly, our focus on charity as a solidarist idea does not remove politics from the equation, as there is no avoiding a debate over what counts as charitable. What is important is that the proposal places boundaries around which the debate can occur.

CONCLUSION

This paper has drawn attention to the problems that INGOs face arising from their lack of international *de jure* legitimacy. It has identified several limitations of pursuing a purely sociological approach to legitimacy using the accountability agenda as an example. It has also identified through Beetham's work the importance of the gap between *de facto* and *de jure* legitimacy, argued that there are several problems that arise out of this legitimacy gap, and suggested that considering official legal recognition for INGOs on the basis of charitable principles might be a good means to begin granting *de jure* legitimacy to INGOs at the international level.

In making these arguments, we do not discount the importance of *de facto* legitimacy. Indeed, it is because INGOs have *de facto* legitimacy that they can be international actors in the first place. Furthermore, it is desirable for INGOs and scholars alike to query the basis of this

sociological legitimacy and suggest where it might be reinforced. However, our argument is that by focussing solely on sociological legitimacy, much of the literature overlooks the problems associated with the lack of legal validity. In highlighting this particular problem and our solution to it, we hope to expand the INGO legitimacy debate to encompass how the existence and conduct of INGOs can be both justifiable in terms of shared beliefs and legal validity.

We believe this paper can serve as the starting place for a larger discussion over the potential for INGO *de jure* recognition in international law that can have positive effects for both international society and the INGOs themselves.

NOTES

¹ INGOs span a wide range of civil society organizations. For the purposes of this paper, we define INGOs to be organizations that are registered or incorporated entities in either domestic law or with international institutions. We follow a broad understanding of what counts as an INGO, as per Lester M. Salamon and Helmut K. Anheier (1997), and Peter Willetts (2011).

² Although some authors have pointed out that in practice accountability flows mainly upwards to donors instead of downwards to beneficiaries (Crack, 2014; Peruzzotti, 2006; Schmitz, Raggo *et al* 2012).

³ The drivers behind this development are not yet clear. One explanation is the emphasis of the Council of Europe on self-regulation as put forward in ministerial recommendations to pursue European wide policy of self-regulatory frameworks for NGOs (Council of Europe, 2007). Another indication is vested interests in auditing regimes (LeBaron and Lister, 2015).

⁴ See, for example, Aspremont and Brabandere's distinction between 'legitimacy of exercise' and 'legitimacy of

origin' (Aspremont and Brabandere, 2013:180). We argue that legitimacy theories that focus on accountability are only measuring how INGOs' exert their powers, and as such fail to capture a significant dimension of their legitimacy that constitutes the underlying consensus of that power.

⁵ This is not simply a theoretical problem. Thomas Davies (2013: 107, 132), for instance, has documented numerous problems that INGOs encountered when negotiating their status with the League of Nations that arose from their lack of legal status.

⁶ Consultative status is also divided into three groups: general, special and the roster, where general consultative status is for NGOs that represent a large number of people from different regions in the world and are expected to make a sustained contribution. This allows them to attend and speak at the ECOSOC meetings and to make proposals. Other categories are afforded fewer privileges (Willets, 2011).

⁷ One of the exceptions to this rule is the International Labour Organisation where NGOs have voting rights (Charnovitz, 1997:283)

⁸ This framing is unlike many other considerations of legitimacy that tend to focus on sociological sources only. For instance, some authors focus on input and output legitimacy (Weiler, 2012), others claim we can only discuss legitimacy in the context of self-legitimation (Barker, 2001), and yet others focus on procedural aspects of legitimacy in network partnerships (Bäckstrand, 2006).

⁹ Kissling notes that there are five criteria that might grant legal personality in the literature: being the addressee of rights, the addressee of duties corresponding to those rights, to have the capacity to maintain rights by bringing about claims, to be able to be held to account in an international court, and to have the capacity to create international law or participate decisively in its creation (Kissling, 2008).

¹⁰ This also helps to alleviate some of the arguments that INGO activity represents an unfair political advantage for those groups that might be more highly organised or have greater access to resources (Bolton, 2000).

¹¹ Although the Commission has come under heavy criticism in recent years, the political and academic debate has revolved around strengthening the powers of the Commission to regulate NGOs rather than the opposite (Hansard [GC369-GC384], 2014; Meakin, 2008; Morgan, Baker *et al* 2013: 123-124).

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