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Giorgi, Maiara

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The Role of Non-Governmental Organizations in the Process of International Treaty Making

*El papel de las organizaciones no gubernamentales
en el proceso de elaboración de tratados
internacionales*

*Le rôle des organisations non gouvernementales
dans le processus de conclusion des traités
internationaux*

Maiara Giorgi*

SUMMARY: I. *Introduction*. II. *Non-Governmental Organizations and their Status under International Law*. III. *International Treaties and the Influence of Non-Governmental Organizations*. IV. *Conclusion*. V. *References*.

* Graduated in Law from Universidade de Caxias do Sul (Brazil). Has a Master degree in Cultural Processes and Manifestations from Universidade FEEVALE (Brazil). Currently, is a Phd Candidate at the University of Hamburg (Germany).

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RESUMEN: Las organizaciones no gubernamentales han desempeñado un papel importante en el escenario mundial. El crecimiento del número de ONG muestra que su importancia, influencia, representatividad y participación en la comunidad internacional es esencial, ya que pueden establecer un vínculo entre los Estados y la sociedad. Con sus acciones y su desempeño son capaces de llenar vacíos dejados por el Estado moderno en la representación de las aspiraciones de la sociedad. En razón a un marco teórico breve y específico, este artículo presenta una explicación sobre las ONG y su estatus en el derecho internacional, a fin de permitir una reflexión sobre su impacto en la conclusión de tratados internacionales, a través del análisis de la Convención sobre los Derechos del Niño, la Convención sobre Minas, Estatuto de Roma.

Palabras clave: organizaciones no gubernamentales, tratados internacionales, Convención sobre los Derechos del Niño, Convención sobre la Prohibición de las Minas, Estatuto de Roma.

RÉSUMÉ: Les organisations non gouvernementales ont joué un rôle important dans le scénario mondial. La croissance du nombre d'ONG montre que leur importance, influence, représentativité et participation à la communauté internationale sont essentielles puisqu'elles peuvent établir un lien entre les États et la société. Par leurs actions et performances, elles sont capables de combler les lacunes laissées par l'Etat moderne dans la représentation des aspirations de la société. S'appuyant sur un cadre théorique, cet article présente une explication sur les ONG et leur statut dans le droit international, afin de permettre une réflexion sur leur impact sur la conclusion de traités internationaux, à travers l'analyse de la Convention Relative aux Droits de l'enfant, la Convention sur l'interdiction des mines et le Statut de Rome.

Mots-clés: organisations non gouvernementales, traités internationaux, Convention Relative aux Droits de l'enfant, Convention sur l'interdiction des mines, Statut de Rome.

ABSTRACT: Non-governmental organizations have been playing an important role in global scenario. The growth of the number of NGOs shows that their importance, influence, representativeness and participation in the international community is essential since they can establish a link between states and society. With their actions and performance they are able to fill in the gaps left by the modern state in the representation of society's aspirations. Relying on a theoretical framework, this article presents an explanation about NGOs and their status in international law, in order to allow for a reflection on their impact on the conclusion of international treaties, through the analysis of the Convention on the Rights of the Child, the Mine-Ban Convention and the Rome Statute.

Keywords: non-governmental organizations, international treaties, Convention on the Rights of the Child, Mine-Ban Convention, Rome Statute.

I. INTRODUCTION

Although Non-Governmental Organizations (NGOs) do not have a legal capacity to conclude international treaties, they can influence international relations. With their actions and performance they fill the gaps left by the modern state in the representation of society's aspirations and serving its interests.

NGOs are actors who develop their activities independently from the state and who are able to affect the public opinion considerably. They have been increasingly expanding their field of activities, including participation in various international conferences. Basically, they are characterized by being independent of the state (or in the very least they are supposed to be, ideally), not having profit and by pursuing, in most cases, well-defined objectives, such as, for example, environmental and human rights NGOs.

The number of NGOs grows every day and it is difficult to say exactly how many there are. Their growth is remarkable, specially in terms of their increasing internationalization and the ways in which they have become prominent actors alongside nation-states in international standard-setting.¹ In terms of health, education, social and economic development of poor, rural and urban communities, NGOs, taken together, already totalize more actions than several UN agencies and, in some countries, more than their respective governments. This can be seen, for example, in humanitarian operations, where it is often possible to find more representatives of NGOs, human rights organizations, religious and refugees organizations, than representatives of governments.

In certain fields, the growth of NGOs has coincided with a perceived increase in the influence that they can and do exert upon governments. They can promote and mediate the negotiation of a wide variety of international agreements on issues of global concern, such as environment, public health and human rights issues. In the field of human rights and humanitarian law, for example, NGOs have played important roles in developing proposals, promoting and building government support for a number of international

¹ Holzscheiter, Anna, "Non-Governmental Organizations", *Oxford Bibliographies*, New York/Oxford, Oxford University Press, 2015, available at: <http://www.oxfordbibliographies.com/view/document/obo-9780199791231/obo-9780199791231-0044.xml>.

agreements, such as the UN Convention on the Rights of the Child, the Mine-Ban Convention (Ottawa Treaty) and the Rome Statute of the International Criminal Court.²

While realizing the importance of a comprehensive study on the participation of NGOs in the most diverse forms of international cooperation, this article's author propose a more narrow reflection on how NGOs influence international law, more specifically international treaties, by reviewing the relevant literature and case-law. To achieve that purpose, a brief explanation about NGOs and their status on international law will be presented, followed by an exposition on how NGOs can influence the conclusion of international treaties. The study's conclusions will be corroborated by the presentation of three practical cases: the Convention on the Rights of the Child, the Mine-Ban Convention and the Rome Statute.

II. NON-GOVERNMENTAL ORGANIZATIONS AND THEIR STATUS UNDER INTERNATIONAL LAW

Although the sovereign states are not the only entities with international legal personality, they are the main subjects of international law and also the primary subjects and founders of the international society.³ A subject of law in legal science is every person who has rights and duties before certain legal order. International person is, therefore, the recipient of international legal norms.⁴

Besides the states, international organizations are also accepted as international persons capable of having rights and assume obligations in the international order, such as the United Nations, the Organization of American states (OAS), the European Union, among others. These international

² Crowley, Michael and Persbo, Andreas, "The Role of Non-Governmental Organizations in the Monitoring and Verification of International Arms Control and Disarmament Agreements", in Borrie, J. and Randin, Vanessa (eds.), *Thinking Outside the Box in Multilateral Disarmament and Arms Control Negotiations*, United Nations Institute for Disarmament Research (UNIDIR), 2006, p. 225 and 226.

³ Cassese, Antonio, *International Law*, 2a. ed., New York, Oxford University Press, 2005, p. 71.

⁴ Mello, Celso de Albuquerque, *Curso de direito internacional público*, 12a. ed., Rio de Janeiro, Renovar, 2002, p. 55.

organizations, in order to fulfil their duties, must also have international legal personality.

Historically, NGOs have as starting point of their existence the end of the First World War. Since then, they have been obtaining more space in the global scenario, because through their actions they have been influencing many negotiations related to a variety of subjects.⁵

Shortly after the Second World War the United Nations Charter was signed (June 26th, 1945), and in this Charter article 71 is linked to the coining of the term “non-governmental organizations”.⁶

Article 71. The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations, which are concerned with matters within its competence. Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.⁷

The question of defining the NGOs is a tricky one, as there exists a number of different definitions in various areas of international law. There is no generally accepted definition of the term “non-governmental organization” in international law. Each area of law that relates to NGOs establishes its own definition.⁸ However, for the purposes of this study, the following definition appears to be sufficiently comprehensive and featuring all the

⁵ Martens, Kerstin, “Mission Impossible? Defining Nongovernmental Organizations”, *Voluntas: International Journal of Voluntary and Nonprofit Organizations*, vol. 13, issue 3, September 2002, p. 271 and 272.

⁶ *Idem*.

⁷ United Nations, “Charter of the United Nations and Statute of the International Court of Justice”, 1945.

⁸ Aside from the already cited provision of the UN Charter, see the following documents: E/RES/288(X), Review of Consultative Arrangements with Non-Governmental Organizations, 27 February 1950, para. 8; E/RES/1996/31, Consultative Relationship between the United Nations and Non-Governmental Organizations, 25 July 1996, para. 12; Fundamental Principles on the Status of Non-Governmental Organizations in Europe and Explanatory Memorandum, Council of Europe, May 2003, p. 18; AG/RES. 57 (I-0/71, Standards on Cooperative Relations Between the Organization of American States and the United Nations, its Specialized Agencies, and Other National and International Organizations, 23 April 1971, para. 2(c); CP/RES. 759 (1217/99), Guidelines for Participation by Civil Society Organizations in OAS Activities, 15 December 1999, para. 2, and others.

necessary elements that have so far been encompassed in those differing definitions: a “non-governmental organization” is a not-for-profit organization which is independent from states and international governmental organizations, does not use or promote violence or have clear connections with criminality, and has a formal existence with a statute and a democratic and representative structure, and does normally, but not necessarily, enjoy legal personality under national law.⁹ A NGO is not constituted by an international legal instrument (such as a treaty).

It is noteworthy that after the Second World War, the Cold War influenced the UN actions until the fall of the Berlin Wall in 1989. In this period, 1948-1989, the development process of the UN objectives was frozen and therefore imposed barriers to the participation of non-governmental organizations in the governance process.¹⁰

There is also a need to clarify the distinction between NGOs and international organizations. According to the prevailing theory in International Public Law, an international organization is a collective entity established by a solemn act between sovereign states and that have three elements as their characteristic ones: a) its creation must be done by an international agreement; b) have at least one decision-making body with a collective will, different from the will of the states Parties, and c) be an institution built under the Public International Law rules.¹¹ According to Norberto Bobbio,¹² the fact that international organizations have to be established by agreement between International Law subjects excludes, per se, the inclusion in the concept above of other forms of associations that are not constituted by international legal acts, commonly referred to as non governmental organizations (see also the definition above).

Two major tracks of NGO interpretation can be distinguished: the sociological approach and the juridical approach. The first is based on studies of

⁹ For a deep and detailed analysis on these elements as well as an excellent argumentation in this regard, see Lindblom, Anna-Karin, *Non-Governmental Organizations in International Law*, New York, Cambridge University Press, 2005, p. 36-52. The proposed definition is based on the elements summarized in Lindblom’s book at p. 52.

¹⁰ Martens, Kerstin, *op. cit.*, p. 272 and 273.

¹¹ Soares, Guido Fernando Silvo, “As ONGs e o direito internacional do meio ambiente”, in Milaré, Edis and Machado, Paulo Affonso Leme (cords.), *Doutrinas essenciais: direito ambiental*, São Paulo, Revista dos Tribunais, 2011, p. 22.

¹² Bobbio, Norberto, *Estado, governo, sociedade: teoria geral da política*, 14a. ed., São Paulo, Paz e Terra, 2007, p. 85.

societal players, and tries to capture the term by examining the composition and functions of NGOs in the transnational area. On the other hand, the juridical approach emphasizes the legal status of NGOs in the national context as well as the implications for international law.¹³ Even though states have been trying to regulate and define important relations in the international context, by establishing conventions and treaties, NGOs, have not yet been recognized by states as having an international legal personality. Despite many attempts "...to define NGOs and to codify their legal status, there is not yet any widely adopted international convention on the nature and law of NGOs".¹⁴

Unlike states and International Organizations, NGOs are not juridical persons of public international law. As a rule, they have legal personality under the national law of a state, which will grant them personality and delegate powers to continue their activities. Thus, its creation is by a national legal act without any connotation of being an act regulated by international public law.¹⁵

Here it might make sense to try to use the concept of juridical person as it is operating in private international law, in order to better explain the legal status of NGOs as a juridical person in their give contexts. The universal recognition of a juridical person of private law will depend on the recognition granted by the legal system of a given country, which will be the country of its nationality. After all, a juridical person of private international law cannot have a domicile without first having personality, and the personality can only be recognized by the state where it was constituted or where it established its headquarters. That means that a bond of nationality will be created. Once the law of its nationality recognized it, the juridical person also begins to be universally recognized. But, its capacity in the universal plan will depend on the capacity that has been recognized by the country of its nationality.¹⁶

¹³ Martens, Kerstin, "Examining the (Non-)Status of NGOs in International Law", *Indiana Journal of Global Legal Studies*, vol. 10, issue, 2, 2003, p. 19, available at: <http://www.repository.law.indiana.edu/ijgls/vol10/iss2/1>.

¹⁴ *Idem*.

¹⁵ Ryfman, Philippe. "Non-Governmental Organizations: an Indispensable Player of Humanitarian Aid", *International Review of the Red Cross*, vol. 89, issue 865, 2007, p. 25 and 26.

¹⁶ Mello, Celso de Albuquerque, *op. cit.*, p. 321.

From a formal point of view, on the global level there are no international legal standards governing the establishment and status of NGOs. The relevant law is that of the state where an NGO is based and this may cause problems in the case of international activities because national laws are different.¹⁷

One should take into consideration that regarding the operation of NGOs, when they are established in a different country other than their nationality, they may have to fulfill additional national requirements than those that have already been met. Thus, local requirements will be added to its basic recognition, which is universal and immutable. Therefore, the juridical person is born under the law of its nationality and dies under it, i.e., NGOs "...remain essentially private legal entities, formed under and essentially governed by the national law of the countries in which they are established".¹⁸ But, problems may arise for NGOs in the international sphere when, for example, its activity transcends the borders of its national state of origin.

An internationally operating NGO with branches in several states, would fall under different national systems of law, depending on the respective jurisdiction of the country in which a branch is located. At the same time, NGOs cannot evade national jurisdiction when they are aiming at participating at the international level, because some International Governmental Organizations (IGOs) require a certain legal status of an NGO when applying for "consultative status".¹⁹

In the same way that they differ from international organizations, International NGOs also differ from transnational companies, since NGOs are non-profit entities.²⁰ Kerstin Martens,²¹ points that "...despite the increasing involvement of NGOs in the processes and proceedings of global politics and international law, the features and functions of the «new player» NGO have not yet been clearly identified". For some, the term NGO just describes different types of not governmental organizations, which

¹⁷ Malanczuk, Peter, *Akehurst's Modern Introduction to International Law*, 7a. ed., New York, Routledge, 1997, p. 97.

¹⁸ Ryfman, Philippe, *op. cit.*, p. 25.

¹⁹ Martens, Kerstin, "Mission Impossible...", *cit.*, p. 275.

²⁰ Daillier, Patrick *et al.*, *Droit International Public*, 8a. ed., Paris, LGDJ, 2009.

²¹ Martens, Kerstin, "Examining the...", *cit.*, p. 2.

would include multi-national companies, national liberation groups, etc. And, for others, the term NGO could only be used for private non-profit organizations.²²

However, in international law:

...the term “NGO” is equally confusing in its application... there is a lack of agreement on NGOs as subjects of international personality. While in many countries domestic legislation for “private associations” serves as a basis for NGO identification and recognition, at the international level, international legal standards to define and regulate the perception of NGOs have not yet been established.²³

Although NGOs participate more and more in international life and negotiation processes, the questions about their status on international law and what characterizes them have not yet sufficiently been answered. Even though “states welcome NGO contributions to international negotiation processes and have granted «private associations» a limited recognition at the national level, they have not yet agreed on a standard for NGOs operating in the transnational sphere”.²⁴ It appears astonishing that NGOs can take part, and are invited to take part, in international affairs but still have an unclear status and characterization in international law.

III. INTERNATIONAL TREATIES AND THE INFLUENCE OF NON-GOVERNMENTAL ORGANIZATIONS

The space achieved by NGO's in the global scenario shows that certain areas suffer from the inability, omission or even unwillingness of the states. Taking into consideration the representativeness that some NGOs have in the international community, there is no doubt that their participation is

²² *Idem*.

²³ *Idem*. A notable effort in this regard at the regional level is the 1986 European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations, which is an international treaty that sets the legal basis for the existence and work of international NGOs in Europe. It was adopted on 24 April 1986 and entered into force on 1 January 1991.

²⁴ *Ibidem*, p. 23.

essential since they can establish a missing link between the state and the society.

Andreas Persbo²⁵ observes that literature has already explored in great depth how NGOs influence international negotiations and “the pervading conclusion is that the influence of non-governmental actors is too powerful to be ignored. Therefore, the question facing governments today is not if, but how, these actors should be allowed to contribute”.²⁶ But, Arnold Pronto²⁷ emphasizes that “notwithstanding the significance of the participation of NGOs in specific recent multilateral negotiations... the majority of international law-making today still occurs with little or no participation of civil society”.

One should also take into consideration that NGOs are not always opponents to governmental institutions who challenge their policies. On the contrary, “they are often directly involved in the design of policies and may shape political processes from inside the official arenas”.²⁸ They are often significantly involved in the activities and performances of the intergovernmental organizations. As a good example, NGOs’ engagement at the United Nations may be cited. They also advise U.N. commissions, committees and institutions, provide necessary information, as well as they work together with UN agencies to help implement their projects.²⁹

NGOs are not only a visible but also an active part of the international scene. As they act in a great variety of areas they promote a wide range of aims and goals. NGOs’ involvement is found in different fields, such as humanitarian aid, peace, environment, education, family, and in highly political arenas, such as disarmament and military surveillance.³⁰ Given the

²⁵ Persbo, Andreas, “The Role of Non-Governmental Organizations in the Verification of International Agreements”, in Vignard, Kerstin (ed.), *Disarmament Forum. Arms Control Verification*, United Nations Institute for Disarmament Research, (UNIDIR), 2010, available at: <http://www.unidir.org/files/publications/pdfs/arms-control-verification-en-320.pdf>.

²⁶ *Ibidem*, p. 65.

²⁷ Pronto, Arnold N., “Some Thoughts on the Making of International Law”, *The European Journal of International Law*, vol. 19, issue 3, 2008, p. 606, available at: <http://www.ejil.org/pdfs/19/3/1629.pdf>.

²⁸ Martens, Kerstin, “Examining the...”, *cit.*, p. 1.

²⁹ *Ibidem*, p. 1 and 2.

³⁰ Betsill, Michelle and Corell, Elisabeth (cords.), “Introduction to NGO Diplomacy”, in *NGO Diplomacy: the Influence of Nongovernmental Organizations in International Environmental Negotiations*, Cambridge, MIT Press, 2007, p. 4.

number of areas where NGOs can work and influence, this article will focus on three specific international treaties (Convention on the Rights of the Child, Mine-Ban Convention and Rome Statute) in order to illustrate the performance of NGOs in the conclusion of international treaties.

It is important to emphasize that treaties, characteristically, are immediate sources in international law scenario. From the moment that states put themselves as signatories, by being subordinated to what was agreed, in case of non-compliance they will face sanctions, restrictions or acts that can influence and harm their relations within the framework of international relations.³¹

The term “treaty” has been classically defined in the Vienna Convention on the Law of Treaties of 1969: “Article 2 (1). For the purposes of the present Convention: (a) «Treaty» means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.³²

Taking into account the participation of non-state entities in negotiations and drafting of treaties, and from the viewpoint of the governance process, the importance of NGOs gains more space in the international scenario, as they also end up acting as a bridge between society and states.

1. *The UN Convention on the Rights of the Child*

The UN Convention on the Rights of the Child adopted in 1989 by the UN General Assembly is an example of the NGOs’ impact and role in the inter-

³¹ Shaw, Malcolm N., *International Law*, 6a. ed., Cambridge, Cambridge University Press, 2008, p. 94 and 95.

³² United Nations Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sep. 18th, 1997, available at: http://www.un.org/Depts/mine/UNDocs/ban_trty.htm; Vienna Convention on the Law of Treaties (VCLT), adopted 23 May 1969, entered into force 27 January 1980, UNTreaty Series, vol. 1155, article 2(1)(a). The Convention deals exclusively with treaties conclude between States. There is also another international legal act (an extension of the VCLT), namely, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, opened for signature on 21 March 1986, not yet in force, available at: http://legal.un.org/ilc/texts/instruments/english/conventions/1_2_1986.pdf.

national treaty-conclusion process.³³ The treaty as well as two of its three Optional Protocols³⁴ are often presented as the international legal instrument which allows most strongly for the participation of NGOs.³⁵ For reasons of limited space, we will focus in this section on the impact by NGOs on the conclusion process of the Convention itself.³⁶

The account of the influence exerted by NGOs on the treaty law would be incomprehensive without looking at the important aspects of the role played by NGOs in the process of adopting this key instrument of human rights law. Overall, that role was remarkable indeed. Several significant aspects may be traced down in the process of the NGOs participation in the negotiation, drafting and conclusion of the Convention. But before considering those, it makes sense to provide a brief background account of the connection between this instrument and NGOs.

The United Nations Convention on the Rights of the Child represents a treaty that establishes the civil, political, economic, social, health and cultural rights of children. It defines a child as any human being under the age of eighteen, unless the age of majority is attained earlier under national legislation.³⁷ The ratifying states are bound to the treaty by international law while compliance with its norms is monitored by a special UN Committee on the Rights of the Child composed of members from countries around the world.

While the first-ever elaborated draft text of the Convention was not proposed by an NGO, either national or international (it was suggested by

³³ United Nations Convention on the Rights of the Child, adopted 20 January 1989, entered into force 2 September 1990, 1577 UN Treaty Series 3.

³⁴ Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, adopted 25 May 2000, entered into force 12 February 2002, GA Res. A/RES/54/263; Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, adopted 19 December 2011, entered into force 14 April 2014, A/RES/66/138.

³⁵ Türkelli, Gamze Erdem and Vandehole, Wouter, "The Convention on the Rights of the Child: Repertoires of NGO Participation", *Human Rights Law Review*, vol. 12, issue 1, 2012, p. 34.

³⁶ For an interesting analysis of the NGOs' participation in the process of conclusion of the Optional Protocols to the CRC, see *Ibidem*, p. 41-45; Breen, Claire, "The Role of NGOs in the Formulation of and Compliance with the Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict", *Human Rights Quarterly*, vol. 25, issue 2, May 2003, p. 453-481.

³⁷ Convention of the Rights of the Child, articles 1 and 46.

the government of Poland), NGOs played a rather active role in the decade-long drafting and negotiation of the project.³⁸ One particular aspect must be noted: even if some NGOs attempted in 1978 to postpone the negotiation of the treaty (with the reason being a need to wait until obtaining the results of NGO research and studies on children's rights) and failed to attain such a postponement, their views have been taken into account in the subsequent drafting process.³⁹

Another remarkable aspect consists in the fact that during the whole stage of negotiation of the Convention and even before, in the whole process of the codification of children's rights at the international level (since 1947 to 1989), NGOs enjoyed a special consultative status.⁴⁰ Indeed, this status served as a baseline for NGOs participation. But even more so: despite some states' disinclination to acknowledge an increased role of the NGOs going beyond the general consultative status, that role was significantly enhanced by way of granting the NGOs formal participation rights in the debates on the Convention's text. Since 1978, they have been officially entitled to propose their views, observations and suggestions on the draft Convention.⁴¹

The frame of NGOs' work on the Convention's text was set by the creation of a special NGO Ad Hoc Group on the Drafting of the CRC. It produced regular reports in the process of drafting which were later distributed to the Working Group on the CRC (a so-called Open-ended Working Group).⁴² Those reports have had a considerable impact on the drafting and they have been incorporated in the article-by-article compilation of proposals, together with the governmental proposals.⁴³

³⁸ For a concise yet informative description of the connection between NGOs and the process of drafting and conclusion of the CRC, see Türkelli, Gamze Erdem and Vandehole, Wouter, *op. cit.*, p. 36-41.

³⁹ *Ibidem*, p. 23-37. NGOs submitted a letter arguing for a postponement, to the UN Commission on Human Rights.

⁴⁰ *Ibidem*, p. 36 and 37.

⁴¹ *Ibidem*, p. 38.

⁴² Office of the High Commissioner for Human Rights, "Legislative History of the Convention on the Rights of the Child", vol. II, HR/PUB/07/1, New York-Genoa, United Nation, 2007, p. 936 and 937. The document includes a list of organizations that regularly participated in the NGO Ad Hoc Group over the years; Also see Türkelli, G. and Vandenhoe, W., *op. cit.*, p. 39.

⁴³ *Idem*.

Two main substantive formats of NGOs' participation in the conclusion and subsequent implementation of CRC and its two Protocols should be pointed out. The first one was expressed in the role played by them in the *lawmaking process* and the second is found in the formal recognition of NGOs' cooperation with the Committee on the Rights of the Child in *monitoring the compliance* with the Convention's provisions and the place accorded to them in the *reporting procedure*. While the second format will not be analyzed here – as it does not pertain directly to the question of NGOs having a voice in the treaty conclusion, it remains important nevertheless: article 45 of the CRC treats NGOs on the same footing as the UN specialized agencies and bodies.⁴⁴

It is the first role that is relevant for the purposes of our discussion. The NGOs' impact on the drafting of the Convention (thus their substantive impact) is recognized in general as having been very strong as correctly noted by Türkelli and Vandenhoe.⁴⁵ That impact in its own turn can be divided into two main areas: the area of *agenda-* and *policy-setting*, and the area of *norm-setting*.

The agenda-setting part was in fact profound. According to OHCHR, at least 13 proposals made by the NGO Ad Hoc Group were included into the eventual text of the Convention, either as individual paragraphs or even the entire articles.⁴⁶ Many NGO concerns have found their place into the outcome document: e.g., the use of gender-free language articles protecting children against sexual and other forms of exploitation, trafficking and torture, provision of recovery and reintegration services to the victims of such situations.⁴⁷ This way the NGOs were able to affect both the substance and policy issues in the course of negotiations on the Convention.

Furthermore, of equal importance is the fact that NGOs were also quite successful in elaborating norms in those provisions of the treaty's text, which dealt with juvenile justice. It was so for two specific articles: articles

⁴⁴ Convention of the Rights of the Child, article 45 (a, b).

⁴⁵ Türkelli, Gamze Erdem and Vandenhoe, Wouter, *op. cit.*, p. 62 and 63.

⁴⁶ See Office of the High Commissioner for Human Rights, *supra* note 42, p. 936.

⁴⁷ Convention of the Rights of the Child, articles 19, 33, 34, 37 and 39. However, to be fair, some of the agenda points advanced by the NGOs in the process of negotiation have not been eventually accepted: for example, this was true with regard to the provision on the protection of the children born out of wedlock or the prohibition of the use of children for medical experimentation.

37 and 40. The successful efforts led by NGOs in this regard served to provide a more coherent and universal insurance of human rights law in general: those efforts made sure that most of the protections established in the International Covenant on Civil and Political Rights of 1966 became applicable to children because of the NGOs' suggestions on juvenile justice and administration of justice.⁴⁸

These active contributions suggest an extensive capacity of NGOs at the treaty-drafting level, at least in what concerns the development of international human rights law. However, we can safely conclude that their impact went beyond merely offering and defending the drafting proposals and making inputs into policy matters. In order to understand it, one must consider a more general picture of the overall context in which the process of negotiations of the CRC was taking place. It was the time when the Cold War was still going on (although it was in its last years) and those negotiations were often marked by heated debates on the draft texts coming from states representing the two main opposing camps: East and West. The proposals from NGOs at that time embodied an apolitical and more or less neutral compromise for the process which otherwise risked becoming stalled due to radically opposing views.⁴⁹ Eventually this led to the adoption of the legal instrument, which has brought the protection of human rights, child's rights in particular, to a new international level. In that sense, the influence of NGOs on the process of drafting and adopting a key instrument of human rights law was very significant.

2. *The Mine-Ban Convention (Ottawa Treaty)*

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and On Their Destruction, also known as the Mine-Ban Convention or Ottawa Treaty, aims at completely eradicating landmines. It was opened for signatures in December 1997 and entered

⁴⁸ See Office of the High Commissioner for Human Rights, *op. cit.*, p. 741 and 742; Türkelli, Gamze Erdem and Vandehole, Wouter, *op. cit.*, p. 62 and 63.

⁴⁹ See Cohen, Cynthia Price, "The Role of the United States in the Drafting of the Convention on the Rights of the Child", *Emory International Law Review*, vol. 20, 2006, p. 192 and 193; Türkelli, Gamze Erdem and Vandehole, Wouter, *op. cit.*, p. 40.

into force in March 1999. Despite the progress made on the subject, also with the participation of NGOs, many challenges still remain.

In 1991, because of the efforts to eradicate landmines some NGOs began to make plans to extinguish these war objects. In 1992 the International Campaign to Ban Land Mines (ICBL) was established by NGOs dealing with human rights, war veterans, advisory groups on mines, among others.

The Ottawa Process, which had as result the Mine-Ban Convention, was “...a response to a failure of the review conferences of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW)”.⁵⁰ It can be considered a major achievement not only because of its humanitarian purpose, but also because it has been heralded as a model for cooperation between NGOs and governments.⁵¹

The efforts of two particular organizations were of primary significance: the International Campaign to Ban Landmines (ICBL) and the International Committee of the Red Cross (ICRC).⁵² The first one was established in 1991 and nowadays is a coalition of more than a thousand NGOs.⁵³ It existed primarily to bring the Convention into force and implement it. After, its campaign grew to include “the signing, ratification, implementation and monitoring of the mine ban treaty” (ICBL, 2016). In fact, the signing of the Ottawa Treaty is considered the Campaign’s greatest success.

The International Committee of the Red Cross also played an important role in the Ottawa process, since its “...field surgeons have been direct

⁵⁰ Short, Nicola, “The Role of NGOs in the Ottawa Process to Ban Landmines”, *International Negotiation*, vol. 4., issue 3, 1999, p. 482.

⁵¹ *Ibidem*, p. 481.

⁵² Strictly speaking, the ICRC is not *per se* an NGO. Its more appropriate description would be: a private humanitarian organization with a limited international mission and mandate conferred upon it by the community of States. Its work in a narrow sense is governed by the national law of Switzerland where it is headquartered. However, for the purposes of this article it makes sense to refer to the ICRC as an NGO even if the Committee does not share some of characteristics typical for a non-governmental organization (e.g., membership). See for more detailed information on ICRC’s status: Bugnion, François, “Le Comité international de la Croix-Rouge et la protection des victimes de la guerre”, Genève, Comité international de la Croix-Rouge, 1994, p. 1115-1137; Debuf, Els, “Tools to Do the Job: The ICRC’s legal Status, Privileges and Immunities”, *International Review of the Red Cross*, vol. 97, 2016, p. 319-344.

⁵³ Lindblom, Anna-Karin, *op. cit.*, p. 18.

witnesses to the horrendous and widespread suffering inflicted on civilians worldwide by anti-personnel mines”.⁵⁴

Its appeal, to which National Red Cross and Red Crescent Societies added their voices, came on the heels of a similar call first made by the International Campaign to Ban Landmines (ICBL). Faced with growing public abhorrence of the devastating effects of anti-personnel mines on civilians, governments led by Canada began a process in 1996 which resulted in the adoption just one year later of the Convention on the Prohibition of Anti-Personnel Mines (hereinafter referred to as the “Ottawa Convention”).⁵⁵

The Ottawa Process involved six meetings in total and the roles of NGOs in it can be divided into two phases. The first one involved the participation of two representatives of ICBL on the negotiations of the draft treaty text in Vienna and Bonn. The second phase concerns the larger negotiations in Brussels and Oslo meetings where many NGOs participated. Also, ICRC sent delegations to all the meetings.⁵⁶

NGOs did many important things during the discussions of the Mine-Ban treaty. They “...highlighted and often reiterated the shortcomings of the CCW, they called for a comprehensive ban on anti-personnel mines, and they demonstrated their capacity for public relations and raised public awareness”.⁵⁷ Perhaps, even more importantly, they initiated the call for a ban. It appears safe to say that NGOs made efforts to shift the terms of the discussions from a military to a humanitarian point of view.

NGOs’ tangible contributions to the Ottawa Process involved influencing the treaty text, organizing forums that involved Southern countries, and creating public awareness materials that supported the call for a treaty... NGOs provided statistics about the nature and extent of the APM (anti-personnel mines) problem, especially its social and economic consequences. They portrayed the indiscriminate

⁵⁴ International Committee of the Red Cross, “Overview of the Convention on the Prohibition of Anti-Personnel Mines”, 2007, available at: <https://www.icrc.org/eng/resources/documents/legal-fact-sheet/landmines-factsheet-150807.htm>.

⁵⁵ *Idem*.

⁵⁶ Short, Nicola, *op. cit.*, p. 485 and 486.

⁵⁷ *Ibidem*, p. 485.

nature of APMs, and their human and societal costs. NGOs were able to do this because of their first-hand experience with demining, mine awareness programs in affected communities, and survivor rehabilitation efforts. Some governments conduct military demining (indeed, many NGO demining trainers learned demining through military training); however, traditionally militaries, although they may be familiar with the consequences of a weapon, are not likely to renounce it.⁵⁸

Currently, more than 20 years after the Ottawa treaty entered into force, 80% of the world's countries are already states Parties to the treaty (162) and only 35 remain outside.⁵⁹ Actually, it set the historical record for the fastest treaty to enter into force, because it garnered the 40 necessary ratifications in only ten months (signed in December 1997, achieved necessary signatures in October 1998 and entered into force in March 1999).⁶⁰

Besides helping the discussions and setting the treaty into force, NGOs, especially ICBL and ICRC, continue nowadays to work for the implementation of the convention, assisting countries when needed, as well as helping the victims of land mines, educating people about the risks and working with partners specialised in mine clearance.⁶¹

3. *Rome Statute of the International Criminal Court*

The Rome Statute, which created the International Criminal Court, was adopted at a diplomatic conference in Rome on July 17th, 1998, by 120 votes in favor, 7 against and 21 abstentions. It entered into force on April 11th, 2002, after reaching 66 ratifications.⁶²

Even though the discussions on establishing an international criminal court began a few years after the founding of the United Nations, only in 1994 the work on a draft Statute for the court was actually completed. Between 1996

⁵⁸ *Ibidem*, p. 488-490.

⁵⁹ International Campaign to Ban Landmines (ICBL), 2016, available at: <http://www.icbl.org>.

⁶⁰ Short, Nicola, *op. cit.*, p. 497.

⁶¹ International Committee of the Red Cross, "Why the Mine Ban Convention Was Worth Fighting for and Still Is", 2016, available at: <https://www.icrc.org/en/document/why-mine-ban-convention-was-worth-fighting-and-still>.

⁶² Lindblom, Anna-Karin, *op. cit.*, p. 465.

and 1998 the Preparatory Committee on the Establishment of an International Criminal Court (PrepCom) held six sessions and presented a consolidated text for a Statute in its final report, together with a draft of Rules of Procedure. After, in 1997, the UN General Assembly decided to organize a diplomatic conference (June 15th to July 17th, 1998), open to all member states of the UN or its specialized agencies, to discuss the adoption of the convention on the establishment of an international criminal court.⁶³

The International Criminal Court is headquartered in The Hague in Netherlands. It has a jurisdiction to try individuals for committing crimes against humanity, war crimes, genocide and crime of aggression. Its creation constituted a great step forward, as this is the first time in the history of relations between states that the necessary consensus was reached to take to trial, at a permanent international court, politicians, military leaders and even ordinary people, who committed crimes of major gravity. It is also known as the court of last resort, since it leaves the primary responsibility to national legal systems to exercise jurisdiction over alleged crimes and acts when national courts are unwilling or unable to do so.⁶⁴

Several NGOs had active participation and influence in the creation of the aforementioned treaty, such as Amnesty International, the Human Rights Watch and the World Federalism Movement. Together, they formed a coalition (1995) with the aim of putting an end to the impunity of those who committed atrocities. The Coalition for the International Criminal Court (CICC) is based in New York, but with offices all over the globe, it has the effective participation of more than 2,500 NGOs around the world, advocating for a fair, effective and independent International Criminal Court.⁶⁵

Since the beginning NGOs have been monitoring the debates about the established of the International Criminal Court. During the Rome Conference they were able not only to monitor but also to participate in the process. Pace and Thieroff⁶⁶ say that NGOS, most from CICC, attended the meetings

⁶³ *Ibidem*, p. 463-465.

⁶⁴ Kestenbaum, Jocelyn Getgen, "Closing Impunity Gaps for the Crime of Aggression", *Chicago Journal of International Law*, vol. 17, 2016, available at: <http://chicagounbound.uchicago.edu/cjil/vol17/iss1/2>.

⁶⁵ About Coalition for the International Criminal Court, available at: http://www.iccnw.org/documents/CICC_Factsheet.pdf.

⁶⁶ Pace, William and Thieroff, Mark, "Participation of Non-Governmental Organizations", in Lee, Roy S. (ed.), *The International Criminal Court: The Making of the Rome Statute. Issues, Negotiations, Results*, The Hague, Kluwer Law International, 1999, p. 391-392.

of its plenary and, in specific situations they could attend formal meetings of the committees. They also received copies of official documents and made, through a limited number of their representatives, oral statements to the opening and closing sessions of the conference.

There was general agreement among the informants that NGOs played a very important role in the negotiation of the Rome Statute, both before and during the conference... Several persons pointed out that the negotiation of the Rome Statute was a process with special characteristics because of its complexity and partly legal–technical nature, which created a special opportunity for NGOs to provide specialized knowledge and information, in particular in relation to smaller delegations... Another point of general agreement, among both state and NGO representatives, was that the forming of the CICC was central to NGOs' success. One NGO representative pointed to the fact that through the formation of the Coalition the NGOs together had by far the largest delegation, amounting to over 200 people and involving some 95 per cent of all NGO members participating in the conference.⁶⁷

NGOs exerted influence on the negotiations of the Statute, among other strategies, by distributing written material through the Secretariat or privately, either generally or to a selected group of people or delegations. Their work during the Rome Conference focused more on information, education and service, than on advocacy itself.⁶⁸ CICC also produced three daily newspapers during the conference: Terra Viva, CICC Monitor and On the Records. "Widely read and trusted, these publication quickly became a common source of information. In addition to this, the common experience of reading the newsletters could be said to be a great unifying factor at the Conference".⁶⁹

Although NGOs did not work directly on the drafts of the Statute, their presence and expertise influenced the negotiations. One example, as reported by Anna-karin Lindblom,⁷⁰ is the role and independence of the pros-

⁶⁷ Lindblom, Anna-Karin, *op. cit.*, p. 470 and 471.

⁶⁸ *Ibidem*, p. 472 and 473.

⁶⁹ Benedetti, Fanny *et al.*, *Negotiating the International Criminal Court: New York to Rome, 1994-1998*, Leiden, Martinus Nijhoff Publishers, 2014, p. 116.

⁷⁰ Lindblom, Anna-Karin, *op. cit.*, p. 478 and 479.

ecutor, because there was not a consensus on this point. But, one of the most important aspects is that NGOs created the necessary, and favorable, atmosphere for the Conference to go successfully and for the Statute to be adopted.

Currently, NGOs, especially CICC, continue to play an important role in the process of monitoring, ratification of the Rome Statute and supporting the International Criminal Court:

The Coalition's overarching outreach objectives include: promoting education and awareness of the ICC and the Rome Statute; facilitating the effective participation of civil society in the sessions of the Assembly of states Parties; encouraging the Assembly of States Parties to provide effective political and financial support to the ICC; providing technical expertise and serving in an advisory role to governments, the ICC, and other institutions; promoting universal acceptance and ratification of/accesion to the Rome Statute, and the full and effective implementation of the treaty's obligations into national law; raising awareness among national, regional and international law enforcement to encourage greater cooperation with the Court; and maintaining a presence in The Hague to facilitate civil society participation in and cooperation with the Court's work.⁷¹

It can be said that today the main purpose of the CICC is to assist the international community in the difficult task of closing the impunity gap for the most heinous international crimes.⁷²

IV. CONCLUSION

The present study aimed at reflecting on the impact of NGOs on the conclusion of international treaties, through the analysis of three important international legal instruments dealing with different branches of international law: the UN Convention on the Rights of the Child (international human rights law), Mine-Ban Convention (international humanitarian law)

⁷¹ Coalition for the International Criminal Court, "An Overview of the ICC and the CICC", 2006, available at: http://www.iccnw.org/documents/CICCFIS-ICC_Overview_current.pdf.

⁷² Coalition for the International Criminal Court, "Implementation of the Rome Statute", 2012, available at: <http://www.iccnw.org/?mod=romeimplementation&idudctp=13&order=authorasc>.

and the Rome Statute (international criminal law). To achieve the purported purpose, an explanation about NGOs and their status on international law was necessary.

In order to demonstrate that NGOs do influence international relations, even though they do not have a legal capacity to conclude international treaties, the process of negotiations and conclusion of the Convention in the Rights of the Child, Mine-Ban Convention and the Rome Statute was considered. In all three cases, the efforts of NGOs were of primary significance, since they did not only assist the discussions and negotiations, but also helped in setting the treaties into force.

The study of the subject also showed that due to the prominent position NGOs achieved at international level, they are able not only to disseminate their actions, but also to suggest projects and convince public opinion that the causes that they defend are important and deserve the support of society. Thus, NGOs have gained supporters around the globe, while denouncing deviations from the law committed by states, transnational companies or any other agents, and consolidated their status as representatives of civil society.

This article also discussed how NGOs can contribute to international negotiations. Their participation in the process of international treaty making involves the provision of information and expertise, effective lobbying, public advocacy and mobilization, agenda and goal setting, enforcement of principles and norms, and monitoring. However, despite their presence and activism on the conclusion of international treaties, NGOs participation in the negotiations remains largely unofficial and subjected to the preferences of national governments.

It can by now be safely assumed that currently NGOs have some limited representation on the global political scenario, given the tendency of the globalized world to be organized in a global governance process. Furthermore, as stated by Malanczuk,⁷³ NGOs add additional expertise and make procedures more transparent, as well as they have a strong effect with regard to the supervision and fact-finding concerning the implementation of international norms. Their efforts in the treaty-making processes may even sometimes represent a politically balanced and neutral solution to otherwise very serious stumbling blocks which may arise during such process in politically difficult context. The latter fact was demonstrated by the long

⁷³ Malanczuk, Peter, *op. cit.*, p. 97.

but eventually successful experience of negotiations on the Convention on the Rights of the Child. In this sense, the said Convention, the Ottawa Treaty and the Rome Statute are the three examples of how NGOs represent civil society and take part in international affairs, influencing and monitoring the pertaining negotiations.

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