

# The Role of Non-Governmental Organizations in Advancing International Criminal Justice<sup>\*</sup>

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## Abstract

*This article examines the role of non-governmental organizations (NGOs) in advancing international criminal justice. I argue that NGOs have had considerable impact by contributing, among other things, to the global struggle against impunity through advocacy for the creation of more robust institutional mechanisms to prosecute those who perpetrate such crimes. This ranges from supporting the processes that led to the creation of several ad hoc international tribunals for Yugoslavia, Rwanda and Sierra Leone, all the way through to their support for the establishment of an independent permanent international penal court based in The Hague. The crux of my claim is that a historically sensitive approach to evaluating the role of NGOs in international governance shows that these entities are not only willing, but also capable of enhancing the protection of human rights and international criminal justice especially but not exclusively in less developed regions of the world.*

**Keywords:** Non-governmental organizations, NGOs and international criminal justice, civil society and human rights, non-state actors in international law.

## 1 Introduction

In the last several decades, the growing influence of non-governmental organizations (NGOs),<sup>1</sup> whether international, national, or local in character, has gener-

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1 There are, of course, a diverse set of actors that fall into this broad category. But for our purposes, by NGO, I am not referring to liberation movements, corporations, rebel organizations, or terrorist groupings. Additionally, an NGO is not established by an intergovernmental agreement, it is free from governmental influence, and it does not have members who represent the government. It is also implied that NGOs have an aim that is not for profit, do not use or promote violence, and have a formal existence with a statute and a generally democratic and representative structure.

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ated increasing concerns about their accountability, transparency, and legitimacy.<sup>2</sup> The successes of NGOs in advocating for human rights generally and, among others, pushing states to adopt specific multilateral treaties banning landmines; addressing disability rights; gender issues and human trafficking; as well as an independent permanent international criminal court suggest that networks of interest-driven non-state actors can significantly impact if not help make new international law. Their apparent ability to mobilize around public policy issues and capacity to shame sovereign states to respect human rights and be more accountable to their populations, especially in developing but also developed countries, has also raised important questions about who they represent and resulted in claims of “normative grey zones” that are alleged to have broken the habitual link between law and state.<sup>3</sup>

Despite the growing controversy to the contrary, NGOs have generally proven themselves to be not only beneficial but also necessary supplements in modern international governance. As part of this, some of these organizations, backed with considerable finances from powerful donors as well as the latest technology ranging from the Internet to Twitter, have developed sophisticated advocacy tools that help shape national and international public opinion on diverse issues. These span from the rights of minorities and other vulnerable populations to questions of human trafficking; civil and criminal accountability for genocide, torture, and other serious crimes; as well as free trade, global warming, and the environment. Indeed, it would be no exaggeration to argue that, although sometimes criticized by developing countries for effectively becoming tools for the advancement of the foreign policy interests and the liberal agenda of developed Western States, NGOs have, for the most part, become “an indispensable component in the functioning of the international human rights regime.”<sup>4</sup> In addition, because they tend to fill a normative gap especially in the face of general governmental reluctance to criticize other states’ human rights records, many NGOs serve as sources of pressure for action by local, state, and national governments as well as international organizations – a role that they will likely continue to play in the foreseeable future. As Philip Alston and Ryan Goodman have rightly observed, “[i]t is inconceivable that the state of human rights in the world, whatever its shortcomings, could have progressed as much since the Second World War without the spur and inventiveness of NGOs.”<sup>5</sup>

Many other commentators might agree with this generally positive assessment of the useful role that NGOs and civil society play in international affairs. For instance, although mentioning them within the context of a discussion lamenting the rampant impunity for heinous international crimes and the gen-

2 See P. Alston & R. Goodman, *International Human Rights: The Successor to International Human Rights in Context*, 2013, pp. 1503-1511.

3 A. Lindblom, *Non-Governmental Organisations in International Law*, Vol. 15, 2005; see generally M.C. Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, *Law & Contemp. Probs.*, Vol. 59, No. 9, 1996, p. 11; S. Dicklitch, *The Elusive Promise of NGOs in Africa: Lessons From Uganda*, 1998, p. 3.

4 Alston & Goodman 2013, p. 1503.

5 *Id.*

eral lack of a commitment on the part of most countries to prosecute the perpetrators of such odious offenses, M. Cherif Bassiouni has argued that even the attempt to establish the basic truth of what happened after conflict is often left to NGOs, among others, to whom much debt is owed for fulfilling that important task.<sup>6</sup> One only has to look at the extensive publicity generated by NGOs in conflicts ranging from Darfur to Syria to Colombia to appreciate the truth of this assertion.

Today, there is little doubt that NGOs are a fast-growing phenomenon in international relations. There is, however, debate about their impact on the present and future of international law.<sup>7</sup> A controversial topic, the presence of NGOs in international governance processes has resulted in disparate views regarding the wisdom of their participation in global affairs.<sup>8</sup> On the one hand, some applaud the positive role of NGOs and welcome their impact on the growth of soft and hard international law and even the establishment of new international institutions. In the 1990s, for example, the World Bank, a key player in development assistance, recognized the importance of NGO participation by providing some of them with funding even as it maintained that they ought to “be independent of the government; and be transparent and accountable.”<sup>9</sup> Similarly, speaking in an NGO forum in 1999 in which he stated that it was imperative for the United Nations to partner with NGOs and civil society to address modern problems, then Secretary-General Kofi Annan envisioned “[A] United Nations which recognizes that the non-governmental organizations revolution – the new global people-power, or whatever else you wish to call this explosion of citizens’ concern at the global level – is the best thing that has happened to our organization in a longtime.”<sup>10</sup> This is a significant statement since the UN is an entity created for as well as run by states.

Others, on the other hand, question NGOs and express unease about their deep level of involvement in international governance in a state-centric Westphalian system.<sup>11</sup> For instance, Kenneth Anderson has argued that NGOs are fundamentally elitist organizations that lack democratic legitimacy.<sup>12</sup> Peter Spiro has submitted that armed with the power of large but generally docile memberships,

6 M.C. Bassiouni, ‘Searching for Peace and Achieving Justice: The Need for Accountability’, *Law and Contemp. Probs.*, Vol. 54, No. 4, 1996, pp. 10-11.

7 The caveat is that there is a tremendous quantity of literature on questions of NGO accountability. For the limited purposes of this paper, I need only identify the broad trends, not to enter into a detailed exegesis of that literature. Interested readers can in any event easily find those additional sources.

8 Z. Pearson, ‘Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law’, *Cornell Int’l L.J.*, Vol. 39, No. 243, 2006, p. 247.

9 P. Tujil & L. Jordan, *NGO Accountability: Politics, Principles and Innovations*, 2006, p. 62.

10 See UN Press Release, ‘Secretary-General Says “Global People-Power” Best Thing for United Nations in Long Time, Needing Response in Partnership with Civil Society’, Press Release, SG/SM/7249, Rev. 1, 7 Dec. 1999.

11 See Pearson 2006, p. 247.

12 K. Anderson, ‘The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society’, *Eur. J. of Int’l. L.*, Vol. 11, No. 92, 2000.

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some NGO secretariats and those who head them act like modern day “non-territorial potentates” holding positions akin to “medieval bishops.”<sup>13</sup> In this same school of thought are some governments in the Global South in places as diverse as Sudan and Burma who tend to be critical of NGOs and have attempted to tighten control over them.<sup>14</sup> The perception that these entities often fail to empower local communities, which appears to be backed up by some studies, implies that NGOs are an unstable source of pressure because of their reliance on foreign aid, tendency towards competition, and general lack of democratic decision-making.<sup>15</sup>

NGOs are themselves, of course, aware of the criticisms. In seeking to assuage their fiercest opposition, the International Non-Governmental Organization (INGO) Accountability Charter, an initiative led by some of the household name human rights organizations such as Amnesty International, Greenpeace, and Transparency International, sought to demonstrate their commitment to accountability, transparency, and effectiveness.<sup>16</sup> They tried to clarify and reframe their role as complementing not replacing the “over-arching role and primary responsibility of governments,” promoting the function and responsibilities of the private sector, and addressing problems that governments and others are “unable or unwilling to address on their own.”<sup>17</sup> They pointed out that adoption of the INGO Accountability Charter would help increase the effectiveness and efficiency of NGOs so that they may remain legitimate and strengthen accountability generally as well as specifically in relation to their stakeholders. The stakeholders include multiple actors including their members, partner organizations, regulatory bodies, the media, and all those who cannot easily speak for themselves.<sup>18</sup>

This article discusses the general role of NGOs in advancing human rights and international criminal justice. I will argue that NGOs have had considerable impact by contributing, among other things, to the global struggle against impun-

13 P.J. Spiro, ‘New Global Potentates: Non-Governmental Organizations and the “Unregulated” Marketplace’, *Cardozo L. Rev.*, Vol. 18, No. 957, 1996, p. 963.

14 See, in this regard, the Statement of the UN High Commissioner for Human Rights, N. Pillay, ‘New Restrictions on NGOs Are Undermining Human Rights: Pillay’, 25 April 2012, at <[www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12081](http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12081)> (last visited 20 December 2014).

15 Dicklitch 1998. On the other hand, other authors find a more promising role for NGOs in pushing for the advancement of human rights. See O.C. Okafor, *The African Human Rights System: Activists Forces and International Institutions*, 2007 (crediting human rights activists, NGOs, and civil society organizations with creative use of regional human rights mechanisms in Africa to impact the human rights of people in Nigeria and South Africa).

16 The Charter was registered as the International NGO Charter of Accountability Company LTD, a company limited by guarantee in the United Kingdom in 2008. It is owned by its Member Organisations and governed by a Board of Directors. See *What Is the Charter?* INGO <[accountabilitycharter.org](http://accountabilitycharter.org)>, <[www.ingoaccountabilitycharter.org](http://www.ingoaccountabilitycharter.org)> (last visited 20 December 2014).

17 *INGO Accountability Charter*, <[ingoaccountabilitycharter.org](http://ingoaccountabilitycharter.org)>, <[www.ingoaccountabilitycharter.org](http://www.ingoaccountabilitycharter.org)> (last visited 20 Dec. 2014).

18 *What Is the Charter?* INGO <[accountabilitycharter.org](http://accountabilitycharter.org)>, <[www.ingoaccountabilitycharter.org](http://www.ingoaccountabilitycharter.org)> (last visited 20 December 2014).

ity through advocacy for the creation of more robust institutional mechanisms to prosecute those who perpetrate such crimes. This ranges from supporting the processes that led to the creation of several ad hoc international tribunals for Yugoslavia, Rwanda, and Sierra Leone all the way through their strong advocacy for the establishment of a robust and independent International Criminal Court (“ICC”) based in The Hague. The crux of my argument is that, although some of the criticisms of NGOs is deserved, a historically sensitive approach to evaluating the role of such entities in modern governance shows that these entities are not only willing but also capable of enhancing the protection of human rights and international criminal justice especially but not exclusively in less developed regions of the world.

In attempting to prove this claim, in the next part of this paper, I will discuss the general place of NGOs in international and regional organizations (Section 2). I then turn to the origins and rise of the modern NGO focusing specifically on some of their contributions to international criminal justice (Section 3). This will set the stage for the subsequent discussion of their current role and impact on contemporary attempts to ensure individual criminal accountability for serious international crimes (Section 4). Finally, in Section 5 of the article, I restate my key argument and conclude with some brief observations on the likely role of NGOs in future efforts towards individual accountability for international crimes.

## 2 NGOs as Active Participants in Global Governance

Although there is apparent disagreement on the appropriate role that NGOs currently play, or more normatively *ought* to play in international governance, the reality is that NGOs nevertheless possess both formal and informal roles in the international system. These typically take the form of state-conferred rights to participate in international organizations and their involvement in international processes from initiating human rights and environmental claims on behalf of individuals against states to law-making. From this wider perspective, NGOs and INGOs have been familiar actors in the international arena, despite the classical but certainly receding doctrinal construct that only states were subjects of international law and hence only they possessed rights and duties on the international plane. The United Nations (UN), which is a leading international organization that has played a tremendously important part in the development of modern human rights and international criminal justice architectures, has recognized the importance of the place of NGOs historically as well as the need to further strengthen NGO participation in modern international relations.

### 2.1 *NGOs as Active Participants in the United Nations System*

NGOs formally seemed to have made their first major debut in international organizations with the adoption of Article 71<sup>19</sup> of the Charter of the United

19 See *Charter of the United Nations, Chapter X: The Economic and Social Council*, <[www.un.org](http://www.un.org)>, <[www.un.org/en/documents/charter/chapter10.shtml](http://www.un.org/en/documents/charter/chapter10.shtml)> (last visited 20 December 2014).

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Nations (hereinafter the “UN Charter”), which was built and expanded on a system of participation that had been created under the League of Nations.<sup>20</sup> Article 71 created the Economic and Social Council (ECOSOC) and, among other things, empowered it to consult with NGOs on matters that fell within its competence. Because that UN organ performs several important functions, including initiating studies on international economic, social, cultural, educational, health, and related matters and making recommendations to the General Assembly and preparing draft conventions and convening international conferences on human rights issues, this opened the door for NGO participation in UN affairs.<sup>21</sup> In September 2000, the UN’s Millennium Declaration reiterated the important role that NGOs play in the UN system. It emphasized the vitality of strengthening these relations and the commitment of UN Member States to give greater opportunities to NGOs in the 2005 World Summit Outcome Document.<sup>22</sup>

However, from the beginning, the main entry point in the UN system for NGOs has been through ECOSOC.<sup>23</sup> Today, that organ remains the principal UN body with a formal framework for NGO participation. Detailed provisions for NGO participation in ECOSOC’s work is found in Resolution 1996/31 of 1996.<sup>24</sup> To engage in participation within ECOSOC, an NGO must obtain one of three consultative statuses: General, Special, and Roster. General Status applies to large international NGOs whose interests cover and intersect with most of ECOSOC’s agenda.<sup>25</sup> These NGOs obtain the most participation: they may speak before delegates, circulate statements, and place items on the agenda.<sup>26</sup> They, therefore, have an opportunity to lobby states and to influence policies on specific issues, both formally and informally, through their access to official meetings and UN documents. NGOs that hold Special Status, which are defined as organizations with “special competence in some fields of activity of the Council,” are responsible for providing a quadrennial report and cannot place items on the agenda.<sup>27</sup> However, they can impact the UN and its Member States by speaking to matters falling within their specific areas of competence. Lastly, an NGO may be a Roster NGO, which is an entity concerned with one or more specific issues.<sup>28</sup> These

20 S. Burgos Caceres, ‘NGOs, IGOs, and International Law: Gaining Credibility and Legitimacy through Lobbying and Results’, *Geo. J. Int’l Aff.*, Vol. 13, No. 79, 2012.

21 See *NGO Branch Department of Economic and Social Affairs*, <<http://csonet.org/index.php?menu=119>> (last visited 20 December 2014).

22 See *Economic and Social Council (ECOSOC)*, <[un-ngls.org](http://un-ngls.org)>, <[www.un-ngls.org/spip.php?page=article\\_s&id\\_article=799](http://www.un-ngls.org/spip.php?page=article_s&id_article=799)> (last visited 20 December 2014).

23 The UN Charter Article 71 states: “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.” *Id.*

24 *Economic and Social Council (ECOSOC)*, <[un-ngls.org](http://un-ngls.org)>, <[www.un-ngls.org/spip.php?page=article\\_s&id\\_article=799](http://www.un-ngls.org/spip.php?page=article_s&id_article=799)> (last visited 20 December 2014).

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

NGOs do not have the right of audience, nor can they circulate statements. In 1996, sub-regional, regional, and national NGOs were finally allowed to be accredited and to apply for consultative status with ECOSOC.<sup>29</sup>

Since 1945, the engagement of NGOs in the work of the UN has evolved. The 1970s and 1980s witnessed a significant increase in their participation in the activities of the organization.<sup>30</sup> Despite the fact that the NGOs involved with the UN were mostly northern-based international organizations and their relations remained formal in nature, their ability to shape the global agenda and their importance as operational actors were strongly recognized.<sup>31</sup> A big barrier, however, remains in that most of the NGOs participating in the UN system are from the Global North as opposed to the Global South. This pattern generally tracks the dominance of the former over the latter, which until the last 50 years or so was generally under one form of colonial domination or the other.

During the 1990s, the UN-NGO relationships is said to have given rise to a “second generation” of such relations.<sup>32</sup> This period, marked by both quantitative and qualitative changes, was especially marked by the presence and involvement of NGOs in UN-organized world conferences. Indeed, this period “is marked by the much larger scale of the NGO presence across the UN system, the more diverse institutional character of the organizations involved, now including national, regional and international NGOs, networks, coalitions, and alliances.”<sup>33</sup> This second generation activity is most notably recognized for its added political ingredient in its UN relations, which demonstrates NGO desire to be part of the institutional architecture of global governance.<sup>34</sup>

## 2.2 *NGOs in Regional Organizations and Human Rights Advocacy*

The UN’s model of allowing NGOs varying degrees of participation in some of its affairs through ECOSOC has served as a model for many regional international organizations. Two examples from Africa and Europe will suffice to make the point. First, under Articles 5 and 22 of the Constitutive Act of the African Union (AU),<sup>35</sup> which underscores the African government’s commitment in including all African peoples in their regional integration efforts, the Economic, Social and Cultural Council of the African Union (ECOSOCC) was envisaged as the primary “vehicle for building a strong partnership between governments and all segments

29 Prior to 1996, only international NGOs could apply for consultative status. *Id.*

30 *Permanent International Court*, <[www.unngls.org/spip.php?page=article\\_s&id\\_article=796](http://www.unngls.org/spip.php?page=article_s&id_article=796)> (last visited 20 December 2014).

31 *Id.*

32 *Id.*

33 *Id.*

34 *Id.*

35 *Constitutive Act of the African Union*, <[www.au.int](http://www.au.int)>, <[www.au.int/en/sites/default/files/ConstitutiveAct\\_EN.pdf](http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf)> (last visited 20 December 2014).

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of African civil society.”<sup>36</sup> In July 2004, the Statute of ECOSOCC was adopted<sup>37</sup> by the Heads of State and Government of the AU and defined ECOSOCC as an “advisory organ of the African Union composed of different social and professional groups of the Member States of the African Union.”<sup>38</sup> Comprised of but not limited to NGOs and other social and professional groups, the AU ECOSOCC’s mission is to “forge strong partnerships between governments and all segments of the civil society.”<sup>39</sup>

In addition to playing a formal role, NGOs can also engage the AU in a variety of other ways through, for instance, securing observer status or conclusion of memoranda of agreement and other forms of partnerships.<sup>40</sup> Requirements to obtain observer status were modified at the AU Summit in Sirte in Libya in July 2005. These included being registered in an African state, having a minimum of three years proof of registration as either an African or an African Diaspora organization, and being managed by a majority of African citizens. In addition, at least half (50%) of the NGO’s income must come from membership contributions, a requirement that some organizations have since argued add an undue burden on civil society and require review.<sup>41</sup>

The AU Commission, defined as the Secretariat of the Union in Article 1 of the Constitutive Act,<sup>42</sup> is also composed of a unit called the Citizens and Diaspora Organizations Directorate (CIDO). CIDO is charged with the responsibility of increasing the participation of non-state actors in AU affairs and managing and advocating for greater civil society engagement with the processes of regional integration in Africa.<sup>43</sup>

Second, to take but another example of the pervasive presence of NGOs in regional organizations, we could move outside Africa and briefly mention Europe. In the European Union (EU), NGOs, represented by the European Economic and Social Committee, are recognized as important consultative partners to all of the

36 *The Economic, Social, and Cultural Council (ECOSOCC)*, <pages.au.int>, <<http://pages.au.int/ECOSOCC/about>> (last visited 20 December 2014).

37 *Decision on the Economic, Social and Cultural Council (ECOSOCC) Doc.*, <pages.au.int>, <[http://pages.au.int/sites/default/files/Assembly%20AU%20Dec%2048%20%28III%29%20\\_E%20ECOS OCC%20Ethiopia%202004.pdf](http://pages.au.int/sites/default/files/Assembly%20AU%20Dec%2048%20%28III%29%20_E%20ECOS OCC%20Ethiopia%202004.pdf)> (last visited 20 December 2014).

38 *Statutes of the Economic, Social and Cultural Council of the African Union*, <pages.au.int>, <<http://pages.au.int/sites/default/files/ECOSOCC%20Statutes.pdf>> (last visited 20 December 2014).

39 *See Id.*

40 Open Society Initiative for Southern Africa and OXFAM, *Strengthening Popular Participation in the African Union: A Guide to Structure and Processes*, 2009, p. 41.

41 *Statutes of the Economic, Social and Cultural Council of the African Union*, <pages.au.int>, <<http://pages.au.int/sites/default/files/ECOSOCC%20Statutes.pdf>> (last visited 20 December 2014); *see also Decision The Progress Report of the Election Into The 2nd Permanent ECOSOCC General Assembly, Doc. Ex.CL/859(XXV)*, <pages.au.int>, <<http://pages.au.int/sites/default/files/ECOSOCC%20%20EX%20CL%20Desision%20849-%20En.pdf>> (last visited 20 December 2014).

42 *Constitutive Act of the African Union*, <www.au.int>, <[www.au.int/en/sites/default/files/ConstitutiveAct\\_EN.pdf](http://www.au.int/en/sites/default/files/ConstitutiveAct_EN.pdf)> (last visited 20 December 2014).

43 *Department of Citizens and Diaspora Organizations*, <www.pages.au.int>, <<http://pages.au.int/cido/pages/who-we-are>> (last visited 20 December 2014).

EU institutions.<sup>44</sup> International NGOs have also gained increased participation, as exemplified by the Council of Europe's 2003 framework decision to change the INGOs' former *consultative* status to *participatory* status.<sup>45</sup> The EU and AU are just two of many possible examples of NGO involvement in the work of regional bodies.

Growing statistical data, reported by NGOs and INGOs themselves, correctly reflect the informal roles and the growing influence that NGOs and INGOs possess in international affairs. Here, without purporting to be representative let alone exhaustive, one can allude to three specific examples from the mainstream category to illustrate the point. One of the best resourced of all NGOs, Human Rights Watch, reported a paid staff of 325 individuals in 2011 and assets of \$215 million.<sup>46</sup> Another NGO, Amnesty International, with its headquarters in London, views itself as an entity with complete independence from government, corporate, or ideological interests.<sup>47</sup> With established national chapters in 68 countries, Amnesty works to protect human rights worldwide although it initially was focused mainly on prisoners of conscience and the death penalty. In 2010, it reported having over 3 million supporters, activists, and volunteers in more than 150 countries.<sup>48</sup> The International Crisis Group (ICG), founded in 1995 as an independent non-profit NGO, commits itself to preventing and resolving deadly conflict.<sup>49</sup> It was founded on the initiative of well-known transatlantic figures.<sup>50</sup> These individuals came together as a result of their belief that the international community failed to effectively respond to the tragedies in Somalia, Rwanda, and Bosnia in the early 1990s.<sup>51</sup> With 130 permanent staff from 53 different nationalities, the ICG currently covers 70 areas of potential conflict, including Burkina Faso, Cameroon, Central African Republic, Guinea, Zimbabwe, and the Democratic Republic of the Congo.<sup>52</sup>

Turning to the international criminal justice arena, where Human Rights Watch and Amnesty are also leading players, one can cite an altogether different beast in the form of the Coalition for the International Criminal Court (CICC or hereinafter "the Coalition"), a sort of super non-governmental organization whose membership is itself comprised of other NGOs instead of individuals

44 S.C. Sieberson, "The Proposed European Union Constitution – Will It Eliminate the EU's Democratic Deficit?", *Colum. J. Eur. L.*, Vol. 10, No. 173, 2004, p. 244.

45 *Council of Europe Participatory Status*, <coe.int>, <www.coe.int/t/ngo/particip\_status\_intro\_en.asp> (last visited 20 December 2014).

46 *Who We Are*, <Amnestyusa.org>, <www.amnestyusa.org/about-us/who-we-are> (last visited 20 December 2014).

47 *Id.*

48 *Id.*

49 *About Crisis Group*, <Crisisgroup.org>, <www.crisisgroup.org/en/about.aspx> (last visited 20 December 2014).

50 *About Crisis Group*, <Crisisgroup.org>, <www.crisisgroup.org/en/about.aspx> (last visited 20 December 2014).

51 *Id.*

52 *Id.*

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directly.<sup>53</sup> From its creation in 1995 with only 25 members,<sup>54</sup> the CICC currently includes approximately 2,500 civil society organizations working in partnership to strengthen international cooperation with the ICC.<sup>55</sup> It describes its role as ensuring that the “Court is fair, effective and independent, that it makes justice both visible and universal, and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity and genocide.”<sup>56</sup> In 2000, more than 1,000 NGOs had joined the coalition, and by March 2005, the CICC’s membership had organizations from over 150 countries.<sup>57</sup>

Since 1998, the CICC has facilitated NGO access to ICC negotiations in order to increase global civil society participation and input in the ICC creation process.<sup>58</sup> Today, an NGO may indirectly participate in the formal processes of and for states parties under the CICC umbrella if it is a member of the CICC, if it was invited to participate in the Rome Conference (which led to the creation of the court), or if it was registered to attend any of the ten sessions of the Preparatory Commission held thereafter.<sup>59</sup> Under the CICC, an NGO may also receive accreditation to participate in the Assembly of State Parties (ASP) sessions.<sup>60</sup> The ASP, which is the political body of the ICC comprised of its states parties, carries out crucial functions specified in Part 11 of the Rome Statute including approval of the ICC’s annual budget and financing, election of ICC judges and prosecutors, management oversight, and consideration and adoption of resolutions on diverse issues ranging from state cooperation to complementarity and amendments to the Rome Statute as well as the Rules of Procedure and Evidence.<sup>61</sup>

In sum, in light of the above brief review demonstrating the formal and informal presence of NGOs in the UN, the AU, the EU, and the ICC, it should be clear that these non-state actors are perceived as important partners to states – even though some states would not necessarily always agree with them and some might even prefer giving less access for their participation in inter-state business. From another perspective, it could be argued that the significance of NGO participation should not be overstated given that it is always controlled. That is to say, it is limited by the relevant instruments adopted by the states and how far they are willing to go to confer consultative and, in some cases, participatory rights on

53 The CICC welcomes new NGO members. Membership is free, ensures NGOs to remain abreast of the ICC campaign, and allows access to the resources within regional and national networks, ICC-related meetings at the national or international level, and more. See *Coalition for the International Criminal Court*, <ICCnow.org>, <[www.iccnw.org/?mod=coalition](http://www.iccnw.org/?mod=coalition)> (last visited 20 December 2014).

54 *Id.*

55 *Id.*

56 *Id.*

57 *Id.*

58 *Id.*

59 *Id.*

60 See *Governance and Oversight*, <[amicc.org](http://amicc.org)>, <[www.amicc.org/icc/asp](http://www.amicc.org/icc/asp)> (last visited 20 December 2014).

61 *Rome Statute of the International Criminal Court*, <[www.icc-cpi.int](http://www.icc-cpi.int)>, <[www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](http://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf)> (last visited 20 December 2014).

NGOs. Nevertheless, whatever the limitations they have been subject to, including those in relation to the well-criticized, cumbersome, and expensive accreditation process that applies to them at the UN, it cannot be reasonably disputed that NGOs are a strong force to reckon with in global affairs.

### 3 NGOs in International Criminal Justice

To fully comprehend the impact of NGOs in the international criminal justice system today, it may be helpful to examine how they came to be the global actors they are today. An in-depth analysis of emergence of such actors prior to and during the First World War, as well as the significant strides taken since the Second World War to today, is beyond the scope of this work but the brief survey that follows should offer useful analytical insights. These are necessary to understanding their overall important role and beneficial impact.

#### 3.1 *The Existence of NGOs before World War I*

The existence of NGOs is hardly novel. NGOs were formed as far back as the 18th century.<sup>62</sup> They have put under the spotlight core human rights issues that were unpopular during their times, such as slavery, and laid a firm foundation for the development of international humanitarian law. In 1840, for example, Anti-Slavery NGOs mobilized support against slavery and, as part of this, promoted and organized the International Anti-Slavery Conference.<sup>63</sup> Additionally, in a well-known example, Henri Dunant, the Swiss founder of the International Committee of the Red Cross (ICRC), which has become the guardian of international humanitarian law, inspired the First Geneva Convention, which was signed in 1864 to protect the sick and wounded during wartime.<sup>64</sup> In 1864, the American Red Cross was instrumental in obtaining the signatures of European States on the Convention for the Amelioration of the Condition of the Wounded Armies in the Field.<sup>65</sup> The ICRC had such impact that, by 1900, a total of 425 peace societies existed worldwide. Indeed, ever since the Convention in 1864, “the Red Cross has played an integral part in the drafting and enforcement of the Geneva Conventions.”<sup>66</sup> And, in the period between the 1870s and World War I, achievements from a range of diverse organizations were booming. The International Abolitionist Federation, for example, took part in organizing campaigns for treaties regard-

62 S. Charnovitz, ‘Two Centuries of Participation: NGOs and International Governance’, *Mich. J. Int’l L.*, Vol. 18, No. 183, 209, 1997, pp. 47-49.

63 *Id.*, p. 209.

64 S. Tiefenbrun, ‘The Failure of the International Laws of War and the Role of Art and Story-Telling as a Self-Help Remedy for Restorative Justice’, *Tex. Wesleyan L. Rev.*, Vol. 12, No. 91, 2005, p. 108.

65 *Our History*, <redcross.org>, <www.redcross.org/about-us/history> (last visited 20 December 2014).

66 *Id.*

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ing sex trafficking, and women's groups were vital components in the dissemination of suffrage activism around the world.<sup>67</sup>

### 3.2 *The Existence of NGOs during and after World War I*

The years during and after the World War I were crucial times for NGOs. Their involvement at the international level grew tremendously. For instance, in 1915, an International Congress of Women was held at The Hague, Netherlands, to protest against World War I.<sup>68</sup> This organization rejected the idea that warfare was inevitable and passed resolutions regarding the war and met with key governments in Europe and the United States to lobby against the use of force.<sup>69</sup> Eventually referring to itself as the Women's International League for Peace and Freedom (WILPF), this NGO pioneered many of the methods used by late 20th century NGOs in international lobbying.<sup>70</sup>

The aftermath of the Armenian Genocide made way for Armenian institutions and their expectation that Young Turk leaders would be brought to justice. In 1919, an Information Bureau, headed by Arshag Zorayan, set about gathering documents on demographic issues, the anti-Armenians prosecutions, massacres, and deportations and even compiled facts about those alleged to be primarily responsible for the genocide based on eyewitness accounts.<sup>71</sup>

Although it did not create official rules for the participation of NGOs in its business, as alluded to earlier, the Covenant of the League of Nations of 1919 (hereinafter the "League") allowed NGOs to participate in League conferences and in lobbying delegates.<sup>72</sup> In fact, NGOs were permitted to present papers in some committees and propose language for documents and resolutions.<sup>73</sup> NGOs submitted petitions, which were greatly influenced by oppressed groups pushing for an accord, to the League to secure minority rights.

Other than their involvement within the League, NGOs often worked alongside governments in the establishment of new treaties and organizations.<sup>74</sup> Although their role was limited, NGOs' input and participation continued to grow as some treaties explicitly acknowledged their role in implementation and even provided for their input through a formal advisory committee.<sup>75</sup> In much the same way that the League supplied precedent for the later UN, it seems that the inclusion of NGOs in its affairs was the basis for Article 71 of the UN Charter, which was discussed earlier.

67 'NGOS: A Long and Turbulent History', *The Global Journal*, <theglobaljournal.net>, <<http://theglobaljournal.net/group/global-governance/article/981/>> (last visited 20 December 2014).

68 *See Women's International League for Peace and Freedom History*, <wilpfus.org>, <<http://wilpfus.org/story/history>> (last visited 20 December 2014).

69 Charnovitz 1997, pp. 183 and 214.

70 *Id.*

71 R. Kevorkian, *The Armenian Genocide, A Complete History*, Vol. 4, 2011.

72 Charnovitz 1997, pp. 183 and 209.

73 *Id.*

74 *Id.*

75 The League sent representatives to attend NGO conferences. *See* Charnovitz 1997, p. 227.

The 1919 Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties (hereinafter the “the Commission”) was perhaps the most vital entity created during this time period – at least when it comes to the specific question of international criminal justice.<sup>76</sup> The first international investigative commission, the Commission was established at the end of World War I by the Allies when they and the associated powers met at the 1919 Preliminary Peace Conference in Paris.<sup>77</sup> The Commission, created by states, was charged with determining and reporting on four main questions relating to state responsibility for the war; breaches of the laws and customs of war; the degree of responsibility that could be attached to particular individual members of the enemy forces, irrespective of their official rank or status; the constitution and procedure of a tribunal for trial of the offenses; and any other ancillary issues. Its membership comprised of two members from the United States, the British Empire, France, Italy, and Japan.<sup>78</sup> Additional states constituting the allied and associated powers were Bolivia, Belgium, Brazil, China, Cuba, Czech-Slovakia, Ecuador, Greece, Guatemala, Haiti, the Hedjaz, Honduras, Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, the Serb-Croat-Slovene States, Siam, and Uruguay.<sup>79</sup> Ultimately, because of their special interest in the matter, Belgium, Greece, Poland, Romania, and Serbia each named a representative to the Commission as well.<sup>80</sup>

At the 1919 Preliminary Peace Conference in Paris, the Allies’ representatives negotiated Germany’s surrender and a peace treaty. In that document, they incorporated proposals of the independent commission with respect to determinations of criminal responsibility. Specifically included in the Treaty was Article 227 providing for the creation of an ad hoc international criminal tribunal to prosecute Kaiser Wilhelm II for initiating the war.<sup>81</sup> Dictating the terms of the Treaty, the allies’ representatives discussed issues such as the prosecution of the king, German war criminals, and Turkish officials for “crimes against the laws of humanity.”<sup>82</sup>

In 1920, the Commission completed its report and submitted a list of 895 suspected war criminals to be tried by the allied tribunal.<sup>83</sup> Ultimately, however, the allies failed to prosecute, as the Kaiser sought refuge in the Netherlands and Article 227 was never implemented.<sup>84</sup> Nonetheless, the seed of an idea for individual accountability for international crimes remained in the imagination of the international community. Advocates for an international criminal court included a group of legal experts working under the auspices of the International Associa-

76 Carnegie Endowment for International Peace, *The Treaties of Peace 1919-1923*, 1924, p. 3.

77 M.C. Bassiouni, ‘From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court’, *Harv. Hum. Rts. J.*, Vol. 10, No. 11, 1997, p. 12.

78 *Id.*

79 *Id.*

80 *Treaties of Peace*, *supra*, note 76.

81 *Treaty of Peace between the Allied and Associated Powers and Germany, concluded at Versailles*, 28 June 1919, 2 Bevans 43.

82 Bassiouni 1997, p. 12.

83 *Id.*

84 *Id.*, pp. 11, 18.

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tion of Penal Law which was established in 1924. That body later teamed up with others in the International Law Association and kept the notion of criminal accountability alive including at the League of Nations. Their actions were to form the basis for the blockbuster developments in international criminal justice that occurred just before the end of World War II and in its aftermath. The result was that the allies were successful in reaching agreement on the outlines of a special tribunal that eventually carried out trials of twenty-two high-ranking Nazis at the International Military Tribunal at Nuremberg and, later on, the trial of those involved in the war in Asia in the International Military Tribunal for the Far East.<sup>85</sup>

### 3.3 *The Role of NGOs in Advocating for Ad Hoc International Tribunals*

Between the immediate post-World War II trials and the 1990s, some NGOs continued to advocate for the establishment of accountability mechanisms at the international level for the prosecution of serious international crimes. Although the process of law making was driven primarily by states, by 1993, NGOs and other civil society actors did play important roles in the lead up to the first ad hoc tribunals created by the UN to prosecute crimes in the former Yugoslavia, Rwanda, and Sierra Leone in 1993, 1994, and 2000, respectively. The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were “subsidiary organs” of the Security Council, whereas the Special Court for Sierra Leone (SCSL), which was established to prosecute crimes that occurred during the brutal Sierra Leonean conflict, was established by virtue of a bilateral agreement between the UN and one of its Member States.<sup>86</sup> It is widely known that NGOs, whether acting as friends of the court filing legal briefs or through their advocacy, impacted the work of the ICTY and ICTR as well as the SCSL, including by pushing for the prosecution of gender crimes as well as progressive interpretations of the law. They also often spoke to emphasize the need for stronger state cooperation with the tribunals, especially in their early days.

Although their actions are only part of the reason for the creation of those modern ad hoc international criminal tribunals, NGOs nevertheless played a useful role in the period leading up to the establishment and creation of the SCSL, which was designed primarily to prosecute serious violations of international humanitarian law and certain violations of Sierra Leonean Law.<sup>87</sup> When the idea of a special court surfaced from a government of Sierra Leone proposal, Sierra Leonean civil society appeared to be divided: some enthusiastically agreed to con-

85 M.C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 1992 (stating that the Allies submitted a list of 895 named war criminals).

86 For an excellent overview of these tribunals, see W.A. Schabas, *The UN International Criminal Tribunals, The Former Yugoslavia, Rwanda and Sierra Leone*, 2006, p. 15. For a detailed analysis of the ICTY’s legacy, see R. Steinberg, *Assessing the Legacy of the ICTY*, 2011; The ICTR, see L.J. Van Den Herik, *The Contribution of the Rwanda Tribunal to the Development of International Law*, 2005; and the SCSL, see C. Jalloh (Ed.), *The Sierra Leone Special Court and Its Legacy: The Impact for Africa and International Criminal Law*, 2014.

87 *Sierra Leone: Establish Special Court Quickly*, Human Rights Watch (21 March 2002), <[www.hrw.org/news/2002/03/20/sierra-leone-establish-special-court-quickly](http://www.hrw.org/news/2002/03/20/sierra-leone-establish-special-court-quickly)>.

sultations with the UN Office of Legal Affairs in Freetown in September 2000<sup>88</sup> while others believed that a Truth and Reconciliation Commission (TRC) would better persuade individuals, such as Revolutionary United Front (RUF) Leader Foday Sankoh, to put down their arms.<sup>89</sup>

International civil society mostly reacted favourably to the idea.<sup>90</sup> For one, some organizations submitted papers outlining what the SCSL should look like and how it should operate and even anticipated and warned against issues that might affect the SCSL's efficiency and accountability.<sup>91</sup> In 1998, No Peace Without Justice (NPWJ) formed a Judicial Assistance Program, which provided legal advisers to small delegations for negotiations in the lead up to the adoption of the Rome Statute.<sup>92</sup> Sierra Leone, which had benefited from such expertise, requested NPWJ to extend the benefits of its program, which resulted in a full-time adviser to the Mission in New York and two full-time advisers to the Office of the Attorney-General and Ministry of Justice in Freetown. These advisers participated in some of the discussions that led to crucial constitutive documents for the SCSL's establishment.<sup>93</sup> The NPWJ also organized the Freetown Conference on Accountability for Violations of International Humanitarian Law in February 2001. The meeting sought to discuss the problem of how best to coordinate between the SCSL and the TRC, which had been two unplanned transitional justice mechanisms that Sierra Leone would experiment in parallel, and resulted in the recommendation that Sierra Leonean civil society take an active role in the preparatory work for both the special tribunal and the truth commission.<sup>94</sup>

Urging that immediate steps be taken to establish the court, Director of the Africa Division of Human Rights Watch, Peter Takirambudde, stated that "for the Special Court to be effective, U.N. member states who have not contributed to the Special Court trust fund will have to step up and pledge adequate funds" and that it was not too soon "to tackle the huge challenges that lie ahead."<sup>95</sup> Human Rights Watch also issued a letter to the Security Council detailing several goals to make the Special Court more efficient, including the duty to map out crimes, formulate an overall strategy, and safeguard prosecutorial and judicial independence.<sup>96</sup> Human Rights Watch, No Peace Without Justice, and the International Crisis Group, among others, proved to have a "strong" voice in the formation of the

88 A. Smith, 'The Expectations and Role of International and National Civil Society and the SCSL', in Jalloh 2014, p. 48.

89 *Id.*, p. 47.

90 *Id.*, p. 46.

91 *See, e.g.*, Human Rights Watch, *U.N. Action on Sierra Leone Court Welcomed* (15 August 2000), <[www.hrw.org/news/2000/08/14/un-action-sierra-leone-court-welcomed](http://www.hrw.org/news/2000/08/14/un-action-sierra-leone-court-welcomed)> (last visited 20 December 2014).

92 *See* Smith 2014, p. 50.

93 The advisers covered all the negotiations for the Special Court Planning Mission in January 2002, where the Special Court Agreement was signed, and for the SCSL's Headquarters Agreement. *See Id.*

94 *See* Smith 2014, pp. 50-51.

95 *Sierra Leone: Establish Special Court Quickly*, Human Rights Watch (21 March 2002), <[www.hrw.org/news/2002/03/20/sierra-leone-establish-special-court-quickly](http://www.hrw.org/news/2002/03/20/sierra-leone-establish-special-court-quickly)>.

96 *Id.*

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SCSL, which, as of the end of December 2013, had concluded all its work.<sup>97</sup> Even before the Sierra Leone war ended, NGOs played a crucial facilitative role such that International Alert, based in London, is credited with having been the first to successfully coordinate a ceasefire meeting between the Sierra Leonean government and its adversary the Revolutionary United Front in Ivory Coast in 1996.

### 3.4 *The Role of NGOs in the Processes of the International Criminal Court*

The idea of a permanent international criminal tribunal long predated the formal adoption of the Rome Statute in July 1998. However, the success and completion of the statute of the permanent ICC were due in part to the vital role played by international civil society including NGOs. Certainly, without civil society and NGO engagement, the form of the permanent court we have today would likely have been different if not radically so. Their engagement goes back to the years before the 1998 Rome negotiations.

In February 1995, a small group of NGOs met in New York and formed the CICC.<sup>98</sup> The CICC's main purpose was to "advocate for the establishment of an effective and just international criminal court."<sup>99</sup> The CICC, which was discussed in Section 1 of this article, connected a broad network of NGOs and international law experts that developed strategies on substantive legal and political issues related to the Statute.<sup>100</sup> Its efforts in arranging meetings with representatives of governments and UN officials enabled civil society to get involved in the negotiation process in a way that was substantively helpful to the final outcome.<sup>101</sup> The CICC, whose membership advocated strongly for victims and the concern of vulnerable communities such as children and gender crimes, also served as a main source of information on the ICC by producing electronic and printed documents on the proposed court and promoting awareness of relevant events.<sup>102</sup>

By the commencement of the Rome Conference, in May 1998, the CICC was made up of more than 800 organizations.<sup>103</sup> Nearly 263 NGOs were accredited to participate in the ICC negotiations at Rome and close to 1,000 NGOs around the world participated in activities meant to support the effort. The organizations that comprised these numbers represented nearly every region of the world and issue area: human rights, rights of women and children, humanitarian and international law, disarmament, peace, and religion.<sup>104</sup> During the conference, NPWJ set up a judicial assistance program that provided legal experts to delegations

97 J.I. Turner, 'Transnational Networks and International Criminal Justice', *Mich. L. Rev.*, Vol. 105, No. 985, 2007, p. 1001.

98 W.R. Pace & M. Thieroff, 'Participation of Non-Governmental Organizations', in R.S. Lee (Ed.), *The Making of the Rome Statute*, 1999, p. 391.

99 *Id.* Groups involved included Amnesty International, *Federation Internationale des Ligues des Droits de l'homme*, Human Rights Watch, the International Commission of Jurists, the Lawyers Committee for Human Rights, etc. *See Id.*

100 Pace & Thieroff 1999, p. 392.

101 *Id.*

102 *Id.*, p. 392.

103 *Id.*

104 R. Ben-Ari, *The Legal Status of International Non-Governmental Organizations*, 2013, pp. 55-58.

from a number of African and other developing countries.<sup>105</sup> Acting through the CICC, NGOs kept the press and global civil society informed, provided reinforcement to national delegations, and compiled and issued a number of reports on key governmental positions including on the need for an independent prosecutor.<sup>106</sup> Three and a half years after advocacy efforts among NGOs, governments, and the UN Secretariat, the adoption of the ICC Statute occurred on 17 July 1998 at the Rome Diplomatic Conference.

After the adoption of the ICC Statute, NGOs continued to participate and impact the Court through their campaigns for ratification of the statute and involvement with the Coalition for the ICC and the Preparatory Commission (hereinafter the “PrepCom”) leading up to the operationalization of the tribunal. NGOs were able to formally be involved by entering the Coalition, whose Secretariat was managed by the World Federalist Movement (WFM). Members of the Coalition participated in teams, which reported back to the full coalition on suggested strategies for addressing concerns related to the ICC.<sup>107</sup> The CICC, and its members, can be said to have had an impact on the Elements of Crimes, and they gave input on issues such as enforced disappearances and sexual and gender based crimes. Additionally, the Coalition offered technical proposals relating to the Rules of Procedure and Evidence.

Approximately 60 to 80 groups also actively participated in the PrepCom, and their right to do so was confirmed annually by the General Assembly through its resolutions on the ICC.<sup>108</sup> Within the Coalition, NGOs served as expert advisors producing papers on issues within their areas of expertise and making those works widely available to delegations and by publicizing the work of the PrepCom.<sup>109</sup> This continued a type of responsibility that they had assumed during Rome discussions. NGOs also served as documentarians, as the Coalition Secretariat became a source of primary and secondary materials to other advocacy organizations, governments, the United Nations, academics, and other institutions.<sup>110</sup>

#### 4 The Diverse Roles of NGOs in International Criminal Justice

Despite the reality that the international criminal justice system has traditionally adopted a state-centred approach, mirroring the wider pattern of international law generally, the emergence and impact of strong NGOs today signify that this approach and its impact results in a tale only half told. In fact, as I will attempt to show below, states are no longer the only important actors exerting influence on the efficiency and practicability of international law. If there was ever a doubt about this, it could be dispelled by looking at the diverse roles of NGOs on human

105 See Pace & Thieroff, 1999, p. 394.

106 *Id.*, p. 391.

107 Ben-Ari 2013, pp. 55-58.

108 *See Id.*

109 *Id.*, pp. 55-58.

110 *See Id.*

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rights issues around the world today. Indeed, using the international criminal justice system as an illustration, we shall see that they (*i.e.* NGOs) have proven to be advantageous supplements to states by serving as entities that have independent goals and ideologies, as well as engaging in transnational advocacy efforts that generally aim at helping improve the efficiency of the tribunals and their accountability to victim communities. Where money is concerned, NGOs have also set themselves out to be a valuable, accessible, and purposeful source of funding. The below, of course, is not a comprehensive survey; these are only examples of some of the possibilities that can be identified.

#### 4.1 *NGOs and Their Impact on Prosecutor Offices in International Courts*

As it is embodied in the heart of the Rome Statute, the power and discretion to pursue an investigation in the ICC lies in the independent prosecutor.<sup>111</sup> However, in a world of limited resources and a limited ICC prosecutorial footprint at crime base locations in different parts of the world, NGOs have proven to be helpful in carrying out prosecutorial investigations. Their being on the ground in several situation countries monitoring human rights conditions have led them to become adjuncts to the ICC's carrying out of its mandate.

Taking up several beneficial roles, NGOs most notably pressure the Office of the Prosecutor (OTP) to prosecute certain categories of individuals that commit certain crimes, such as child recruitment, which might otherwise go unnoticed in certain regions of the world. Although not a panacea by any means, the role that NGOs play includes their contribution to initial evidence gathering, among other things, which seemed to have been particularly useful in the early days of the ICC although it has not come without its drawbacks.

This phenomenon is exemplified by the reactions of human rights and humanitarian NGOs in their stand against child soldiers. In recent years, NGOs have engaged in an international lobbying campaign in an attempt to emphasize how problematic children's involvement in armed conflicts really is.<sup>112</sup> Furthermore, not only have they attempted to emphasize the lack of moral value that this phenomenon demonstrates, but also, they have attempted to turn it into a legal norm.<sup>113</sup>

The role of NGOs in influencing the OTP is also demonstrated by their activities in the gathering of evidence during the investigations that resulted in the Lubanga Trial and Judgment. On 14 March 2012, Thomas Lubanga Dyilo was found guilty of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities.<sup>114</sup> On 10 July 2012, he was sentenced to 14 years imprisonment.<sup>115</sup> Both the conviction and sentence have since been upheld by the ICC Appeals Chamber.

111 M. Bergsmo & P. Kruger, 'Article 53: Initiation of an Investigation', in Otto Triffeterer (Ed.), *Commentary on the Rome Statute* (1999), pp. 701-702.

112 N. Quevinet, 'The Liberal Discourse and the "New Wars" of/on Children', *Brook. J. Int'l L.*, Vol. 38, No. 1053, 2013, p. 1055.

113 *Id.*

114 See <[www.iccpi.int/en\\_menus/icc/situations](http://www.iccpi.int/en_menus/icc/situations)> (last visited 30 Jul. 2014).

115 *See Id.*

Prior to Lubanga's conviction and sentencing, the OTP faced investigative difficulties in the Democratic Republic of the Congo. The OTP, although this proved to be problematic in many ways, was not alone in gathering the required evidence during the investigation as it delegated evidence gathering to third parties.<sup>116</sup> In this regard, the OTP relied heavily on investigations carried out by the UN as well as evidence gathered by local and international NGOs working in the region. It became difficult to keep local communities out of the investigations and to avoid adverse consequences for victims and witnesses.<sup>117</sup>

Even though their involvement resulted in some witnesses making potentially misleading statements in the *Lubanga* case and later led to the criticism of the OTP, the help offered by NGOs enabled the prosecutorial investigators to save some of their resources. It also reportedly offered a relatively safer method to protect potential witnesses.<sup>118</sup> Intermediaries, who local persons employed as liaison officers between the investigators and the local communities, gathered information and travelled without suspicion.<sup>119</sup> These intermediaries often had links with NGOs and solved some of the immediate investigative problems faced by the OTP.<sup>120</sup>

First, intermediaries are known to have introduced various witnesses to the OTP. Additionally, when confronted with difficulties in the Democratic Republic of Congo (DRC) and in Ituri during the investigative stage of that situation, for example, the OTP decided to rely on these intermediaries because some of the child soldiers and other witnesses came under pressure to withdraw their statements.<sup>121</sup> This approach was considered helpful during investigations, and the OTP even claimed that the use of intermediaries was necessary due to the lack of security in the DRC and Ituri and the need to reduce potential risks to witnesses.<sup>122</sup>

Influence and participation of NGOs in the operational work of the ICC OTP also came in the form of criticism during the investigation of the *Lubanga* case. Harshly criticizing the methods adopted by the first ICC Prosecutor, Luis Moreno Ocampo, and acting as a public advocate of the Court, Human Rights Watch – for

116 See C. Buisman, 'Delegating Investigations: Lessons to Be Learned from the Lubanga Judgment', *Nw. J. Int'l Hum. Rts.*, Vol. 11, No. 30, 2013, p. 6. For a strong critique of the problems that arise from third party investigations including regarding confidentiality and disclosure, integrity of evidence gathering and equality of arms between prosecution and defense, see E. Baylis, 'Outsourcing Investigations', *UCLA J. Int'l L. & Foreign Aff.*, Vol 14, No. 1, 2009, p. 121.

117 Investigators were instructed to avoid contact with the chiefs of the localities, families, churches, and close allies of potential witnesses. *Id.* Additionally, investigators were told to stay away from schools attended by child soldiers, which prevented the cross-checking of potential "child soldier" witnesses' ages and other information vital to the investigation. *Id.*

118 *Id.*

119 *Id.*

120 Intermediaries selected potential witnesses, which were interviewed in safe locations outside the conflict zone and formed an integral part of the witness protection system. *Id.*, p. 16.

121 *Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings"*, <[www.icc-cpi.int](http://www.icc-cpi.int)>, <[www.icc-cpi.int/iccdocs/doc/doc1036342.pdf#search=%20ICC-01%2F04-01%2F06-26-57-Conf-tENG](http://www.icc-cpi.int/iccdocs/doc/doc1036342.pdf#search=%20ICC-01%2F04-01%2F06-26-57-Conf-tENG)> (last visited 20 December 2014).

122 *Redacted Decision on the "Defence Application Seeking a Permanent Stay of the Proceedings"*, <[www.icc-cpi.int](http://www.icc-cpi.int)>, <[www.icc-cpi.int/iccdocs/doc/doc1036342.pdf#search=%20ICC-01%2F04-01%2F06-26-57-Conf-tENG](http://www.icc-cpi.int/iccdocs/doc/doc1036342.pdf#search=%20ICC-01%2F04-01%2F06-26-57-Conf-tENG)> (last visited 20 December 2014).

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example – wrote a letter to the Executive Committee of the ICC to express concerns regarding poor management practices in the OTP and the effect it was having on the investigation.<sup>123</sup> The letter also chided the OTP for its failure to develop “sufficiently supportive work environment” and to provide enough staff to support the rigorous demands. It even criticized the prosecutor for “due process violations.”<sup>124</sup> Hence, Human Rights Watch, acting as a public advocate of the Court, acted as another external source that made sure the ICC was aware of the alleged “poor management practices” in the OTP.<sup>125</sup>

Although NGOs greatly aided the investigation in the *Lubanga* case and even brought public attention to its alleged “ineffectiveness,” their help and cooperation also resulted in multiple problems. For one thing, NGOs were willing to share their work product with the OTP as long as the work was not disclosed at any stage of the proceedings without the organizations’ consent. This condition prevented the OTP from disclosing potentially exculpatory evidence to the defence or judges and prevented its vital duty to assess whether the trial would still be fair without disclosing such information to the defence.<sup>126</sup> Hence, at one point, the Lubanga Trial Chamber famously ordered a conditional stay of the proceedings, which was upheld by the Appeals Chamber.<sup>127</sup> Ultimately, even though that stay was lifted for the process to continue, the trial had suffered serious delays and may have helped to exacerbate the inequality of arms between the prosecution and the defence.<sup>128</sup> On the other hand, it could be argued that the problems that were experienced in the *Lubanga* case were less a result of NGO involvement than the OTP’s over reliance on the work of intermediaries and its failure to independently discharge its mandate of only using any initial evidence supplied as a spring board for further investigations – as the ICC Statute actually envisaged in Article 54.

But the involvement of NGOs in facilitating the work of international prosecutors did not just occur at the ICC. It can further be demonstrated by citing, as an example, Human Rights Watch’s involvement and reaction to Jean-Bosco Barayagwiza’s release in the ICTR. In May 1994, the ICTR initiated one of the first

123 J. Flint & A. De Waal, ‘Case Closed: A Prosecutor without Borders’, *World Affairs*, Spring 2009, <[www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders](http://www.worldaffairsjournal.org/article/case-closed-prosecutor-without-borders)>.

124 *Id.*

125 *Id.*

126 Buisman 2013, p. 18.

127 The UN agreed to let the information be disclosed to the Chamber for a determination on the exculpatory nature of the material and whether there was a need to disclose such information to the UN. The stay of proceedings was lifted after the UN agreed to such disclosure. See ICC, *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06-1486, Judgment on the Appeal of the Prosecutor Against the Decision of Trial Chamber I Entitled “Decision on the Consequences of Non-Disclosure of Exculpatory Materials Covered by Article 54(3)(e) Agreements and the Application to Stay the Prosecution of the Accused, Together With Certain Other Issues Raised at the Status Conference on 10 June 2008” (21 October 2008), <[www.icc-cpi.int/iccdocs/doc/doc578371.pdf](http://www.icc-cpi.int/iccdocs/doc/doc578371.pdf)>.

128 The inequality resulted from the defence’s lack of opportunity to investigate and look through the material for itself. Buisman 2013, p. 13.

judicial proceedings related to the Rwandan genocide.<sup>129</sup> Human Rights Watch was also responsible for initiating a suit against Barayagwiza in the US Southern District Court of New York, which ultimately resulted in the award of \$105 million in damages (although not a penny of that was paid).<sup>130</sup> Barayagwiza, charged by the Prosecutor of the ICTR with genocide and other crimes in connection with the 1994 Rwandan genocide, filed a motion seeking to nullify his arrest and detention on the grounds of abuse of process.<sup>131</sup> Although his motion was dismissed by the ICTR Trial Chamber, the appeals chamber accepted his argument and found that his delayed detention without charge constituted an abuse of process on the part of the prosecutor. The appellate court therefore ordered his release, with prejudice to the prosecutor, on 3 November 1999.<sup>132</sup>

Condemning the appeals chamber decision, Human Rights Watch “deplored prosecutorial incompetence” at the ICTR and called for greater care in prosecution investigations.<sup>133</sup> The Rwandan specialist at Human Rights Watch, Alison Des Forges, publicly criticized the suspect’s release stating that the “decision should jolt the prosecutor’s office and the international community in general, reminding everyone of the need for prompt and exemplary justice.”<sup>134</sup> She additionally emphasized the need for national courts to “take up the burden” to “break the impunity” that initiated the violence in central Africa and for governments to be ready to assist with funds and personnel.<sup>135</sup> After the outrage of the Tutsi-led government in Kigali over Barayagwiza’s potential release and the supplementary noise made by the NGO community, the ICTR Prosecutor submitted a new motion to the appeals chamber requesting it to reconsider its decision on the basis of “new facts” that had been discovered in the case.<sup>136</sup> A number of other threatening measures were taken by Kigali, including cutting off the flow of witnesses to testify in other cases in Arusha. Ultimately, the appeals chamber granted the Prosecutor’s motion for reconsideration. It found that even though Bar-

129 The genocide resulted in the death of at least half a million persons. See *Prosecutorial Incompetence Frees Rwandan Genocide Suspect*, Human Rights Watch (10 November 1999), <[www.hrw.org/press/199/nov/Rwanda1109.htm](http://www.hrw.org/press/199/nov/Rwanda1109.htm)>.

130 See *Prosecutorial Incompetence Frees Rwandan Suspect*, Human Rights Watch (10 November 1999), <[www.hrw.org/press/199/nov/Rwanda1109.htm](http://www.hrw.org/press/199/nov/Rwanda1109.htm)>.

131 W.A. Schabas, ‘Case Report: *Barayagwiza v. Prosecutor*’, *AJIL*, Vol. 94, p. 563, 2000.

132 A.M. Danner, ‘Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court’, *Am. J. Int’l L.*, Vol. 97, No. 510, 2003, p. 531. The release by the Appeals Court on procedural grounds closed the case against him in the ICTR. Pursuant to the release, Barayagwiza remained subject to prosecution by national courts of Cameroon (where he was first arrested) and Rwanda. See *Prosecutorial Incompetence Frees Rwandan Suspect*, Human Rights Watch (10 November 1999), <[www.hrw.org/press/199/nov/Rwanda1109.htm](http://www.hrw.org/press/199/nov/Rwanda1109.htm)>. For the implications of this OTP practice and the wider problem of provisional arrest of suspects and the jurisprudence developed in that regard, see M. Taylor & C. Jalloh, ‘Provisional Arrest and Incarceration in the International Criminal Tribunals’, *Santa Clara. J. of Int’l Law*, Vol. 11, No. 2, 2013, pp. 303-334.

133 See *Prosecutorial Incompetence Frees Rwandan Suspect*, Human Rights Watch (10 November 1999), <[www.hrw.org/press/199/nov/Rwanda1109.htm](http://www.hrw.org/press/199/nov/Rwanda1109.htm)>.

134 See *Id.*

135 See *Id.*

136 See *Id.*

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ayagwiza's rights had been violated, the new information brought forth by then Prosecutor Carla Del Ponte rendered the decision to dismiss the case, with prejudice, a "disproportionate"<sup>137</sup> remedy. A different remedy would be to hold the trial and, if the accused is convicted, account for the violation through a sentencing reduction. If he was acquitted, he would be paid monetary compensation. In the event, a sentencing reduction was later given because the trial chamber convicted Barayagwiza.

Whether NGO influence on prosecutorial discretion is a positive or negative thing has been subject to much debate. One side of the debate focuses on the result of having an international prosecutor being effectively accountable to NGOs that, in turn, are not accountable to anyone. One advocate of this position is Justice Geoffrey Robertson. Justice Robertson, who sat on the Appeals Chamber of the SCSL and was that tribunal's first president, opined that "[c]ourts must guard against allowing prosecutions to present evidence which amounts to no more than hearsay demonisation of defendants by human rights groups and the media. The right of sources to protection is not a charter for lazy prosecutors to make a case based on second-hand media reports and human rights publications."<sup>138</sup> This is an important point, especially given the media frenzy that tends to pervade high-profile international trials. Furthermore is the tendency for people to equate charges to guilt in violation of the fundamental right to be presumed innocent until proven guilty.

Despite Judge Robertson's opinion and what we may generously describe as occasional bumps that resulted from NGO involvement in carrying out preliminary investigations during the Lubanga proceedings at the ICC, for instance, their beneficial impact is apparently demonstrated by their role as at least a partial solution to the problems the OTP faced in gathering evidence in the DRC. They in essence became advocates for potential victims at the ICC by helping out using their own resources and notifying the public when the OTP was thought to engage in inefficient conduct, a role similar to that they played for the many genocide victims during the *Barayagwiza* case at the ICTR. Even if evidence gathered by NGOs may not by itself prove to be the most reliable source for the prosecution to discharge the burden of an entire trial beyond a reasonable doubt,<sup>139</sup> as the *Lubanga* case aptly demonstrated, NGOs are nevertheless able to assist the Prosecutor when faced with uncooperative states. Evidence gathered by NGOs, who acted primarily based on their desire to aid victims of egregious crimes, is better than no evidence at all.

Overall, one might argue that NGOs have, in diverse contexts, helped investigators gather evidence, develop more knowledge about the occurrence of poten-

137 *Barayagwiza v. Prosecutor*, Request for Review or Reconsideration, ICTR-97-19-AR72, para. 71 (31 March 2000).

138 SCSL, *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara & Santigie Borbor Kanu*, SCSL-04-16-AR73-506, Separate and Concurring Opinion of Hon. Justice Geoffrey Robertson, QC, Decision on Prosecution Appeal Against Decision on Oral Application for Witness TF1-150 to Testify without Being Compelled to Answer Questions on Grounds of Confidentiality, ¶ 35 (26 May 2006), <[www.sc-sl.org/LinkClick.aspx?fileticket=mkkX0rrspuk%3d&tabid=197](http://www.sc-sl.org/LinkClick.aspx?fileticket=mkkX0rrspuk%3d&tabid=197)>.

139 Buisman 2013, p. 19.

tial crimes within an international court's jurisdiction, and generally ensure that more victim-oriented prosecutorial decision-making can occur in international criminal courts.

#### 4.2 *NGO Influence on Advocating for the Rights of Victims*

NGOs have influenced the formation and internal regulations of tribunals. Indeed, their active participation in the implementation of the Rome Statute of the ICC is perhaps one of their more recognized contributions to international criminal law.<sup>140</sup> However, even before the ICC came along, NGOs had also contributed to, among many others, transitional justice efforts in Sierra Leone and East Timor.<sup>141</sup> Human Rights Watch, for example, made several recommendations for the SCSL Statute and some of these seemed to have been adopted. NGOs are also advocates for the rights of victims to protection and their rights to participate in proceedings. In the ICTY, women's groups were active in demanding that the international community take action to stop the rapes and to seek accountability for those who were responsible.<sup>142</sup> They have also, in advocating for a more diverse work force including women, helped indirectly. Barbara Bedont and Katherine Hall-Martinez have suggested that "the gradual shift toward taking rape and other sexual crimes seriously and investigating them zealously can be traced to the participation of women in the ICTY as investigators, researchers, judges, legal advisors, and prosecutors."<sup>143</sup>

In fact, feminists worked to advocate and support policy changes when crimes of sexual violence predominantly impacting women went uncharged.<sup>144</sup> The feminists' benevolence to the cause was demonstrated during the *Tadic* case, when Prosecutor Richard Goldstone sought his transfer to the ICTY.<sup>145</sup> In his motion to transfer Tadic, Goldstone, according to women's advocacy groups and other NGOs, had greatly undermined the severity of rape, treating it as secondary to other crimes.<sup>146</sup> In response to an amicus brief being filed by various NGOs,<sup>147</sup> which emphasized the trivial importance that violence against women was given in the motion, and Judge Odio-Benito's questioning on such trivialization, Goldstone concurred and stated that the Declaration did not appropriately reflect the OTP's belief of equating rape to other "serious transgressions of international

140 Turner 2007.

141 *Id.*

142 J. Mertus, 'When Adding Women Matters: Women's Participation in the International Criminal Tribunal for the Former Yugoslavia', *Seton Hall L. Rev.*, Vol. 38, No. 1297, 2008.

143 *Id.*, p. 1306; see also K. Hall-Martinez & B. Bedont, 'Ending Impunity for Gender Crimes Under the International Criminal Court', *Brown J. World Aff.*, Vol. 6, No. 65, 1999, pp. 75-76.

144 J. Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', *Mich. J. Int'l L.*, Vol. 30, No. 1, 2008, p. 14.

145 *Id.*

146 *Id.*

147 The amicus brief was filed by the International Women's Human Rights Law Clinic, the Harvard Human Rights Program, and the Jacob Blaustein Institute. See *id.*; see also K.L. Fabian, 'Proof and Consequences: An Analysis of the Tadic & Akayesu Trials', *DePaul L. Rev.*, Vol. 49, No. 981, 2000, p. 998.

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law.”<sup>148</sup> Goldstone later emphasized the effect of NGO activism on the ad hoc courts and how gigantic steps had been made “by the tribunals in the development of the normative law.”<sup>149</sup> Similar activism on crimes of sexual and gender-based violence occurred in the *Akayesu* case in the ICTR, leading to the first ever judicial finding that rape can be genocidal when it takes place in a context in which the victims are targeted for their membership in a protected group.

Since its establishment in 1993, the ICTY has forever impacted the way that victims participate in proceedings and voice their personal experiences<sup>150</sup> and obtain relief. This success can at least, in some measure, be attributable to the position of advocacy employed by NGOs. Today, Rule 34 of the Rules of Procedure and Evidence, which was crafted with the help of some proposals from NGOs,<sup>151</sup> provides for the creation of a Victims and Witnesses Unit within the ICTY’s administrative organ.<sup>152</sup> In the creation of the Victims and Witnesses Unit, Rule 34 states that “[d]ue consideration shall be given, in the appointment of staff, to the employment of qualified women” and that the purpose of such a Unit is to “[p]rovide counseling and support for [victims and witnesses], in particular[,] in cases of rape and sexual assault.”<sup>153</sup>

NGOs have exerted influence on international tribunals by “planting a seed” into the minds of individuals that have great discretion in gearing the direction of these various tribunals. Such strategic influence inevitably resulted in a much-needed change in their formation and internal regulations. NGOs have also pushed for the rights of victims to protection and their right to participate in proceedings. Additionally, they have emphasized the importance of the right to a fair trial and have kept up consistent efforts to have such rights incorporated into tribunal rules and regulations.

In the ICTR and subsequently the SCSL, due to the ICTY precedent, victims units became part of the institutional fabric of those tribunals. But when it comes to victims, the ICC went further than any other ad hoc tribunal. Although the idea necessarily had to enjoy strong support from states especially the civil law countries that championed them, the role of victims went far beyond anything that had been experienced in international criminal justice. Under the Rome Statute scheme, victims not only have the ability to appear as witnesses but also are for-

148 R. Goldstone, ‘The United Nations’ War Crimes Tribunals: An Assessment’, *Conn. J. Int’l L.*, Vol. 12, No. 227, 1997, p. 231.

149 *Id.*

150 About the ICTY, <icty.org>, <www.icty.org/sections/AbouttheICTY> (last visited 20 December 2014).

151 Fabian 2000, p. 998.

152 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, at Rule 34, U.N. Doc. IT/32/Rev. 38 (13 June 2006); see also M. Monshipouri, *Seeking Justice and Accountability: The Dilemmas of Humanitarian Law and Human Rights NGOs*, 2013, p. 82.

153 Mertus 2008, p. 1310; see also International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, Rules of Procedure and Evidence, at Rule 34, U.N. Doc. IT/32/Rev. 38 (13 June 2006).

mal participants in the courtroom process and enjoy, among other rights, the right of appearance as well as the possibility of securing reparations through the trust fund. In providing for victim restitution, compensation, and rehabilitation, the Court can even make an order directly against a convicted person. The reverse of the coin is the criticism that the defendants now have to face multiple prosecutors, not just the official prosecutor, who bring all kinds of information to the court thereby stacking the deck against them and in violation of fair trial guarantees.

#### 4.3 *NGOs as Supplements to the Policy Steps of States*

NGOs contribute to the efficiency of the international criminal justice system by serving as important supplements to the work carried out by international organizations and like-minded states. In this regard, NGOs specialize in particular issues and geographic regions sometimes more than state-based international organizations do. Because they tend to be effective in their areas of expertise, they are arguably less vulnerable to corruption compared with other organizations, and their objectives and goals are less likely to fluctuate according to political influence or support.<sup>154</sup> Indeed, in June 2006, the signatories of the first international NGO Charter<sup>155</sup> (hereinafter “Charter”) emphasized “their unique role in finding solutions to problems that governments are either unable or unwilling to address on their own.”<sup>156</sup>

One way that NGOs have been beneficial supplements to states is by making preventive aid more efficient and more easily distributed throughout states that require such aid. One way of making the distribution of preventive aid more effective is through a process called “alliance formation.”<sup>157</sup> Alliance formation is a newly recognized process where NGOs work with one another; complement each other’s work; and, therefore, increase their overall impact.<sup>158</sup> One such example of this “alliance formation” has been taken on by divisions of the International Committee of the Red Cross (ICRC), which have come together and properly coordinated their actions to provide relief and make sure their efforts do not overlap.<sup>159</sup> The internal conflict in Darfur, Sudan, exposed the need for an expanded view of modern international law, which demonstrates the need for intervention procedures that integrate NGOs and their alliances. NGOs such as France’s Action Against Hunger, Ireland’s GOAL, the United States’ Coalition for International Justice, and Respond have been involved in the Darfur crisis in large numbers.

154 J.J. Welling, ‘Non-Governmental Organizations, Prevention, and Intervention in Internal Conflict: Through the Lens of Darfur’, *Ind. J. Global Legal Stud.*, Vol. 14, No. 147, 2007, p. 171.

155 See Int’l Non-Governmental Organizations: Accountability Charter 2, 2006, <[www.oxfam.org/en/files/INGO\\_accountability\\_charter\\_0606](http://www.oxfam.org/en/files/INGO_accountability_charter_0606)>.

156 C.H. Udo, ‘Nongovernmental Organizations and African Governments: Seeking an Effective International Legal Framework in A New Era of Health and Development Aid’, *B.C. Int’l & Comp. L. Rev.*, Vol. 31, No. 371, 2008, p. 381.

157 Welling 2007.

158 *Id.*

159 *Id.*

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In the international criminal justice system, NGOs also serve as an additional means of financial support.<sup>160</sup> In addition to funding from its Member States, the creation of the ICTY and the SCSL have benefited from additional financial support by NGOs.<sup>161</sup> Among many others, NGOs that have assisted the Tribunal in such a manner include the Carnegie Foundation, the Coalition for International Justice, and the Rockefeller Foundation.<sup>162</sup>

Although NGOs act as supplements to states, there are factors that place a limit on what they can actually accomplish. I mention some of these factors briefly here. The rapid participation and growing presence of NGOs in active relief has led to growing possibility that in the process, such NGOs may subject themselves to manipulation by political forces.<sup>163</sup> Because private agencies must often negotiate in order to gain access to those in need of assistance, NGOs have increasingly become subject to manipulation, which has created the risk of undercutting their primary responsibility to alleviate suffering.<sup>164</sup> Moreover, being that they are heavily dependent on state power and regional organizations, NGOs face the difficulty of accomplishing their goals as far as their source of funding would allow.<sup>165</sup>

#### 4.4 *NGOs as Advocates for Global Cooperation*

NGOs serve as catalysts for global cooperation between themselves and among government officials. Aside from participating in more specific elements of the subparts of our international criminal justice system, NGOs also play a useful role in making all such subparts and element come together on a global level. Consistent with their long record (as described above), NGOs continue to not only report on situations that cause international crimes but also open up paths for governmental officials to come together.<sup>166</sup> For example, many NGOs have launched campaigns to raise awareness and demand action in response to the serious human rights violations in Sudan through the Save Darfur Campaign.<sup>167</sup> Additionally, Amnesty International is said to have been among those responsible for mobilizing the public support necessary for the adoption and individual governments' ratification of the United Nations Convention against Torture.<sup>168</sup> By keeping international crimes on the agenda of developed countries, establishing contact points in countries affected by conflict, and providing building blocks for more robust trans-governmental cooperation in the field, NGOs give sovereign

160 N.J. Crimm, 'The Global Gag Rule: Undermining National Interests by Doing Unto Foreign Women and NGOs What Cannot Be Done at Home', *Cornell Int'l L.J.*, Vol. 40, No. 587, 2007, p. 628.

161 *Support and Donations*, <icty.org>, <[www.icty.org/sections/AbouttheICTY/SupportandDonations](http://www.icty.org/sections/AbouttheICTY/SupportandDonations)> (last visited 20 December 2014).

162 *Id.*

163 Monshipouri 2013, p. 79.

164 *Id.*

165 *Id.*

166 Turner 2007.

167 *Id.*

168 *Id.*

governments the tools, justification, and that extra “push” to fully cooperate in achieving shared goals.

Another critical role that NGOs have played in the international criminal justice system relates to the arrests and surrender of suspects and accused persons. Among the best examples of this is the case of former Liberian President Charles Taylor, who was indicted by the SCSL in 2003. But, under a political arrangement reached by states, he was given asylum in Nigeria instead of being transferred to the Sierra Leone Tribunal for prosecutions. It took many years of NGO advocacy, including in Nigeria and internationally, before the accused was handed over in March 2006 to the SCSL for trial. Obviously, his arrest ultimately had to be carried out when the political will of states existed.

But to think that this would have occurred without civil society pressure would be to deny credit where it was due. International NGOs, working with counterparts in the local (West Africa) region, were also instrumental in creating the type of pressure that eventually resulted in the actions of Senegal and the African Union to create a special chamber in Senegalese courts to prosecute former Chadian President Hisséne Habré on allegations of torture committed during his presidency in Chad. In both instances, it seems that without the effective global campaigns mounted by NGOs and civil society supporters for justice, neither result would have occurred. And we have not even mentioned the wider prominence and role that NGOs are playing today in pushing for prosecutions in the area of universal jurisdiction for international crimes especially within certain European national courts. Nor have we, in the context of the ICC's work, mentioned the crucial role of NGOs in presenting over 10,000 formal communications by the end of 2013 to the Office of the Prosecutor alleging the commission of serious crimes under Article 15 of the ICC Statute.

## 5 Some Criticisms of NGOs: Issues of Transparency, Accountability, and Legitimacy

The end of the Cold War made way for an era in which international and transnational NGOs became very prominent in the international political arena.<sup>169</sup> In fact, in a December 1999 speech to the World Civil Society Conference, Kofi Annan, the then Secretary General of the UN, stated that NGO representatives had brought the “We, the Peoples” concept of the UN Charter to life and even notched up the promise that “people power” could make the UN Charter work.<sup>170</sup> However successful these NGOs were – like in the adoption of a global landmines ban (the first ban on an active weapons system in history) – it was not long before doubt as to their accountability, legitimacy, and transparency began to rise to the

169 K. Anderson, ‘What NGO Accountability Means – and Does Not Mean’, *Am. J. Int'l L.*, Vol. 103, No. 170, 2009.

170 Kofi Annan, Secretary-General, United Nations, Address at Millennium Forum (22 May 2000), at M2 Press wire, 23 May 2000 (calling for an intensified “NGO revolution”).

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surface.<sup>171</sup> So to say that their role has been critical in progress is not to be naïve or blind to their challenges.

Advances in technology, the cooperation of NGOs, changes in our international system, and the acceptance of NGOs by governments have certainly contributed to how much power and influence NGOs seem to enjoy today.<sup>172</sup> The more prevalent they are, the more the need for accountability of these actors.<sup>173</sup> The current literature points to the reality that NGOs are hardly accountable to anyone: NGO leaders are not always elected by the membership, they are not always subject to effective domestic laws, and there is no standard public law that regulates them at a global level.<sup>174</sup> Additionally, there is always the risk that NGOs will be bought off, as there is not much for them to do without the requisite funds and many have routinely accepted government funding. Some of them, in their programming and ideology, seem to follow the money. These are legitimate issues that will likely increasingly call for more concerted international action and regulation than has so far been the case with the current patchwork of disparate national laws and regulations governing them.

Another thing that is controversial about NGOs turn on their legitimacy. On one side of the debate are the individuals, like Kofi Annan, who apparently see the advantages of NGOs and their role as a source of legitimacy in global governance.<sup>175</sup> NGOs themselves, as aptly stated by Kenneth Anderson, have “helped themselves to this legitimacy by making otherwise unsubstantiated claims of representation.”<sup>176</sup> On the other side of the debate, however, are the individuals that ponder whether NGOs are responsible with their power and if they even have a basis for that power.<sup>177</sup> A strong focus is put on representation and how the people that NGOs claim to represent really may not have a meaningful say in the internal decision-making processes. Democratic participation, which is a valued liberal idea, is a rare prospect with some NGOs.<sup>178</sup> Their legitimacy is further diminished by their strong incentive to cooperate with international organizations, which gain legitimacy as a result and offer NGOs recognition, access, and other privileges in return.<sup>179</sup>

171 See Anderson 2009, p. 173; see also ‘NGOs: Sins of the Secular Missionaries’, *Economist* 29 January 2000, p. 25; see also J. Marozzi, ‘Whose World Is It, Anyway?’, *Spectator* (London), 5 August 2000, p. 14.

172 See, generally, Anderson 2009, p. 173.

173 Spiro 1996.

174 *Id.*; see Anderson 2009.

175 *Id.*, p. 175.

176 *Id.*, p. 176.

177 NGO leaders are not elected by membership and members even tend to maintain their affiliation with an organization despite the fact that they disagree with the NGO’s position. Additionally, there is no standard public law that can act as a “check-and-balances” on the NGO’s discretionary power. This results in the leadership of the NGO obtaining a vast amount of discretion. See Spiro, 1996.

178 See Anderson 2009, p. 175; see also S. Charnovitz, ‘Nongovernmental Organizations and International Law’, *AJIL*, Vol. 100, No. 348, 2006.

179 Anderson 2009, p. 177.

Significantly, in some influential circles such as the UN, the over-representation of NGOs from the Global North is a major concern that remains yet to be resolved. Often, their comparatively better resources mean that they are also the ones more likely to influence policies, to the detriment of their NGO brethren from the Global South, which often have relatively more limited resources to participate in official UN conferences and other sites of advocacy. This creates a type of dependency that narrows the scope of views available and privileges policy preferences of the more powerful – as in other areas of life.

Despite the risk that NGOs pose in terms of accountability and legitimacy in the international criminal justice system, it is submitted that these institutions, nevertheless, generally bring advantages that go beyond their vital roles as information sources or platforms for progressive advocacy. Although it is important to establish some type of institutional accountability and formal law-making that govern NGOs, it is neither necessary nor a sufficient condition for good governance. The competition among NGOs serves as a loose system of “checks and balances” among themselves, as other NGOs will make light of situations when other NGOs default.<sup>180</sup> It can perhaps even be claimed that it is important for NGOs not to turn into a true bureaucracy, as this allows them to more freely express their views and oppositions and diverse points of views based on their distinctive agenda.<sup>181</sup> This wide array could in turn be an acceptable basis to hold other actors in the international criminal justice system, especially those institutions created by states, more accountable to the people whose interest they purport to represent.

## 6 Conclusion

In this article, I have discussed the influential role and impact of NGOs on the fledgling international criminal justice system. I have tried to show that, by any measure, the participation of these actors has undoubtedly increased since the end of World War II – even though advocacy for criminal responsibility for international crimes predated the current international patchwork of tribunals we have. Indeed, in the years following the founding of the United Nations, the increased participation of NGOs in global affairs has led to them being indispensable players in a still largely state-centric international law system. This includes providing support and advocacy in relation to human rights generally and the processes leading up to the international community’s creation of the ICTY, ICTR, and the SCSL, all of which provided a base for the establishment of a permanent International Criminal Court in 1998.

The establishment of these international tribunals and NGOs’ contribution to their formation, operation, and sustainability have inevitably moulded our perception of international criminal law and helped put it on a generally more positive path on the side of humanity and the victims of mass atrocities. NGOs help

180 Spiro 1996.

181 See Anderson 2009, p. 177.

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prosecutors carry out their mandate by performing complex functions ranging from collecting evidence and documenting the commission of international crimes to offering suggestions and input on policies or holding states' feet to the fire to put their money where their mouths are. They also help to raise general public awareness of the perpetration of international crimes, provide assistance where states and international organizations sometimes are unable to reach, and serve as vital links between victim communities and the international community.

Although far from suggesting that they do not sometimes deserve criticism, especially when it comes to questions about their accountability, transparency, and legitimacy and the lack of body of formal rules governing their actions on the international plane, NGOs have proved themselves to be not only beneficial but also necessary actors in our state-centric international criminal justice system. For that reason, they are likely to continue being a permanent fixture and source of inspiration for states to the future development of international criminal justice.