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**From Outside Contributors to Inside Participants:
Exploring How NGOs Contribute to and Participate in Creating International Law
- Examining the Negotiations for the Ottawa Convention Banning Landmines and the Rome Statute of
the International Criminal Court -**

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**– Examining the Negotiations for the Ottawa Convention
Banning Landmines and
the Rome Statute of the International Criminal Court –**

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Abstract

Within the current accepted paradigm of the international legal system, states are the only entities with the right to create international law. Recent experience however, shows that non-state entities, in particular non-governmental organizations, are increasingly becoming directly involved in the process of creating international law. This dissertation examines two cases – the Ottawa Process to ban landmines, and the International Criminal Court negotiations – to explore how NGOs *contribute* to international law creation, and whether they *participate* in the process of creating international law.

In both cases NGOs engaged in a multitude of activities as they interacted with other entities involved in the negotiations. NGOs contributed to the process through: (a) agenda-setting; (b) creating conference agendas; (c) providing knowledge, expertise, and analysis; (d) negotiating with and between states; and (e) drafting instruments. In addition to these traditional activities, in these two cases NGOs also worked in coalition with each other, and with core-group and like-minded states to advance shared purposes.

Multilateral negotiation theory and coalition dynamics offer a lens through which to understand how NGOs and states interacted with one-another in the process of creating international law. In working in alliances with similarly inclined states, NGOs contributed to three key aspects of coalition strength: (1) coalition size; (2) coalition diversity – through naming and shaming, contributing different resources and bargaining skills, taking risks, and securing support from civil society to leverage governments; and (3) communication functions – through intelligence networks, enrolment power, monitoring and analytical capacity, and institutionalized communications.

NGOs worked alongside states, contributing to the effectiveness and strength of coalitions, and fulfilling the same roles as states, indeed, in some instances roles states could not fulfill on their own. By contributing to coalition strength and success, NGOs *participated* in the exercise of creating international law, even though they are not states. The result of this study is the recognition that two recent instances of international law creation fall outside the widely accepted understanding stating that only states create international law.

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The last word is a dedication. To the human rights defenders around the world who work to protect the vulnerable and hold human rights violators to account, and who frequently themselves become the victims of human rights abuses, I dedicate my small efforts here to you. ~ **Human Rights for All. No Exceptions.** ~

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I. Chapter One: Introduction

A. Background

International law is created within the framework of the traditional international legal system, which, in turn, is shaped by and populated by nation states. From the Peace of Westphalia¹, and the beginnings of what was to become a coherent system of nations negotiating bilaterally on items of common interest, international law has been based on the will and the say of states. States now regularly have multilateral conversations with one another, and over time international agreements have become more complex. In part to deal with this complexity, states have collectively created international organizations that have their own legal personality, and through which states also create international law. In this dissertation the notion of states creating international law includes both states acting individually, and states acting collectively through international organizations. Nevertheless, the principal unit of international law remains the state. International law, though it has gradually extended to encompass non-state actors, continues to be created largely for states, and exclusively by states.

Over the past century, however, other forces have begun to emerge, gradually demanding more recognition and more power within the international arena. Multinational corporations, for example, with holdings and operations in multiple nation states, and dealings crossing a multitude of national legal systems, exert a real and tangible influence on the international legal system. Similarly, civil society has become increasingly

¹ The treaty negotiated in 1648 established equality between nations; Richard Falk, "The Interplay of Westphalia and Charter Conceptions of International Legal Order" in R.E. Falk & C.E. Black eds., *The Future of the International Legal Order: Trends and Patterns* (Princeton, N.J.: Princeton University Press, 1969) 32 at 43.

cohesive and organized, and has begun to influence the shifts and turns of international events.² One of the ways in which civil society comes together and expresses itself is through the vehicle of non-governmental organizations (NGOs).³ NGOs have become increasingly apparent in society over the past few decades. Their numbers, their ability to make certain issues come to the fore in the international public discourse, and their connection to and reflection of civil society have all helped to make NGOs an actor on the world stage.

As nations create international law on myriad topics, various forces attempt to influence state decision-makers. Lobbying, bringing media attention to bear, and engaging the voice of citizens and/or shareholders are tried and true methods for pressuring governments. All of these tactics are presumed to take place on the periphery of the system when it comes to creating international legal standards. NGOs are generally seen to influence states, where they can, from the outside, but not from within the process of law creation itself. The *status quo* of the international legal system, based on the foundations of Westphalian notions of state sovereignty, do not allow for non-state entities to participate as equal players in the formal process of creating international law.

Increasingly, however, it appears that some non-state voices have been playing a bigger role and have been making an increasingly significant impact. Particularly in the 1990s, NGOs seemed to be on a roll with regard to their input to the creation of international

² Unfortunately, it is beyond the scope of this project to examine the extent of multinational corporations' impact on international law, or the scope and dynamics of civil society, however these examples demonstrate the changing reality of the international legal system.

³ For more on non-governmental organizations, see Chapter Two, section C.

law. In quick succession, NGOs were actively involved in negotiations to ban the production and use of landmines, and the negotiations for the creation of an international criminal court. Non-governmental organizations were visibly playing key roles, and often seen to be working closely with states. Indeed, in some instances, such as the case of the movement to ban landmines, it appeared that NGOs were themselves driving the international discourse on the topic, and at a minimum contributing to the shaping of the final international legal instrument.

1. Research Problem

So what was happening here? Were non-governmental organizations contributing to negotiations in these two cases of international treaty negotiations? And if they were contributing, were they taking things one step further and actually *participating* in the process of negotiation that would ultimately create new international law? It appeared so. But how could this be? NGOs are not states. States had not suddenly granted law-creating powers to non-state entities. This research is an attempt to resolve the following question: If international law is created by states, do non-governmental organizations participate in the creation of international law, and if so, how?

2. Research Questions

In order to grapple with the research problem, several sets of problems present themselves. Firstly, in order to understand the dynamics in which international law is made, the following questions arise: What does the framework of the international legal system look like, and who are the main actors within that framework? How is

international law made? What are non-governmental organizations, and where do they fit into the international legal system? What are the elements of the international legal framework that determine whether and how NGOs can participate in the process of creating international law? Are there any theories that would help explain how NGOs take part in the process?

The second set of questions revolves around actual examples of international law creation. Are there useful examples of significant NGO contribution to the creation of international law? How did states and non-governmental organizations interact in these cases? What were the key activities of NGOs, and did NGOs collaborate with one another, and with states, in the context of negotiations leading to the creation of international legal instruments?

The third set of questions, revolve around an analysis of the practical examples considered. Based on the cases examined, do NGOs, in fact, contribute to the creation of international law? If so, what do they contribute, and what techniques do they use to take part in that process? How do NGO activities match up to the roles played by various parties to negotiations? Do NGOs play any particular roles within that framework? And finally, are the activities of NGOs having any impact on the creation of international law within the context of the current international legal system?

3. Situating the Study

The data used to help answer these questions comes from primary and secondary sources. I examine international legal doctrine, and review monographs, journal articles, media coverage, and NGO reports. These provide first hand accounts as well as scholarly analyses of the events. I also conduct a number of personal interviews with individuals who were intimately involved in the negotiations. And of course, I consult the instruments themselves, as well as select drafts and agreements entered into prior to the final treaties.⁴

In order to try to understand the shifting dynamics with regard to the role played by NGOs in international multilateral negotiations, I examine more closely two recent examples of international negotiations that resulted in the creation of international legal instruments: the landmines negotiations, and the negotiations for an international criminal court. Both of these negotiations happened in the 1990s, and both involved unprecedented levels of NGO participation. By examining each of these cases more closely, I hope to identify patterns that help explain how NGOs seem to become intimately involved in a negotiation process at levels normally open only to states.

The field of negotiation theory serves as a starting point to grapple with the forces at play when parties come together from divergent backgrounds to work out a common resolution. More specifically, theories of international multilateral negotiations are particularly useful as they attempt to take into account the added complexity of various

⁴ While NGOs made comprehensive and significant suggestions of specific draft text in both instances examined in this study, the extent to which these suggestions were on-going, and the lack of consistent documentation of drafting suggestions from NGOs, makes it difficult to follow NGO contributions at this level. The study, does however, consider select instances of NGO drafting contributions in subsequent chapters.

streams and levels of negotiations occurring at the same time. I. William Zartman points out the various levels of complexity by identifying six characteristics of multilateral negotiations: 1) multiparty; 2) multi-issue; 3) multirole; 4) variable values, parties, and roles; 5) outcomes are geared towards rule making; and 6) the prevalence of coalitions.⁵ The complex brew of these characteristics is certainly present in both cases studied here.

Fen Osler Hampson and Holly Reid build on this recognition by observing that international multilateral negotiations tend to take place not so much between individual actors, but between groups of actors, or coalitions.⁶ They suggest that one of the determining factors of a coalition's success is the extent to which the coalition benefits from size and diversity. They argue that regardless of which school of international negotiations is used as a lens to examine coalition dynamics, size and diversity remain the determining factors in a coalition's success.⁷ Peter Drahos also explores the way parties work in coalitions.⁸ Drahos' analysis focuses primarily on communications functions, and various activities that contribute to the ability of coalitions to prosper. He points out that communication within groups increases cooperation and decreases defection from the groups.⁹

⁵ I. William Zartman, "Two's Company and More's a Crowd" in I. William Zartman ed. *International Multilateral Negotiation: Approaches to the Management of Complexity* (San Francisco: Jossey-Bass Publishers, 1994) at 5-6.

⁶ Fen Osler Hampson & Holly Reid, "Coalition Diversity and Normative Legitimacy in Human Security Negotiations" (2003) 8 *Int'l Negotiation* 7.

⁷ *Ibid.* at 33-34.

⁸ Peter Drahos, "When the Weak Bargain with the Strong: Negotiations in the World Trade Organization" (2003) 8 *Int'l Negotiation* 79.

⁹ *Ibid.* at 99.

Each of these commentators, when considering coalition dynamics, focuses primarily on the participation of nation states. Where consideration is given to non-state actors, it is generally with regard to their impact on the process as secondary to that of states – how they influence states to behave in certain ways or take certain positions. Little consideration is given to the role non-state actors take themselves within coalitions. Is it possible that, within international multilateral negotiations in the context of law creation, NGOs are engaging with coalitions in a more direct way?

Perhaps the two perspectives on coalition dynamics presented by Hampson and Reid, and Drahos offer some clues as to how NGOs participate in international multilateral negotiations. Perhaps NGOs contribute crucial factors to coalitions that states are themselves less able to provide. Perhaps, through these contributions, NGOs participate in discussions and in other functions of coalitions, much as states do. And perhaps, then, NGOs *directly participate* in treaty negotiations by becoming equal members of coalitions alongside states. In exploring the questions laid out above, this research adds to the academic discourse on the very specific role NGOs play in coalition dynamics within international multilateral negotiations, and how that role differs from and complements the role played by state actors.

As this study focuses on only two cases of NGO involvement in international multilateral negotiations, it limits itself to instances where NGOs have met a high degree of success in their endeavours. This research does not answer questions about instances where NGOs have failed entirely to participate in the system, or even cases where they have not

been quite so successful. Nor does this research consider in any detail the myriad factors that contribute to creating a mood ripe for negotiations to be successful in general, such as the issue being one that can be easily distilled for a public audience to grasp; the pre-existing inclination of state leaders towards a particular outcome; and the issue being one around which the NGO community can easily rally without challenging existing organizational mandates.

In addition, because of the cases chosen for this study, this work deals with law creation in the domain of human rights and human security realm, and therefore cannot speak to NGO involvement in other areas of international law creation such as the environment, or finance. By the same token, the choice of cases determines in which field the participating NGOs work; perhaps NGOs working in the environment, or international finance issues would behave differently in coalition scenarios and therefore produce different results. Nevertheless, the discoveries made by examining these two cases do offer answers to the research problem this study addresses.

B. Presentation of the Research

In the next chapter, Chapter Two, I consider the international legal system, examining the component pieces of the international law framework as they relate to non-governmental organizations. First, I briefly describe the Westphalian system as the root of the current international legal system, before examining the notion of personality in international law, and the concept of statehood as the main criterion for legal personality. I then explore the categories of non-state actors that have over time gained qualified legal status

within the international legal system. Then I consider how international law is created: the processes of developing customary international law and treaty law, and the interrelations between the two. In the second section of the chapter I give a brief overview of the phenomenon of non-governmental organizations – their key characteristics, and some of the elements of NGOs that are currently under debate. I also give a synopsis of the recent history of NGOs in the international legal system. The third section of Chapter Two allows me to explore the complex relationship between non-governmental organizations and the United Nations – the official status granted to NGOs in the inter-governmental body, both through formal mechanisms and through practice. Finally, I set out the key components of international multilateral negotiation theory as they relate to coalition dynamics in multilateral negotiations. I then outline two aspects of coalition dynamics – the size and diversity theory, and the role of communications functions. In the chapters that follow I will use these two aspects of coalition theory to examine how non-governmental organizations contribute to the process of creating international law.

In Chapter Three I examine the case of the international multilateral negotiations known as the Ottawa Process, that culminated in the creation of the ban landmine treaty. First, I examine the history of landmines, and present the reality of the effects of these weapons; the impact they have on individual lives, and on societies and cultures faced with their use. Second, I present some of the events in the previous decades that allowed for a shift in perspective on the usefulness and appropriateness of landmines. In the third section of Chapter Three I examine the negotiations that happened beginning in the early 1990s, the

various locations in which these conversations took place, and the two tracks taken to bring the world's attention and determination to ending the scourge of landmines with a treaty signed in Ottawa in December 1997. The fourth section of this chapter offers a closer examination of the various players in the multilateral negotiations, including the core group states, and the anti-mine movement generally. I then consider how non-governmental organizations contributed to, and participated in, the conversations taking place on the issue of landmines, and briefly describe the collaboration both between NGOs themselves, and between NGOs and governments.

Chapter Four offers an examination of the international multilateral negotiations that took place with a view to creating an international criminal court. I begin by examining previous attempts at securing international criminal justice through courts over the course of the 20th century. Second, as in the previous chapter, I consider some of the factors that shifted over time that allowed for a new approach to this issue. Thirdly, I lay out the various stages of the negotiation journey which ultimately led all the participants to Rome, Italy in the summer of 1998 for the final diplomatic conference. In the fourth section of this chapter, I examine more closely the various actors that participated in the multilateral negotiations, specifically the United Nations, various groupings of state actors, and non-state actors. I then go on to explore the specific ways in which non-governmental organizations took part in the conversations, and how they contributed to the process. I also briefly consider some of the key issues facing the Rome Conference, and the forms of collaboration that emerged between NGOs themselves, and between NGOs and governments.

In the fifth chapter I discuss the findings of the previous chapters. In the first section I examine in detail the contributions made by non-governmental organizations to the creation of international law in each of the two case studies. I catalogue the contributions, and then consider the techniques NGOs used both working in coalitions among themselves, and in coalitions with states. In the second section, I review multilateral negotiation theory and coalition dynamics, and apply these principles to both cases, parsing out where NGOs contributed to size and diversity, and to communication functions of the coalitions in which they participated. In the third section of Chapter Five, I consider how NGOs are impacting the current international legal system, not only in the content of the law and in the process of creating the law, but also their impact on coalition dynamics and the Westphalian paradigm itself.

In the sixth and final chapter I briefly review the findings of the previous chapters: the international legal framework, the cases examined, and the key findings from the discussion chapter. I conclude with some thoughts about further areas of research and thinking.

II. Chapter Two: International Law Framework

A. Introduction

This chapter examines the international legal system, and how non-governmental organizations participate in that system. The first section outlines the traditional Westphalian system within which the classic international law perspective is rooted. It looks at the primacy of states within the system, and the extent to which legal personality has been granted to select non-state entities. The section also examines how international law is created through customary law and the creation of treaties, and the interrelationship between the two.

The second section of this chapter gives a brief overview of the NGO phenomenon. It outlines the key characteristics of NGOs, and presents some of the factors open for debate in determining whether an entity qualifies as a non-governmental organization. The section also looks briefly at the recent history of NGOs in international law.

The third section of the chapter explores the relationship NGOs have with the United Nations. It examines the formal place of NGOs within the UN, primarily within and through ECOSOC, and then considers how NGOs actually function within the UN system. The chapter ends with an overview of multilateral negotiation theory as it is used to understand of the creation of international law. It goes on to examine some key aspects of coalition theory as they relate to coalition strength, in particular size and diversity, and communications.

B. The Westphalian System and Classical International Law

The international legal system is based on a classical view of international interaction where states are the prime actors, and all other actors are secondary. While this may well have been an accurate representation of the international legal system when the United Nations was founded, it is increasingly being challenged as a fair picture of what happens in the world today. Nevertheless, this framework remains the basis for international relations, particularly within the context of law creation, where – at least on paper – states are the only actors with full legal personality in international law, and thus the only actors entitled to make international law. As will be seen in the two cases studied in this dissertation, it is becoming increasingly common for non-state actors to contribute to, and take part in the process of creating international law. Nevertheless, they do so within the confines of the traditional system, which does not in fact entitle them to be involved in this way.

1. Origins of the Westphalian System

The origins of the classical international legal system lie in the Peace of Westphalia negotiated in 1648. Until Westphalia medieval European society had functioned within an infrastructure dominated by the Pope and the Holy Roman Empire.¹ After decades of wars throughout central Europe based largely on religious differences, the Peace of Westphalia established a principle of religious equality which was to contribute to peace

¹ Richard Falk, "The Interplay of Westphalia and Charter Conceptions of International Legal Order" in R.E. Falk & C.E. Black eds., *The Future of the International Legal Order: Trends and Patterns* (Princeton, N.J.: Princeton University Press, 1969) 32 at 43.

“under an international guarantee.”² Nationalism replaced feudalism, and national governments asserted exclusive authority within their territorial jurisdiction.

Within the resulting Westphalian model there is no authority superior to state governments. States, based on fixed territorial boundaries, with “a single, secular authority governing each territory and representing it outside its borders”³ became the standard upon which international relations were based. International peace, though by no means guaranteed, was buoyed by the respect for the principle of non-intervention shared by a growing number of states.⁴ In theory, although not in practice, sovereign states have equal status under international law, with equal bargaining power.⁵ As far as states – as primary actors – were concerned, this rigid and conservative structure had the effect of promoting political stability. State sovereignty, based on defined territorial boundaries – within which other states have no rights and no legal authority to intervene in the sovereign or domestic affairs of that state – remains to this day the corner stone of international law.

2. Personality in International Law

From this beginning the current international system has evolved to retain sovereign states as the primary units within the international legal framework. As a result, states benefit from full legal personality as subjects of international law; they are capable of

² Leo Gross, "The Peace of Westphalia" (1948) 42 Am. J. Int'l L. 20 at 22.

³ J.T. Mathews, "Power Shift" (1997) 76 Foreign Affairs 50 at 50.

⁴ Falk, *supra* note 1 at 44.

⁵ Christopher Harding & C.L. Lim, "The Significance of Westphalia: An Archaeology of the International Legal Order" in Christopher Harding & C.L. Lim eds., *Renegotiating Westphalia -- Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Boston: Martinus Nijhoff, 1999) 1 at 5.

possessing legal rights and duties, and capable of making international claims.⁶ In short, they are subjects of international law as of right. States, then, take on a role in international law equivalent to that played by individuals in most domestic legal systems. They are the centre of the system; its *raison d'être*.

Case law defines a subject of international law as an entity capable of possessing rights and duties under international law, and having the capacity to maintain its rights by making international claims.⁷ In fact, this definition from the *Reparations Case* is circular, in that only an entity with legal personality can satisfy the requirements stated in the definition of a subject of international law. It is nevertheless the common definition, and some point out that it accurately reflects what it means to define a subject of international law.⁸ Non-state entities wishing to participate in the international legal infrastructure, may do so only if they conform to the requirements of being a subject of international law. Further, entities with restricted legal personalities are subjects of international law only to the extent permitted by states – the primary subjects. Examples of secondary international subjects include international organizations, individuals, and corporations, which will be treated below.

3. Criteria of Statehood

If states are the principal members of the international legal system, it is helpful to have a list of generally accepted criteria by which to determine whether an entity is a state

⁶ Ian Brownlie, *The Rule of Law in International Affairs*, (Boston: Martinus Nijhoff, 1998) at 35 [Brownlie, *Rule of Law*].

⁷ *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] I.C.J. Rep.174 at 179 [*Reparations Case*].

⁸ John Currie, *Public International Law*, (Toronto: Irwin Law, 2001) at 19.

within the context of the international legal system. The indicia of statehood have long been established in customary international law, and are codified in the *Montevideo Convention*⁹ which sets out the criteria in Article 1 of the *Convention* as follows: “The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states.”

While these qualifications may be helpful in determining whether an entity is indeed a state in international law, the indicia are not hard and fast requirements. As there is no central body charged with determining each candidate’s suitability,¹⁰ the qualification process cannot be said to be hard and fast. There are instances where entities are treated as states even with one or more of the requirements unsatisfied, or entities that satisfy all the technical requirements and yet are not treated as states.

The first qualification is that there be a permanent population. Such a population is taken to indicate that there is a stable community to which the identity of statehood can apply.¹¹ A definable population establishes that the state exists for some purpose, namely to govern an organized group of people. There is no specified minimum population,¹² nor is

⁹ *Convention on the Rights and Duties of States*, 26 December 1933 (entered into force 26 December 1934), (1934) 28 Am. J. Int’l L. Supp. 75.

¹⁰ Currie, *supra* note 8 at 21.

¹¹ Ian Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 70-71 [Brownlie, *Principles*].

¹² There are several recognized states with very small populations, e.g. Vatican City (under 1000, and Nauru and Tuvalu (both under 11,000); Currie, *supra* note 8 at 21, n. 11; James Crawford, *The Creation of States in International Law*, (Oxford: Clarendon Press, 1979) at 40.

there any requirement of homogeneity, or historical longevity.¹³ The population need not necessarily share the same nationality.¹⁴

The second factor, a defined territory, is also somewhat flexibly defined, though it seems to be a critical precondition of statehood.¹⁵ There must be some indication of which physical territory the state applies to, however there is no minimum requirement of geographical size.¹⁶ The territory need not be contiguous,¹⁷ nor is there a need for clearly defined and settled borders.¹⁸ In fact it is not uncommon for recognized states to be involved in disputes with neighbouring states over territorial boundaries, and as a result not being able to clearly stipulate the exact demarcations of territory.¹⁹ What is at issue is the requirement for some identifiable piece of territory to be under the actual and effective control of the state.²⁰

The third qualification, that of government, is somewhat more complex. There is no restriction on the form of government.²¹ Rather the requirement is for “an indication of some sort of coherent political structure and society, as opposed to the necessity for a sophisticated apparatus of executive and legislative organs.”²² This qualification requires that the government be independent of any other authority,²³ and have sovereign control

¹³ Currie, *supra* note 8 at 21.

¹⁴ Crawford, *supra* note 12 at 40.

¹⁵ Currie, *supra* note 8 at 22.

¹⁶ Rebecca M.M. Wallace, *International Law*, (London: Sweet & Maxwell, 1986) at 55.

¹⁷ Currie, *supra* note 8 at 22.

¹⁸ Malcolm N. Shaw, *International Law*, 4th ed. (New York: Cambridge University Press, 1997) at 141.

¹⁹ Currie, *supra* note 8 at 22.

²⁰ Shaw, *supra* note 18 at 141.

²¹ Currie, *supra* note 8 at 24.

²² Shaw, *supra* note 18 at 141.

²³ Wallace, *supra* note 16 at 55.

over its territory.²⁴ According to Crawford, there are two elements to the government factor: first, it must have the actual exercise of authority, and second, it must have the right or title to exercise that authority.²⁵ Government need not, however, be a permanent factor to statehood, as the temporary breakdown or dislocation of government has not, until now, in and of itself ended a state's categorization as such.²⁶ Indeed, states frequently undergo periods of ineffective governments, yet continue to be recognized as states.²⁷

The final element of statehood, according to the *Montevideo Convention*, is that the state have capacity to enter into international relations, also known as independence. According to some theorists independence is the decisive factor in determining statehood.²⁸ Independence requires that there be only one governing authority over political, economic, and legal systems, and that the entity not be subject to any external authority other than international law itself.²⁹ Even if an entity displays what appears to be sovereignty and institutional capacity, it may still fall short if it is in fact subject to control by an outside foreign state. Where this is the case, other states are unlikely to regard the putative state as being capable of freely entering into binding relations with other members of the international community.³⁰ This mustn't be confused, however, with the realities of modern international interactions where states frequently attempt to

²⁴ Currie, *supra* note 8 at 23.

²⁵ Crawford, *supra* note 12 at 44.

²⁶ Currie, *supra* note 8 at 23-24.

²⁷ Brownlie, *Principles*, *supra* note 11 at 73; Currie, *ibid.* at 22-23.

²⁸ For a detailed review of the elements of state independence see Brownlie, *Principles*, *supra* note 11 at 74.

²⁹ Currie, *supra* note 8 at 25.

³⁰ For a more detailed description of the subtleties of independence see *ibid.*, 26 ff; and Brownlie, *Principles*, *supra* note 11 at 74 ff.

exert pressure on one another in a variety of ways in order to gain advantage for their own interests.³¹ Nor is independence vitiated by voluntary treaty relationships with other states, where a state agrees to certain conditions in the benefit of its overall interest.³² Ultimately, the requirement is that the state be in a position to make its own decisions.

While these criteria are indicators of an entity's status as a state within the international legal system, not all criteria need be met in each instance in order for a state to be recognized. Ultimately, an entity will be treated as one with international personality if it is recognized by other states within the system.

4. Non-State Actors with Qualified Legal Status

While it may be generally accepted that states are the primary subjects of international law, it is also recognized they are no longer the only entities affected by international law.³³ As Louis Henkin has written, “[t]he international system is a system *of* states, made *by* states, perhaps largely – still – *for* states, but not only for states.”³⁴ Because states are the primary entities in international law – subjects of international law as of right – they in turn have the power to grant certain degrees of legal personality to other entities. These entities are then said to have ‘derivative’ personality in international law.³⁵

³¹ Currie, *supra* note 8 at 26.

³² *Ibid.*, at 26-28.

³³ I consider the most commonly agreed upon subjects of international law. Some authors have described much more nuanced categories of non-state actors, however such a discussion is beyond the scope of this work. See, for example, Brownlie, *Principles*, *supra* note 11.

³⁴ Louis Henkin, *International Law: Politics and Values*, (Boston: Martinus Nijhoff, 1995) at 17 (*italics in original*).

³⁵ Harding & Lim, *supra* note 5 at 5.

Based on post-war practice among states it is now generally accepted that states have the capacity to create new subjects of international law.³⁶ In addition, states can assign the ability to make law to new entities created by states, such as is the case with the United Nations Security Council.³⁷ States also have the ability to grant subject status to individuals, as reflected in the development of anti-genocide laws, and the large body of international human rights law.³⁸ Similar arguments have been made for bestowing limited legal status on multinational corporations. The most common non-state entities with some legal personality in international law are considered here.

a. State-Like Entities

In addition to states, which according to agreed-upon norms automatically hold international legal personality, there are also entities that are similar to states, but do not quite qualify as states.³⁹ Perhaps the most notable among these is the City of the Vatican and the Holy See. Their legal status in international law has long been surrounded by controversy.⁴⁰ The Holy See, of which the Pope is the head, has a non-permanent population, and performs an exclusively religious function.⁴¹ Nevertheless, it is recognized by a number of states, participates in diplomatic relations, is party to multilateral conventions,⁴² and is admitted as a full member of some specialized UN agencies.⁴³ Vatican City, on the other hand, has a permanent, though small, territory, and an administrative organization, but no permanent population. It too is recognized by a

³⁶ Currie, *supra* note 8 at 57.

³⁷ Henkin, *supra* note 34 at 17.

³⁸ *Ibid.*

³⁹ For a detailed review of all such entities, see Brownlie, *Principles*, *supra* note 11 at 61ff.

⁴⁰ Crawford, *supra* note 12 at 152.

⁴¹ Wallace, *supra* note 16 at 67.

⁴² Brownlie, *Principles*, *supra* note 11 at 65.

⁴³ Wallace, *supra* note 16 at 67.

number of states to have legal personality and treaty-making capacity.⁴⁴ The situations of the Holy See and Vatican City are anomalous because despite not meeting the standard requirements for statehood, they each enjoy international personality akin to that of a properly constituted state. This is largely because they are recognized by other international actors who are willing to enter into international relations with them.⁴⁵ This example highlights that the generally accepted criteria for statehood are subject to some flexibility.

b. International Organizations

International organizations, or more precisely inter-governmental organizations (IGOs), are the most important entities that exist as subjects of international law by virtue of states.⁴⁶ International organizations are a relatively new subject of international law, created by states and with states as their principal members.⁴⁷ As a result of their creation, states are no longer the only subjects of international law.⁴⁸ Unlike states, however, international organizations do not all share identical rights and duties at international law, rather, the precise attributes of their derivative legal personality must be determined in each individual case.⁴⁹ It is generally agreed that in order to have legal personality:

⁴⁴ Brownlie, *Principles*, *supra* note 11 at 65.

⁴⁵ Wallace, *supra* note 16 at 68; The Sovereign Order of Malta, with its headquarters in Rome, has similar status even though it only performs functions of a charitable nature.

⁴⁶ International governmental organizations are not to be confused with non-governmental organizations: the latter are established by individuals and civil society, while the former are established by agreement, usually by treaty, of their principal members – nation states; *ibid.*, at 60; Joshua S. Goldstein, *International Relations*, 3rd ed. (Don Mills, ON: Longman, 1999) at 16.

⁴⁷ Wallace, *supra* note 16 at 60.

⁴⁸ Currie, *supra* note 8 at 57.

⁴⁹ *Reparations Case*, *supra* note 7 at 179; Currie, *ibid.* at 57; S.A Williams & A.L.C. de Mestral, *An Introduction to International Law*, (Toronto: Butterworths, 1987) at 61.

...1) the organization must represent a permanent association of states, and be equipped with permanent organs or institutions with internationally legal purposes or functions; ... 2) there must be a distinction, express or necessarily implied, between the legal powers and capacities of the organization or its organs on the one hand and those of its member states on the other; ...[and] 3) the organization must have legal rights and duties that are exercisable in the international legal system (for example, treaty-making, immunities, et cetera) and not merely within the domestic legal system(s) of one of its member states.”⁵⁰

In order to interact effectively in international law, an international organization must be recognized to have a degree of international personality. The degree of international personality varies between organizations, and the rights enjoyed by international organizations differ widely. As a result each case must be determined individually on the basis of constituent documents and the organization’s past practice.⁵¹ The constituent document of an organization may expressly provide that the organization is to have legal personality; however it is more common that legal personality is implied from the constituent document and strengthened through practice.⁵² In practical matters organizations may have the capacity to own, acquire and transfer property, to enter into contractual relations with states and other international organizations, pursue legal remedies, and may enjoy certain rights and duties under international law. International organizations have powers on the international plane as well as within domestic legal systems of member states.⁵³

The most prominent example of an inter-governmental organization is the United Nations, which was founded in 1945 as a direct result of the experiences of the Second

⁵⁰ Currie, *ibid.* at 60.

⁵¹ Wallace, *supra* note 16 at 60, 65.

⁵² *Ibid.* at 61.

⁵³ Brownlie, *Rule of Law*, *supra* note 6 at 49.

World War. Its primary purposes are to maintain peace and security, to develop friendly relations among nations, all the while basing its work on equal rights and the self-determination of peoples. In addition its focus is to solve international problems of economic, social, cultural, or humanitarian nature.⁵⁴ The vast majority of the world's nation states count themselves members of the UN which fulfils a critical function in international political affairs, by providing a relatively neutral forum in which governments can enter into discussion with one another on contentious issues.

As international dialogue has increased over the past century, so too has the number of IGOs. There are now hundreds of international organizations worldwide.⁵⁵ They vary in function and in size, ranging from the small and specific, such as the Organization of Petroleum Exporting Countries (OPEC), which coordinates the production and pricing policies of its twelve member states,⁵⁶ to virtual universal membership with global scope, such as the United Nations. There are also many regional organizations, such as the Organization of American States.

c. Peoples

It has become an accepted doctrine that in certain circumstances peoples – as distinct from states – have some claim to self-determination in international law.⁵⁷ The United Nations has used the term “peoples” in its declarations and resolutions to mean a somewhat homogenous, identifiable group of people, that are aware of their collectivity.

⁵⁴ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7. art 1 [*UN Charter*].

⁵⁵ Brownlie, *Principles*, *supra* note 11 at 49.

⁵⁶ Goldstein, *supra* note 46 at 16.

⁵⁷ Currie, *supra* note 8 at 48.

The right to self-determination in this context means not complete independence, but rather the freedom to choose how the group is to be governed.⁵⁸ Recognizing the rights of peoples often involves applying those rights against competing rights of a state.⁵⁹ Despite the potential for destabilizing existing states, peoples are generally given the opportunity to make their case for self-determination, and as a result, the right of self-determination has been “tightly circumscribed so as to preserve as much as possible the integrity of existing states.”⁶⁰

There is no automatic right to self-determination among religious or ethnic groups within a state.⁶¹ Only in extreme cases of denial of internal rights have peoples been able to impose the recognition of their right of external self-determination.⁶² Indeed, successful declarations of the right to self-determination have taken place primarily in the context of the colonial experience, where sub-national groups have experienced an on-going struggle for independence.⁶³ With the ever-decreasing influence of colonial empires of the past, there are fewer remaining peoples with a strong chance of success in a quest for self-determination.⁶⁴ Successful claims for a right of self-determination have generally led to the creation of a new state, or to integration with an existing state. As a result, the international legal personality of a people is ultimately transformed into international legal rights and duties of statehood as already described.

⁵⁸ Williams & de Mestral, *supra* note 49 at 57.

⁵⁹ Currie, *supra* note 8 at 49.

⁶⁰ *Ibid.* at 49.

⁶¹ Brownlie, *Rule of Law*, *supra* note 6 at 47.

⁶² Currie, *supra* note 8 at 55.

⁶³ *Ibid.* at 51; Williams & de Mestral, *supra* note 49 at 59.

⁶⁴ Currie suggests that the peoples of Tibet may be an example; Currie, *supra* note 8 at 55.

d. Individuals

Traditionally individuals had no international legal status except as through their relationship with states; individuals *per se* had no direct legal rights, and owed no international legal obligations. While this is largely still the situation today, there have been some developments in the limited areas of international criminal law and international human rights law.⁶⁵ In these fora there has been gradual recognition that individuals do, in fact, participate in international events, and as a result individuals may now be recognized to possess both international rights and duties in certain circumstances.⁶⁶

The first development indicating some legal personality for individuals was in the field of international criminal law. This area of law developed as a result of the atrocities committed over the course of the twentieth century, and sets out what is acceptable behaviour in situations of armed conflict. This field includes humanitarian law which applies regardless of whether the situation involves armed conflict. The rules of international criminal law impose duties directly upon individuals, as well as consequences for individuals who breach those rules.⁶⁷ Genocide and war crimes are now recognized as acts for which individuals can – and should – be held directly responsible at international law.⁶⁸ As one commentator has put it, “the legal fiction that individuals do not participate on the international scene, and that consequently could not be held

⁶⁵ *Ibid.* at 61.

⁶⁶ Wallace, *supra* note 16 at 65.

⁶⁷ Currie, *supra* note 8 at 62.

⁶⁸ Wallace, *supra* note 16 at 65.

responsible for their acts, has been denied.”⁶⁹ Because international law has imposed these obligations on individuals, it is argued that individuals now have a limited degree of international legal personality.⁷⁰

The second development affecting individual legal personality is the growing body of international human rights laws. Exemplified by the Universal Declaration of Human Rights of 1948⁷¹ this field of law is an attempt to grant, or recognize, the basic human rights individuals hold as against states. While individuals may have already enjoyed such rights within some domestic legal systems, international human rights law recognizes these rights at the level of international law, and imposes corresponding obligations on states.⁷² In theory, this means that individuals now hold international legal rights that are “valid against any and all states,” thereby acknowledging a degree of international legal personality. As is the case in international criminal law, this recognition of individuals confers partial legal personality on individuals. In practice, however, individuals are still hampered by the limited international instruments under which they can claim their rights directly. For the most part any individual’s right to recourse through international convention and treaty bodies is dependent upon prior consent of the state in question.⁷³ These developments nevertheless demonstrate that individuals do hold a limited degree of international legal personality.

⁶⁹ *Ibid.* at 65.

⁷⁰ Currie, *supra* note 8 at 62.

⁷¹ *Universal Declaration of Human Rights*, G.A. res. 217 (III) (1948) [UDHR].

⁷² Currie, *supra* note 8 at 62.

⁷³ Brownlie, *Rule of Law*, *supra* note 6 at 48; Currie, *supra* note 8 at 62; Wallace, *supra* note 16 at 66.

e. Corporations

The number, size, and power of multinational corporations is phenomenal. Some are so large they have greater resources available to them than some states, and many have powerful diplomatic support from national governments.⁷⁴ Multinational, or transnational, corporations may be constituted in several state domestic legal systems giving them the appearance of having an international legal nature. They participate in international relations and their actions can have far-reaching consequences in the international sphere. Because multinational corporations enter into agreements with foreign governments, jurists suggest that “the relations of states and foreign corporations *as such* should be treated on the international plane.”⁷⁵ Nevertheless, corporations are created within domestic legal systems and carry only the rights and obligations granted within those systems. As such, they do not exist as subjects of international law; rather corporations are seen to be artificial legal persons within domestic legal systems. When international law must take account of multinational corporations they are treated much as individuals are in international law.⁷⁶

The sections above show that the task of determining which entities are actors in international law is far from firmly defined. Indeed, it may be seen to be more an art than a science. There is significant fluidity apparent in the application of the criteria of statehood to entities wanting to be recognized as states. The range of non-state actors that have been granted qualified legal status indicates that this is not a closed set, and shows

⁷⁴ Brownlie, *Principles*, *supra* note 11 at 67.

⁷⁵ *Ibid.*

⁷⁶ Currie, *supra* note 8 at 63; the recent developments in the recognition of individuals in international law have not extended to corporations.

that there is some flexibility in the context of what might constitute an actor in international law.

5. The Making of International Law

Traditionally international law has been developed to regulate how nation states interact with one another under various circumstances. Sovereign states have been the originators of the various forms of international law, as the primary actors in the international law framework, and its subjects. An understanding of the methods through which international law is created will be helpful in understanding how non-governmental organizations are and are not able to participate in those processes.

While there is some debate among theorists as to the philosophical sources of international law, it is generally agreed that there are two key places to look when trying to determine what international law has to say about a given topic, at any given time. The two primary fields are customary international law, or patterns of behaviour and tacit agreement over time, and international treaties that result from negotiations and agreements between states.⁷⁷ Additional sources of international law are said to include general principles of law, institutionalized procedures,⁷⁸ judicial decisions, and text writings.⁷⁹

⁷⁷ Falk, *supra* note 1 at 43.

⁷⁸ Hermann Mosler, *The International Society as a Legal Community*, (Germantown, M.D.: Sijthoff & Noordhoff, 1980) at 68.

⁷⁹ D.P. O'Connell, *International Law*, 2 ed. Stevens, 1970) at 7 debunks several of these sources.

Article 38(1) of the *Statute of the International Court of Justice* is often cited as the modern starting point for the sources of public international law.⁸⁰ It reads:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- (a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) the general principles of law recognized by civilized nations;
- (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁸¹

Because the first line of the Article states “in accordance with international law,” it is easy to assume that the items listed in the Article constitute the entirety of international law.⁸² Many commentators have pointed out that the Article does not claim to list the source of international law, rather the methods the Court can use to assist in resolving disputes. The Article has nevertheless caused significant confusion and debate over the sources of international law, likely because of reliance on the false simplicity of the Article.⁸³

a. Customary Law

Customary law is the original format of international law, and most international law over the centuries has taken this form. Long before states began to keep written records of their agreements, much of their behaviour with one another was based on a shared

⁸⁰ Note however, that the Statute itself does not use the term “source”; see Henkin, *supra* note 34 at 27, n. 1.

⁸¹ *Statute of the International Court of Justice*, 26 June 1945, 59 Stat. 1055, 1060 [reprinted in Brownlie, *Principles*, *supra* note 11 at 3.

⁸² M.H. Mendelson, “The Formation of Customary International Law” (1998) 272 *Rec. des Cours* 155 at 180.

⁸³ This point is well made by John King Gamble, “The Treaty/Custom Dichotomy: An Overview” (1981) 16 *Tex. Int’l L.J.* 305; Gamble also gives examples of some confusing academic literature arising from the Article, at 306.

understanding of what form their relationships should take. Such understandings developed over time, and continued to change as new circumstances arose. Particularly in matters of war and peace, it became important to be able to rely on expected state behaviour, and how they would likely react in specific situations. Gradually patterns of behaviour emerged. As Mendelson has put it, "Over long periods of time, all sorts of rules have evolved out of practice, concerning the conduct of warfare, about the inviolability of those trying to negotiate a return to peace, about trade, the sharing of resources and so on."⁸⁴ Some patterns develop quickly and easily when one state finds an effective way to deal with a problem, and other states copy the conduct. In other cases, behaviour only develops into common practice over long periods of difficult relations, with much trial and error.⁸⁵

Generally, no formal declaration is made to indicate that any given conduct has become a rule of law. Indeed, even if the rule has been accompanied by conflict and disagreement, once the practice has become so common that states begin to rely on other states to behave in a certain way, the rule becomes a part of law.⁸⁶ Though custom is historically seen as the original form of international law, it continues to be created in modern times, most recently with regard to topics such as freedom of outer space, and exclusive economic zones.⁸⁷

⁸⁴ Mendelson, *supra* note 82 at 166.

⁸⁵ *Ibid.* at 167.

⁸⁶ Mosler, *supra* note 78 at 75.

⁸⁷ Mendelson, *supra* note 82 at 169.

Customary international law, then, is a compilation of the “international behavioural regularities that nations over time come to view as binding as a matter of law.”⁸⁸ Or, put in another way, customary law is created through a general and consistent practice among states, accompanied by a sense that the practice is a legal obligation and is more than a mere courtesy.⁸⁹ It is a two-part process. Being a long-standing practice among states is alone not enough to turn a rule into customary law. It takes time – and the length of time differs from case to case – for nations to come to see a rule of behaviour as one which is legally binding. This process is sometimes referred to as the “ripening” or “hardening” of a practice into a customary law.⁹⁰

Many have attempted to describe the course from the initial pattern of behaviour to the ultimate hardening of that pattern to law. Mark Villiger has described it particularly well. The typical course consists of three stages, varying in duration in each instance. The first stage involves some states engaging in a given practice, or making certain claims. In the second stage, other states react to the practice or claims and contribute their own conduct, claims, and counter claims, thereby legitimizing the initial practice. In the third stage, more states become familiar with the conduct and begin to participate or acquiesce in the new behaviours. The practice becomes common and uniform, and as states begin to consider the pattern of conduct obligatory, the conduct begins to harden to a general rule.⁹¹

⁸⁸ Jack L. Goldsmith & Eric A. Posner, "A Theory of Customary International Law" (1999) 66 U. Chicago L. Rev. 1113 at 1116.

⁸⁹ Henkin, *supra* note 34 at 29.

⁹⁰ Goldsmith & Posner, *supra* note 88 at 1117.

⁹¹ Mark E. Villiger, *Customary International Law and Treaties*, (Boston: Martinus Nijhoff, 1985) at 30.

The precise rules for the making of customary law are unclear and controversial. It is a nebulous process that is often not identifiable as such while it is actually taking place. Only once the practice has ripened into customary law does it become feasible to look back and identify the stages in the development of the rule. Even once established, customary law is difficult to isolate, since it is both created and applied through practice. There are no clear beginnings and endings in the process of “performing” customary law. It has been compared with the process of building a house – at what point in the exercise of putting together the raw materials does it become a house?⁹² Despite the conceptual difficulties associated with customary international law, it is widely accepted that it binds all states, and it does so with the same legal force as international law that exists in the more tangible form of treaties.

It is widely recognized that customary international law suffers from a number of difficulties, not least among which are that it has no centralized law-making authority, no centralized enforcer or enforcement mechanism, and no centralized, authoritative decision-maker.⁹³ There are also significant questions on issues such as the number of participants required to establish that a rule is a general practice among states. Does the identity of the participants matter, that is, do larger, more powerful states carry more weight than smaller ones? Do states more directly involved in the topic in question have more influence in determining whether a rule has become customary law? How much

⁹² Mendelson, *supra* note 82 at 175.

⁹³ Goldsmith & Posner, *supra* note 88 at 1114.

time must pass for general practice to be accepted as a customary rule? How consistent must a practice be? Do omissions qualify as practice as well as actions?⁹⁴

Despite some conceptual uncertainties surrounding the creation of customary law, it nevertheless remains one of the two primary forms of international law. Though there is not necessarily any formalized agreement as to this behaviour, nor is it traditionally codified,⁹⁵ once the balance shows that more nations than not follow a certain pattern of behaviour over a period of time – because they believe they ought to, or because they see it as a norm of behaviour in a matter – a pattern of behaviour becomes a custom, and is said to make up part of the body of international customary law.

The details are different in every example of customary international law,⁹⁶ what is settled, however, is that in order to qualify as customary international law a rule must comply with two requirements. The first, the general practice requirement, is met when a behaviour becomes the general practice of states. The second, the *opinio juris* requirement, requires that states follow the rule because of a belief that they are legally required to do so.⁹⁷ Neither of these requirements has clearly defined indicia or benchmarks, and determining whether the requirements have been met is generally a subjective process. However, some patterns have been established over time and have

⁹⁴ For more complete lists of uncertainties, see Mendelson, *supra* note 82 at 170-71; Henkin, *supra* note 34 at 29.

⁹⁵ There have, however, been recent efforts to catalogue customary international law in a written format.

⁹⁶ Henkin, *supra* note 34 at 30.

⁹⁷ Arthur M. Weisburd, "Customary International Law: The Problem of Treaties" (1988) 21 Vand. J. Transnat'l L. 1 at 6.

come to be accepted as indicative of fulfilling the elements of customary international law.

General practice is determined on a case by case basis when a rule of international behaviour comes into question. Practice need not be universal,⁹⁸ and there is no agreed upon number of nations required to establish a general practice among states, although in theory, it should be so general that all or almost all nations engage in the practice.⁹⁹ As it is practically impossible to determine the practice of 190 or so nations, establishing the generality requirement does not demand proof that all states engage in the practice, or even that most states do so. In fact, on occasion, rules of customary law have been determined based on the practice of less than a dozen states.¹⁰⁰ Customary international law is frequently determined with a selective survey of the practice of major powers and states concerned with the particular subject in question.¹⁰¹ There does seem to be a requirement, however, that it at least be possible to infer acquiescence in a rule by a large majority of states, even if the actual number of states participating is not large.¹⁰²

In addition to the number of states participating, it must also be established that the states are, in fact, incorporating the behaviour as a practice. Determining what constitutes practice can be challenging. There continues to be disagreement as to what sorts of actions may constitute state practice. The least controversial include policy statements,

⁹⁸ Brownlie, *Principles*, *supra* note 11 at 6.

⁹⁹ Goldsmith & Posner, *supra* note 88 at 1116.

¹⁰⁰ *Paquete Habana*, 175 U.S. 677 (1900); Weisburd, *supra* note 97 at 6.

¹⁰¹ Goldsmith & Posner, *supra* note 88 at 1117 n. 8; Henkin, *supra* note 34 at 30.

¹⁰² *North Sea Continental Shelf Case*, 1969 I.C.J. 1; Weisburd, *supra* note 97 at 7.

national legislation, and diplomatic correspondence.¹⁰³ More contentious actions include treaties, writings of jurists, non-binding statements and resolutions by multilateral bodies such as the United Nations General Assembly. What constitutes state practice has been determined in a number of ways, including treaties between states, orders from governments to military officers, and decisions of national courts.¹⁰⁴

The second requirement for establishing customary international law, that of *opinio juris*, is equally complex. What forms of independent evidence go towards establishing that states are complying with a rule out of a sense of legal obligation? Courts and scholars have accepted as evidence statements by important government officials,¹⁰⁵ ratification of a treaty containing a norm similar to the customary international law in question, and a demonstrated attitude of approval of a United Nations General Assembly Resolution.¹⁰⁶ It has not been established under what conditions such examples are adequate to demonstrate *opinio juris*, nor has a process been fixed for determining how regular voluntary behaviour transforms into a binding legal obligation.¹⁰⁷ Indeed, the International Court of Justice has shown itself willing to dispense with proof of *opinio juris* altogether, assuming it to exist based on general state practice.¹⁰⁸

Though there are conceptual difficulties surrounding the *opinio juris* requirement, the idea can be broken down into two obligations placed upon a state that is legally bound by

¹⁰³ Goldsmith & Posner, *supra* note 88 at 1117.

¹⁰⁴ These factors were considered in *Paquete Habana*, *supra* note 100.

¹⁰⁵ It has been argued that verbal statements are particularly valuable as they may shed light on the *opinio juris* of the State; see Villiger, *supra* note 91 at 7.

¹⁰⁶ Goldsmith & Posner, *supra* note 88 at 1118.

¹⁰⁷ *Ibid.*

¹⁰⁸ Brownlie, *Principles*, *supra* note 11 at 7.

a rule which flows from the *opinio juris* of the state.¹⁰⁹ First, if a state acknowledges that according to a given rule it has a duty to behave in a certain fashion, it must by extension acknowledge that its conduct might be questioned if it does not behave according to that rule. Second, if a state breaches a legal rule, it has a duty to correct the breach through reparation. There is no simple method to determine if a state sees a particular rule as one to which it is legally obligated to adhere, rather one must examine whether the state believes there will be consequences if it does not follow the rule.

The *opinio juris* element of a customary international law, then, depends on a state's belief that "if it breaches a rule the states toward which it owes the duty may inquire into its conduct and that it will be obligated to make those states whole, in some fashion, for its breach."¹¹⁰ In essence, *opinio juris* is a psychological element of customary international law.¹¹¹ Once a practice has been accepted as having matured into customary law, however, the elements of general practice and *opinio juris* are no longer open to question.¹¹²

The notion that customary law binds all states raises the question of consent. If state sovereignty is the foundation of international law as it is thought to be, shouldn't it then be a requirement that states give explicit consent to the laws by which they agree to behave? In practice, customary law is binding on all states as states are taken to acquiesce to customary law without any requirement of specific consent. Some have argued that a

¹⁰⁹ Weisburd, *supra* note 97 at 8.

¹¹⁰ *Ibid.* at 10.

¹¹¹ Goldsmith & Posner, *supra* note 88 at 1116.

¹¹² Henkin, *supra* note 34 at 37.

state should not be bound to customs to which it did not contribute. However, since the requirement for customary law is not universal practice among all states, but only general practice, all states are obligated to comply regardless of any active consent.¹¹³ Indeed, new states are automatically bound by customary law, as it is taken as part of the “rules of the club” new states wish to join.¹¹⁴ States need not take any positive action in order to be bound by customary law; their inaction is taken as acceptance of the rules. This contradiction to the principle of state consent highlights one of the many procedural difficulties with customary law.

b. Treaties

Current international law is formed in large part by treaties. A treaty is created when two or more parties reach an agreement with the intention of giving it legal validity.¹¹⁵ The International Law Commission has defined a treaty as “any international agreement in written form, whether embodied in a single instrument or ... more ... concluded between two or more States or other subjects of international law and governed by international law.”¹¹⁶ A treaty might also be called a convention, protocol, covenant, charter, statute, act, declaration, and so on. Customary law does not specify any particular form to follow in order to create an international agreement such as a treaty.¹¹⁷ Different types of

¹¹³ *Ibid.* at 30.

¹¹⁴ *Ibid.* at 36.

¹¹⁵ P.K. Menon, *The Law of Treaties Between States and International Organizations*, (Lewiston, N.Y.: Edwin Mellen Press, 1992) at 1.

¹¹⁶ Brownlie, *Principles*, *supra* note 11 at 608-9, citing Yrbk. ILC (1962), ii.161. The *Vienna Convention on the Law of Treaties* defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation,” United Nations, Doc. A/CONF. 39/27 (May 23, 1969), Art. 2. 1. (a). For more on the *Vienna Convention* see *infra*, note 128 and accompanying text.

¹¹⁷ Menon, *supra* note 115 at 11.

agreements may constitute a treaty, such as accords, acts, arrangements, charters, conventions, covenants, protocols, and so on.¹¹⁸

Historically treaties tended to be bilateral -- created between two states -- and their usual purpose was to regulate how states could co-exist peacefully with one another. Treaties usually concerned topics such as peace, alliance, navigation, and national boundaries.¹¹⁹ Over the past few decades however, and especially with the participation of the United Nations in the international legal system, the topics of treaties have become increasingly wide-ranging covering not only how states could coexist peacefully with one another, but also the myriad activities they may engage in. As one writer puts it, “[t]he law of coexistence is being changed to coactivity.”¹²⁰ Treaty law has become the foundation of the modern international legal structure; it provides the framework within which international subjects relate with one another.¹²¹

Some treaties result from the task of ascertaining and declaring existing customary law.¹²² In addition to codification of existing customary law, treaties may also contain elements of progressive development, where new written rules are created to supplement existing customary rules. It has been said that precisely because customary law is often vague and general, any act of codification will require some element of creative change

¹¹⁸ *Ibid.* at 9.

¹¹⁹ *Ibid.* at 1.

¹²⁰ *Ibid.*

¹²¹ *Ibid.* at 3.

¹²² Villiger, *supra* note 91 at 118.

and supplementation.¹²³ As a result, the uncertainty surrounding customary law is often reduced in the field of treaty law.

Law-making treaties create specific legal obligations between specified parties. They provide a method of stating general norms of conduct which parties are expected to observe from the time of the treaty onward.¹²⁴ Such treaties are ongoing in that adherence to the terms of such an agreement does not dissolve the treaty obligations. While technically only parties to the treaty are bound by the provisions, treaties do sometimes have the effect of customary law if the number of parties is high enough, and general practice is in accordance with the treaty. In addition, non-parties can indicate their acceptance of the provisions of a multilateral convention through their conduct; thereby taking it to represent general international law.¹²⁵ Bilateral treaties also form part of treaty law. Though entered into by only two parties they can also provide evidence of customary international law given enough consistent practice among states.¹²⁶

There is some debate among writers as to whether treaty law constitutes a source of international law. Again, the confusion arises in part from the listing of resources available to the ICJ in Article 38, which includes international conventions as the first item. However, regardless of whether international conventions are sources of law, or merely contracts between nations the legality of which depends on the rules of customary

¹²³ *Ibid.* at 123.

¹²⁴ Brownlie, *Principles*, *supra* note 11 at 12.

¹²⁵ For more on the overlap of customary law and treaty law, see below, section B.5.c.

¹²⁶ Brownlie, *Principles*, *supra* note 11 at 13-14.

law,¹²⁷ treaty law constitutes a significant element of the international legal system, and is often the first avenue pursued by those wishing to ascertain the status of international law.

The number, variety, and importance of international treaties grew to such an extent in the second half of the twentieth century that the International Law Commission took up the task of codifying the international law of treaties. After two decades of work, and two international conferences, the *Vienna Convention on the Law of Treaties*¹²⁸ was adopted in 1969. It took some time to reach the required number of signatures; the *Vienna Convention* came into force on 27 January 1980.¹²⁹ The *Vienna Convention* is now the primary source for guidance on the process surrounding the creation of treaties, and it clearly applies to states only. Non-state actors are not included within the scope of the *Vienna Convention* reinforcing the notion that they do not participate in the creation of international treaties that are binding between states.

The *Vienna Convention* covers all aspects traditionally viewed to be associated with the law of treaties, and is meant to set out a “comprehensive set of principles and rules governing all the most significant aspects of the law of treaties.”¹³⁰ The *Vienna Convention* codifies existing practice on the creation of treaties, but also takes on an element of progressive development of international law, supplementing existing

¹²⁷ O'Connell, *supra* note 79 at 21.

¹²⁸ United Nations, Doc. A/CONF. 39/27 (May 23, 1969) [*Vienna Convention*].

¹²⁹ Art. 84 requires 35 instruments of ratification in order for the *Vienna Convention* to come into force.

¹³⁰ I.M. Sinclair, *The Vienna Convention on the Law of Treaties*, (Dobbs Ferry, N.Y.: Oceana, 1973) at 6.

customary law where additional rules were found to be helpful.¹³¹ There were several contentious topics in the discussions, among them treaty-making capacity, reservations to multilateral conventions, and interpretation of treaties; the most controversial were categories of multilateral treaties, and universal participation.¹³² As a result of these difficulties, the *Vienna Convention* has “a tendency to overcome points of difficulty by expressing rules at a level of generality and abstraction sufficient to hide the underlying divergencies.”¹³³

The most salient portions of the *Vienna Convention* set out the scope of the treaty, and provide definitions of terms. The text specifies that the *Vienna Convention* applies only to treaties between states,¹³⁴ but recognizes that treaties are entered into between states and other subjects of international law, and between other subjects of international law themselves.¹³⁵ Such subjects may include the Holy See, international organizations, and other international entities.¹³⁶ Further, the *Vienna Convention* applies only to written agreements, and specifies that it does not have any bearing on oral agreements.¹³⁷ The terms of the *Vienna Convention* apply only to treaties entered into by parties after the entry into force of the *Vienna Convention*.¹³⁸

¹³¹ *Ibid.* at 26.

¹³² Villiger, *supra* note 91 at 94.

¹³³ Sinclair, *supra* note 130 at 1.

¹³⁴ Art. 1.

¹³⁵ Art. 3.

¹³⁶ The *Vienna Convention* defines international organization to mean an intergovernmental organization, thereby excluding non-governmental organizations; Art. 2. 1(i).

¹³⁷ Art. 3.

¹³⁸ Art. 4.

The *Vienna Convention* has been groundbreaking in international law in that it has provided an agreed-upon process for the negotiation and implementation of international treaties. It has taken the customary rules surrounding treaties and added to them where necessary, in order to develop a consistent, coherent methodology for states to follow. What is clear in the *Vienna Convention*, however, is that by default the treaty applies only to nation states. It makes no comment on the treaty-making ability of non-state entities, except to recognize that other international entities do enter into treaties with states and with one another.

c. Interrelationship Between Customary Law and Treaties

There is some debate among theorists as to the proper description of interaction between treaty law and customary law. Indeed, customary law and treaty law are entirely independent of one another. From the rules regarding their creation, existence, and termination, it is clear that they do not rely on one another for their formation.¹³⁹ It has been suggested, however, that the drafters of the ICJ Statute placed the so-called sources of law in a specific order to show that some carry more weight than others. The order of the items would indicate that the first two mentioned -- international conventions and international custom -- are to be seen as equal primary sources without any hierarchy between the two. The Court may generally refer to the items in the order in which they appear, however the usefulness of each item will depend on the case in question, and it is suggested that there should not be any strict approach to the order in which they may be considered.¹⁴⁰

¹³⁹ Villiger, *supra* note 91 at 35.

¹⁴⁰ Brownlie, *Principles*, *supra* note 11 at 3.

As described above, treaties often develop as a result of customary law, reflecting international custom among states in the codified form of a convention. Treaties are thus sometimes seen as a formalized version of the relevant customary law.¹⁴¹ As a result there has been some debate as to whether customary laws continue to exist as independent laws once they have been codified. There are three general approaches to this question: first, that treaties overwrite custom and customary rules cease to exist; second, that customary rules continue to apply to those States not party to the convention; and third, that that customary rules continue to exist vis-à-vis all States regardless of codification.¹⁴² Because of their continuing independence, it would seem that the customary law continues to exist, and be applicable regardless of the existence of the treaty.¹⁴³ In fact, it is not uncommon for customary law to change even once a treaty has been concluded on the same topic. Not only does customary law continue to develop, it can develop in a direction contrary to the established treaty law.¹⁴⁴ If the *de facto* state practice is persistently inconsistent with the terms of the treaty, over time customary law will evolve according to the behaviour of states. Customary law does not freeze at the establishment of a treaty.¹⁴⁵

Though it would seem helpful to establish the precise relationship between convention law and customary law, it is virtually impossible to do so.¹⁴⁶ There is much overlap

¹⁴¹ O'Connell, *supra* note 79 at 21.

¹⁴² Villiger, *supra* note 91 at 156-57.

¹⁴³ O'Connell, *supra* note 79 at 23.

¹⁴⁴ Weisburd, *supra* note 97 at 11 ff; Weisburd gives as examples the development of river law, and specific elements of the law of the sea.

¹⁴⁵ *Ibid.* at 17.

¹⁴⁶ Gamble, *supra* note 83 at 309.

between the topic matter of customary law and negotiated treaties, often to the point that they seem to have identical content. Nevertheless they continue to retain separate identities and exist independently of one another.¹⁴⁷ One approach to clarifying the spheres of the two forms of law has been to examine what treaties say about customary law. In some cases, treaties make specific mention of customary international law within their text. King Gamble, Jr., has divided treaties mentioning customary law into four categories: 1) treaties that say nothing about custom; 2) treaties that specify that areas not covered in the treaty continue to be subject to customary law; 3) treaties that aim to codify customary international law; and 4) treaties that intentionally create new law not in conformity with the existing customary law.¹⁴⁸ These categories demonstrate the complexity and the ongoing interconnectedness of customary laws and treaties.

As described above, international customary rules can lead to the creation of international treaties. However, the opposite is also true in that conventions can contribute to the creation of customary international law. If the content and form of treaties are repeated often enough by enough states, they can indeed form the basis of customary international law.¹⁴⁹ Another example of treaties giving form to customary law is when non-parties to a treaty choose to adopt identical practices as contained in the treaty.¹⁵⁰ Scott and Carr have proposed a three-part test to aid in determining whether a treaty forms part of customary international law. The three conditions to be met are: 1) that a sufficient number of states accept the treaty; 2) that a significant number of states most affected by

¹⁴⁷ Brownlie, *Principles*, *supra* note 11 at 13.

¹⁴⁸ Gamble, *supra* note 83 at 310.

¹⁴⁹ *Ibid.* at 313.

¹⁵⁰ Timothy F. Malloy, "Disentangling Treaty and Customary International Law (panel discussion)" (1987) *Am. Soc'y Int'l L. Proc.* 157 at 161 (remarks by Maurice Mendelson).

the treaty are party to the treaty; and 3) that the parties place no reservations on the provisions of the treaty.¹⁵¹ The authors argue that treaties may indeed form part of customary law, but they reject the growing trend towards accepting every treaty into customary law simply by virtue of its coming into being. Only once a treaty has met the three conditions outlined can they be said to properly form part of customary law.¹⁵²

It becomes clear, upon closer examination, that international treaties and customary international law overlap and interact to such an extent that it sometimes becomes difficult to see where one begins and the other ends. What this suggests is that the traditional view of regarding the two forms of international law as separate and distinct is no longer a helpful approach. As King Gamble suggests, the overlap between treaty and custom is significant, and a Venn diagram would show the majority of international law to be covered by both treaty and customary law.¹⁵³ In addition, King Gamble points out that the interrelation between treaty and custom occurs in a variety of patterns and sequences:

The dominant impression is that custom as the older source of international law usually evolves to a point at which the developing law may be codified. This does occur. But there are many instances where repetition of identical treaties on the same subject will generate a rule of customary international law. There are other cases where treaty and custom simultaneously influence each other. In some instances, there is a long causal chain with custom and treaty alternately assuming principal roles.¹⁵⁴

¹⁵¹ Gary L. Scott & Craig L. Carr, "Multilateral Treaties and the Formation of Customary International Law" (1996) 25 Denv. J. Int'l L. & Pol'y 71 at 72 ff.

¹⁵² *Ibid.* at 93.

¹⁵³ Gamble, *supra* note 83 at 318.

¹⁵⁴ *Ibid.* at 319.

Precisely because of their independence treaties and customary rules can have a significant effect on one another, and it remains a challenge to determine which takes precedence in international law.

The description of the various aspects of the creation of international law is helpful in understanding the context in which non-governmental organizations operate when trying to contribute to the process. There is little formal room for non-state entities to participate in the process of law-creation, either in the context of customary law or treaty law.

However, as will be explored below, NGOs are finding ways to have a positive influence on the process and the outcome of international law creation.

C. The Phenomenon of NGOs

NGOs struggle to participate within the context of a highly state-centred international system. Before examining how non-governmental organizations fit into the structure of the international legal system, it is helpful to understand what NGOs are, as well as their purposes, and who they represent.

Despite the vast array of writing on the phenomenon of non-governmental organizations, it is singularly difficult to craft a definition of NGOs upon which all agree. Within international law, the starting place for determining an NGO is Article 71 of the United Nations Charter and how it is applied. Article 71 goes some way to making the picture clearer; however, it is not the sole factor for determining the parameters of NGOs. A number of elements can contribute to establishing whether an organization is an NGO,

including questions of whether such organizations can be for profit, whether they advocate violence, and whether they must be international in scope or can be focused domestically. Even the question of their relationship to governments is disputed, despite the label most often used for this category of organizations: non-governmental organization.

Non-governmental organizations exist in virtually every facet of human existence. The most visible NGOs work in the fields of human rights¹⁵⁵ – like Amnesty International and Human Rights Watch – and the environment – like the World Wildlife Fund and Greenpeace. There are prominent NGOs in the areas of development assistance, humanitarian aid, peace, and education.¹⁵⁶ There are also non-governmental organizations active in areas as diverse as disarmament and sports.¹⁵⁷ One analysis of international NGOs across social sectors has identified thirteen sectors of activity with the largest being industry/trade-related, followed by medicine & health care.¹⁵⁸ Some NGOs advocate for the specific interests of their members, and others work for the public

¹⁵⁵ Smith, Pagnucco & Lopez have conducted a thorough study of human rights NGOs and have listed 16 goals specific to the range of human rights organizations alone; Jackie Smith, Ron Pagnucco & George A. Lopez, "Globalizing Human Rights: The Work of Transnational Human Rights NGOs in the 1990s" (1998) 20 Hum. Rts. Q. 379 at 388.

¹⁵⁶ Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*, 1998) at 11.

¹⁵⁷ Kerstin Martens, "Examining the (Non-) Status of NGOs in International Law" (2003) 10 Ind. J. Global Leg. Stud. 1 at 4 [Martens, "Examining"].

¹⁵⁸ John Boli & George M. Thomas, "INGOs and the Organization of World Culture" in John Boli & George M. Thomas eds., *Constructing World Culture: International Nongovernmental Organizations since 1875* (Stanford: Stanford University Press, 1999) 13 at 42.

good which will benefit a much wider group of people¹⁵⁹, yet all seek to improve the current situation of more than one individual in some way.¹⁶⁰

1. Characteristics of NGOs

It is notoriously difficult to define NGOs;¹⁶¹ as one commentator has put it, “[d]efining NGOs is not an exercise for the intellectually squeamish.”¹⁶² While the term is widely used in many circles, there is little agreement on its precise meaning.¹⁶³ Considerations of what makes an NGO include “size, organization, objectives, location, staffing, funding sources, membership, strategy, life cycle.”¹⁶⁴ In addition, the term *NGO* is frequently and inconsistently applied to a number of other structures making it difficult to determine where the boundaries of the category begin and end. Some of the terms used interchangeably with *non-governmental organization* include *voluntary association*, *nonprofit association*, *non-state actor*, *grassroots organization*, *pressure group*, and *civil society*,¹⁶⁵ yet these terms do not help in defining NGOs, and frequently focus on just one

¹⁵⁹ And in the case of environmental groups, non-human beneficiaries as well.

¹⁶⁰ Though NGOs fall into a broad range of interests, size, and impact, the situations considered in this dissertation deal primarily with international NGOs, or domestic NGOs that are international in scope, and whose focus is human rights and humanitarian issues.

¹⁶¹ Leon Gordenker and Thomas Weiss have described a number of terms used to describe non-governmental organizations that deviate from the traditional perception of an NGO including GONGOs (government-organized non-governmental organizations); QUANGOs (quasi-non-governmental organizations); and DONGOs (donor-organized non-governmental organizations); Leon Gordenker & Thomas G. Weiss, “Pluralizing Global Governance: Analytical Approaches and Dimensions” in Leon Gordenker & Thomas G. Weiss, eds., *NGOs, the UN, and Global Governance* (London: Lynne Reinner, Inc., 1996) 17 at 20-21 [Gordenker & Weiss, “Pluralizing”].

¹⁶² P.J. Simmons, “Learning to Live with NGOs” (Fall 1998), online: Global Policy <<http://www.globalpolicy.org/ngos/issues/simmons.htm>>.

¹⁶³ Martens points out that there are many contradictory interpretations within the current examinations of the term; Kerstin Martens, “Mission Impossible? Defining Nongovernmental Organization” (2002) 13 *Voluntas: Int’l J. Voluntary & Nonprofit Org’s* 271 at 272 [Martens, “Mission”].

¹⁶⁴ Adam Chayes & Antonia Handler Chayes, *The New Sovereignty*, (Cambridge: Harvard University Press, 1995) at 252.

¹⁶⁵ J.L. Fernando & A.W. Heston, “Introduction: NGOs Between States, Markets, and Civil Society” (1997) 554 *Annals Am. Acad. Pol. & Soc. Sci.* 8 at 10; Gordenker & Weiss, *supra* note 161 at 18; Martens, “Mission” *supra* note 163 at 278.

aspect of such organizations. Depending on how broadly the category is drawn, it may include groups as diverse as schools, charities, professional associations, foundations and lobby groups, and even crime rings and separatist organizations.¹⁶⁶

Determining whether any given organization is an NGO depends very much on who is doing the determining, and the context of the exercise. It is difficult to create clearly delineated categories within which to determine what is and what is not a non-governmental organization, and it may in fact be more of a case of knowing one when we see one. Nevertheless, some of the factors that come into consideration are the formal existence of an organization, whether it is independent of government, that it not use or advocate violence, and that it not be a for-profit undertaking.

NGOs are formal institutions that exist to fulfill a specific, on-going purpose, rather than *ad hoc* groupings of people.¹⁶⁷ Spontaneous movements cannot be said to be NGOs, though NGOs may play a role in such movements. As institutions, NGOs are expected to have “at least a basic organizational structure, such as permanent members, offices, or financial income.”¹⁶⁸ They are self-governing, with their own internal constitutional structures.¹⁶⁹ Some global organizations with large memberships follow democratic processes for decision-making and elections for key posts.¹⁷⁰ They decide on their own

¹⁶⁶ Fernando & Heston, *supra* note 165 at 10.

¹⁶⁷ Leon Gordenker & Thomas G. Weiss, "NGO Participation in the International Policy Process" in Leon Gordenker & Thomas G. Weiss eds., *NGOs, the UN, and Global Governance* (London: Lynne Reinner, Inc., 1996) 209 at 20 [Gordenker & Weiss, "NGO Participation"].

¹⁶⁸ Martens, "Mission", *supra* note 163 at 281.

¹⁶⁹ Gordenker & Weiss, "Pluralizing", *supra* note 161 at 20; Martens, "Mission", *ibid.* at 281.

¹⁷⁰ Peter Willetts, "What is a Non-Governmental Organization?" in *UNESCO Encyclopaedia of Life Support Systems* (London: City University, 2002) at 11 [Willetts, "What is"].

purpose, they do their own fund-raising, and they have their own internal governance and decision-making processes.¹⁷¹

As the name implies, the primary concept behind NGOs is that they are organizations that are not governmental, and do not include governmental representatives¹⁷² – they are of the private sphere in the sense that they are outside government control. As such they do not govern over society, nor can they expect support from society.¹⁷³ NGOs are seen to be not-political in the sense that they do not seek government power – therefore political parties are not NGOs – though they may seek to influence government policies.¹⁷⁴ They choose their own areas of focus, and decide internally how to carry out their work. To varying degrees they rely on their organization's independence from government to buttress their reliability, and their impartiality, particularly when criticizing governments or pressing governments to act in certain ways.

Based on the label, NGOs are defined by what they are not. Ironically, while the *non-governmental* label draws attention to the fact that they are independent from governments, at the same time many NGOs have a close connection to governments.

Some exist to fill a role of reacting to the activities and policies of governments.¹⁷⁵ NGOs

¹⁷¹ Chayes & Chayes, *supra* note 164 at 251.

¹⁷² Martens point out that several commentators have criticized the negative starting point in this label including observations that using this label defines the boundaries of organization in relation to governments, and that in some languages the label is translated as “against the government”. Some authors have suggested that the acronym NGO be recast in a positive light as standing for “Necessary to Governance Organization”; Martens, “Mission”, *supra* note 163 at 277.

¹⁷³ Gordenker & Weiss, “Pluralizing”, *supra* note 161 at 20.

¹⁷⁴ Some commentators point to some NGOs that have openly supported political parties; see Fernando & Heston, *supra* note 165 at 11.

¹⁷⁵ Peter R. Baehr, “Non-Governmental Organizations” in *Human Rights: Universality in Practice* (New York: St. Martin's Press, Inc., 1999) 114 at 114.

lobby governments, and criticize their actions. They may also fill in gaps in government services. For many NGOs, much of their philosophical purpose and their practical work is closely tied to government action and inaction. It may seem that NGOs are primarily in an oppositional position vis-à-vis governments, however many NGOs work in close collaboration with governments wherever possible, and frequently share the same goals. While the label describes what NGOs are not, it also highlights why they exist.

NGOs are organizations that do not use or promote violence.¹⁷⁶ Because non-violence is a characteristic of NGOs, terrorist groups, liberation organizations, and organized crime syndicates are excluded from consideration.¹⁷⁷ While resistance groups, or “national liberation movements”, have been granted observer status in the UN General Assembly, they have never been considered non-governmental organizations.¹⁷⁸ Most accept non-violence as a non-negotiable defining factor of NGOs.¹⁷⁹

One of the most agreed-upon elements of what defines NGOs is that they do not exist as commercial organizations,¹⁸⁰ or for the purpose of making money.¹⁸¹ Though fund-raising may be a part of their work, any funds raised go to cover costs associated with

¹⁷⁶ Peter Willetts, "Introduction" in Peter Willetts ed. *The Conscience of the World: The Influence of Non-Governmental Organizations in the UN System* (Washington, D.C.: The Brookings Institution, 1996) 1 at 4 [Willetts, "Introduction"].

¹⁷⁷ Martens, "Mission", *supra* note 163 at 279.

¹⁷⁸ Willetts, "Introduction", *supra* note 176 at 4.

¹⁷⁹ Willetts, "What is", *supra* note 170 at 10. Others, however, question whether organizations that sometimes use violence to further their goals, animal liberation organizations for example, may nevertheless be justifiably considered non-governmental organizations; Martens, "Mission", *supra* note 163 at 279.

¹⁸⁰ Willetts, "Introduction", *supra* note 176 at 3.

¹⁸¹ Gordenker & Weiss, "Pluralizing" *supra* note 161 at 20.

achieving their goals, such as staff, programs, and other activities.¹⁸² Martens points out that NGOs are described as non-profit making in order to separate them from “other nonstate actors, such as multinational companies, whose primary aim is the pursuit of profit.”¹⁸³ So much for the factors that most tend to agree on. There are also many factors that are disputed in the world of NGOs.

2. Factors Open to Debate

There are also several factors that apply to NGOs, but are debated among commentators. These include whether an NGO must have international scope, whether it is driven primarily by volunteers or professionals, and where it gets its funding.

Typically NGOs are seen to be organizations that operate at the international or transnational level, or national organizations with an international presence.¹⁸⁴ An organization can have international character in a number of ways, from having members from more than one country, to acting in one more than one country.¹⁸⁵ In the context of NGO relations with the UN, NGOs have until recently been understood to be primarily international bodies, “of recognized international standing”¹⁸⁶, while national organizations were specified to be “national NGOs” and only considered in unusual

¹⁸² Fernando and Heston have remarked that as NGOs must be financially self-sufficient and their activities increasingly include fund-raising, the lines between for-profit and not-for-profit become blurred; Fernando & Heston, *supra* note 165 at 11.

¹⁸³ Martens, “Mission”, *supra* note 163 at 278.

¹⁸⁴ Some commentators use the term *nonuninational*; Martens, “Mission”, *supra* note 163 at 279. Others talk about *transnational* networks; Steve Charnovitz, “Nongovernmental Organizations and International Law” (2006) 100 A.J.I.L. 348 at 362. For changes to the consultative arrangements for NGOs with the United Nations, see section D.1.a.iii, below.

¹⁸⁵ Martens, “Mission”, *supra* note 163 at 280.

¹⁸⁶ *Arrangements for Consultation with Non-Governmental Organizations*, E.S.C. Res. 1296 (XLIV) B, U.N. ESCOR, May 23, 1968 [Resolution 1296] at para. 4; see below, section D.1.a.i.

circumstances.¹⁸⁷ In common usage, however, the term NGO is used for both international and national organizations, and clarification is provided by adding *international* to *NGO* where appropriate.¹⁸⁸

Martens points out that since states have not yet recognized NGOs as having a legal international personality,¹⁸⁹ NGOs are dependent on national legislation to determine their status.¹⁹⁰ As domestic laws on associations vary widely, organizations that qualify as NGOs in some states may not in others, and vice versa. Many fora, particularly international ones, look to the UN criteria for determining NGOs, and UN recognition of specific organizations.¹⁹¹ As will be seen below, these criteria are themselves vague.

NGOs come into being and continue to exist because of the voluntary efforts of individuals who believe in the goals of the organization,¹⁹² rather than because of a decree from some external force.¹⁹³ The concept of voluntarism is particularly important to some commentators, as a factor that distinguishes NGOs from commercial and government bodies.¹⁹⁴ Governments recognize that large voluntary membership NGOs may represent a significant proportion of their electorate, and such organizations may

¹⁸⁷ For more on the relationship between NGOs and the UN, see section D, below.

¹⁸⁸ Willetts makes the point that it would be convenient if NGO were used for national organizations, and INGO for international organizations, but this is not a widely shared convention; Willetts, "Introduction", *supra* note 176 at 5.

¹⁸⁹ Martens describes the historical attempts to codify NGOs' legal status and adopt an international convention relating to their rights and responsibilities in international law; Martens, "Mission", *supra* note 163 at 274-75.

¹⁹⁰ *Ibid.* at 275, 281.

¹⁹¹ *Ibid.* at 277.

¹⁹² Martens observes that this distinction is more pronounced in Anglo-Saxon commentaries; *Ibid.* at 279.

¹⁹³ Gordonker & Weiss, "Pluralizing" *supra* note 161 at 20.

¹⁹⁴ Fernando & Heston, "Introduction", *supra* note 165 at 11. Membership criteria vary broadly, and there has been much discussion about the democratic legitimacy claimed by some NGOs as a reason for their increased involvement in international fora. See for example, Charnovitz, *supra* note 184 at 359; Simmons, *supra* note 162.

therefore have a greater impact on politicians.¹⁹⁵ While many NGOs start out as grass-roots organizations, the tendency is that as they become increasingly involved in national and international activities, they become more professional, including the hiring of professional staff with specific skills such as legal or fund-raising abilities.¹⁹⁶

The question of an NGO's sources of funding is open for debate. When NGOs receive significant funding from governments, there is always a question of whether such funds are accompanied by government control. Many non-governmental organizations, such as Amnesty International, maintain that they must remain entirely independent of government – including not accepting any government funding – in order to maintain “their neutrality, credibility and freedom of action.”¹⁹⁷ In reality, however, many NGOs rely extensively on public funds in order to carry out their work,¹⁹⁸ particularly development NGOs who frequently rely – directly or indirectly – on donor governments or their own governments for funding.¹⁹⁹ Willets points out that receiving funds from governments is not automatically a bad thing; some well-established NGOs can influence government policy through their requests for funding.²⁰⁰ Most commentators agree, however, that NGOs must not depend significantly on governments for financial

¹⁹⁵ Baehr, *supra* note 175 at 120.

¹⁹⁶ Martens, “Mission”, *supra* note 163 at 279. Indeed, this phenomenon can be the cause for some tension in organizations that define themselves in part based on their grass roots origins and internal decision-making processes.

¹⁹⁷ Cecilia Albin, “Can NGOs Enhance the Effectiveness of International Negotiation?” (1999) 4 Int'l Negotiation 371 at 376.

¹⁹⁸ Willets, “What is”, *supra* note 170 at 8.

¹⁹⁹ P. Streeten, “Nongovernmental Organizations and Development” (1997) 554 Annals Am. Acad. Pol. & Soc. Sci. 193 at 207.

²⁰⁰ Willets, “What is”, *supra* note 170 at 8.

support.²⁰¹ The UN also stipulates that NGO funding should come primarily from members and voluntary contributions.²⁰²

The factors used to determine the category of non-governmental organizations seem to depend upon the context and the parties doing the defining.²⁰³ Regardless of how NGOs are defined, NGOs have grown significantly over the past few decades. Though it is impossible to know the exact figure of NGOs worldwide, their numbers have increased significantly, and continue to do so. Some estimates have pointed to an increase from 6,000 international NGOs to over 29,000 in the course of the 1990s alone.²⁰⁴ The numbers of NGOs are increasing in all sectors, and particularly in the service delivery sector. It has been pointed out that NGOs now deliver more aid than the UN system as a whole.²⁰⁵ The impact of NGOs' activism and participation in the international system has also increased over the past few decades. Perhaps due to the strength gained from numbers, non-governmental organizations have contributed to international processes, and as will be seen in following chapters, have been valuable contributors in at least two cases.

²⁰¹ Martens, "Mission", *supra* note 163 at 280.

²⁰² Resolution 1296, *supra* note 186 at para. 8; see below, section D.1.a.i.

²⁰³ Kerstin Martens has pointed out that there are two broad approaches to characterizing NGOs: the juridical approach, and the sociological perspective; Martens, "Mission", *supra* note 163.

²⁰⁴ Kathy L. Brock, "Democracy is Coming: The New Interest in NGOs, Civil Society and the Third Sector" (2001) 16 *The Philanthropist* 263 at 264. Other commentators indicate a leap from 23,600 to 44,000 during the same time-frame; Natalie Steinberg, "Background Paper on GONGOs and QUANGOS and Wild NGOs" (December 2001), online: Global Policy <<http://www.globalpolicy.org/ngos/role/intro/def/2001/0112wild.htm>> at 8.

²⁰⁵ Steinberg, *supra* note 204 at 5.

3. History of NGOs in International Law

International non-governmental organizations have a long history that predates the founding of the United Nations, even if they were not always labelled the same way. These groups provided avenues for citizens to come together from across international boundaries in support of particular goals. Lyman Cromwell White has examined the history of non-governmental organizations, and points out that prior to the First World War they were more visionary and less about achieving particular results; “debate rather than action was the rule.”²⁰⁶ Most organizations focused on humanitarian and religious concerns.²⁰⁷ Some of the oldest such organizations include the World Alliance of YMCAs, founded in 1855, and the Anti-Slavery Society founded in 1823.²⁰⁸ While some commentators say the term *non-governmental organization* was not used until its inclusion in the UN Charter, others point to its use immediately after World War I.²⁰⁹

After World War I the number of organizations grew rapidly, as did their membership and financial strength.²¹⁰ The Covenant of the League of Nations, drafted in 1919, includes a reference to the International Red Cross,²¹¹ and uses the words, “all international bureaux.”²¹² This phrase was initially interpreted generously and as a result

²⁰⁶ Lyman Cromwell White, *International Non-Governmental Organizations: Their Purposes, Methods, and Accomplishments*, (New Brunswick, NJ: Rutgers University Press, 1951) at 5.

²⁰⁷ *Ibid.* at 4.

²⁰⁸ Martin A. Ölz, "Non-Governmental Organizations in Regional Human Rights Systems" (1997) 28 Colum. Hum. Rts. L. Rev. 307 at 314, n. 14.

²⁰⁹ Charnovitz, *supra* note 184 at 351; Charnovitz states that the term was being used by scholars of international law by 1943.

²¹⁰ White, *supra* note 206 at 6.

²¹¹ *The Covenant of the League of Nations*, 28 April 1919, Art. 25.

²¹² *Ibid.* art. 24.

for some time virtually all international organizations were given access to the League.²¹³ They contributed through written statements, oral reports, participation in discussions, and they proposed resolutions.²¹⁴ It is estimated that approximately 450 international NGOs had regular and close contact with the League.²¹⁵ Beginning in 1923, however, the League began to restrict its relations with NGOs to the point that it had virtually no contact with non-governmental organizations.²¹⁶ Nevertheless, international non-governmental organizations continued to solidify their existence during the inter-war period, and by the late 1930s there were more than a thousand non-profit international NGOs.²¹⁷

By the time of the founding of the United Nations there was a growing awareness among some key actors that NGOs do indeed play a significant role in world affairs. When states came together in San Francisco in 1945 to negotiate the terms of the new United Nations, non-governmental organizations were also present; 1,200 NGOs attended the San Francisco conference that finalized the UN Charter.²¹⁸ Initial proposals for the UN did not include a role for non-governmental organizations; however, they successfully pressed for formal inclusion in the Charter through aggressive lobbying.²¹⁹ NGOs placed

²¹³ Bill Seary, "The Early History: From the Congress of Vienna to the San Francisco Conference" in Peter Willets ed. *The Conscience of the World: The Influence of Non-Governmental Organizations in the UN System* (Washington, D.C.: The Brookings Institution, 1996) 15 at 22.

²¹⁴ Martens, "Examining", *supra* note 157 at 10.

²¹⁵ *Ibid.* at 11, citing Charles Chatfield, "Intergovernmental and Nongovernmental Associations" in *Transnational Social Movements and Global Politics: Solidarity Beyond the State*, Jackie Smith et al., eds., 1997. For a description of the ways in which NGOs interacted with the League, see Martens, "Examining", *ibid.* at 9-13.

²¹⁶ *Ibid.* at 13; Seary, *supra* note 213 at 23.

²¹⁷ White, *supra* note 206 at 7. Others provide different numbers. One estimate gives the number of NGOs in 1939 as 700; Seary, *supra* note 213 at 17.

²¹⁸ Peter Willets, "Pressure Groups as Transnational Actors" in Peter Willets ed. *Pressure Groups in the Global System* (New York: St. Martin's Press, 1982) 1 at 11 [Willets, "Pressure"].

²¹⁹ Charnovitz, *supra* note 184 at 358.

significant pressure on the United States delegation to advocate for the inclusion of a formal role for NGOs in the Charter, which it did.²²⁰ Whatever the impetus, the Conference adopted a Charter that included Article 71 which provided a consultative role for NGOs within the Economic and Social Council of the UN,²²¹ and ensured that NGOs had some measure of official status within the UN system.²²² As will be seen in more detail below, it was also through Article 71 that NGOs were first officially acknowledged in international law.²²³

D. NGOs and the United Nations

Since the founding of the United Nations, NGOs have had an impact on many UN bodies.²²⁴ Non-governmental organizations have contributed “theoretical insights, examples, draft language and other advice.”²²⁵ Particularly in the field of human rights, it is widely agreed that “human rights NGOs are the engine for virtually every advance made by the United Nations in the field of human rights since its founding.”²²⁶ The following section will outline the status non-governmental organizations have within the UN system, and will then examine how NGOs function within the UN.

²²⁰ Angus Archer, "Methods of Multilateral Management: The Interrelationship of International Organizations and NGOs" in Toby Trister Gati ed. *The US, the UN, and the Management of Global Change* (New York: New York University Press, 1983) 303 at 306; Willetts, "Pressure", *supra* note 218 at 11. The United States also invited 42 NGO representatives to act as consultants to the US delegation; Seary, *supra* note 213 at 25.

²²¹ For more on Article 71 and the place of NGOs in the UN system, see below at D.1.a.

²²² Charnovitz, *supra* note 184 at 358.

²²³ Martens, "Examining", *supra* note 157 at 15.

²²⁴ Gordenker & Weiss, "Pluralizing", *supra* note 161 at 17.

²²⁵ Felice D. Gaer, "Reality Check: Human Rights NGOs Confront Governments at the UN" in Leon Gordenker & Thomas G. Weiss, "Pluralizing Global Governance: Analytical Approaches and Dimensions" in Leon Gordenker & Thomas G. Weiss, eds., *NGOs, the UN, and Global Governance* (London: Lynne Rienner, Inc., 1996) 51 at 53.

²²⁶ *Ibid.* at 51.

1. Formal NGO Status

Non-governmental organizations obtain their status at the UN through a number of formal triggers. Perhaps the most crucial touchstone for the relationship between NGOs and the UN is Article 71 of the Charter which establishes the relationship between non-governmental organizations and the Economic and Social Council. Over time the relationship between NGOs and the UN has shifted, based on resolutions from ECOSOC, declarations from international conferences, and various review processes. In addition, NGOs have limited relationships with other organs of the United Nations.

a. UN Charter Article 71

Article 71 offers the only reference to non-governmental organizations in the United Nations Charter; however its inclusion has allowed NGOs to become formal participants, alongside nation states, in limited aspects of UN business. The Article was included as a result of an NGO coalition pushing for formal status of non-governmental organizations in the UN Economic and Social Council.²²⁷ Article 71 gives the Economic and Social Council the power to “make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence.”²²⁸ As a result, NGOs are officially linked to the workings of a significant inter-governmental organization.²²⁹ Despite being a groundbreaking provision, Article 71 confined consultation to the areas covered by ECOSOC, and limited NGO involvement

²²⁷ *Ibid.* at 52.

²²⁸ The entire Article reads: 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; *UN Charter*, *supra* note 54 art. 71.

²²⁹ Pei-heng Chiang, *Non-Governmental Organizations at the United Nations: Identity, Role, and Function*, (New York: Praeger, 1981) at vii.

to “consultation”. It was a priority for drafters to make clear that NGOs were to have fewer rights than those granted to UN specialized agencies and member states who could “participate without vote” in ECOSOC deliberations.²³⁰

i. Status by Virtue of ECOSOC Resolution 1296

The details of ECOSOC consultations with NGOs²³¹ are defined in ECOSOC Resolution 1296(XLIV), of 23 May, 1968.²³² This resolution sets out the principles to be applied in establishing consultative relations with non-governmental organizations, including which areas fall within the competence of ECOSOC,²³³ principles governing the nature of such arrangements, and various procedural standards. NGOs are admitted to the lists periodically; the ECOSOC Committee on NGOs meets every two years to review NGO applications.

Resolution 1296 establishes three categories of NGOs with consultative status:

Categories I and II, and the Roster.²³⁴ This categorization of NGOs was intended to allow for differentiation between types of NGO activity and function, and accord NGOs varying degrees of privileges and rights in how they are entitled to relate to ECOSOC.

²³⁰ Dianne Otto, "Nongovernmental Organizations in the UN System: The Emerging Role of International Civil Society" (1996) 18 Hum. Rts. Q. 107 at 109; Peter Willetts ed. *The Conscience of the World: the Influence of Non-Governmental Organisations in the UN System* (Washington, DC: The Brookings Institution, 1996) at 37 [Willetts, *Conscience*].

²³¹ NGOs have formalized relations with a number of other UN bodies, such as the World Health Organization, the International Labour Organization, and the UNESCO, however, this paper confines itself to examining NGO relations with ECOSOC and related bodies.

²³² Resolution 1296, *supra* note 186; this replaced UN ECOSOC Res. 3(II) (1946) and 288 B (X) (1950) and was greatly influenced by the political realities of the Cold War; Leon Gordenker, "NGOs and Democratic Process in International Organisations" in Monique Catermans-Holleman, *et al.* eds., *The Role of the Nation-State in the 21st Century* (Boston: Kluwer Law International, 1998) 277 at 283, n. 22; Otto, *supra* note 230 at 110.

²³³ Matters with which ECOSOC can concern itself are limited to “international economic, social, cultural, educational, health, scientific, technological and related matters and to questions of human rights.” Para. 1

²³⁴ Paras. 16-19.

Category I consists of “organizations in general consultative status” – these are organizations with considerable membership, in a large number of countries, which make contributions in the broad objectives of the UN as listed in paragraph 1. Category II is made up of “organizations in special consultative status” – those that specialize in specific fields of activity. The third category, the Roster, applies to organizations that can make occasional and useful contributions to ECOSOC and other bodies of the UN. NGOs in Category I and II can attend public meetings of the Commissions and other ECOSOC organs as observers. Roster NGOs are limited to attending meetings on matters that fall within their specific field of competence.²³⁵

While there may seem to be some logic to the separation of NGOs in this way, the manner in which the criteria of each category have been applied has been described as inconsistent and *ad hoc*. As one commentator has put it, “the practice of classifying organizations when there are no clear-cut guidelines results in decisions which are often political, arbitrary, and subjective.”²³⁶ It is undeniable that the hierarchy of categories used with regard to NGOs at the UN contributes to a real and perceived status system among non-governmental organizations.²³⁷

ii. Status by Virtue of Rio Declaration

Recently NGOs have also benefited from a second mechanism for gaining consultative status with ECOSOC. At the 1992 UN Conference on Environment and Development in Rio de Janeiro, the participation of 1500 NGOs was formally recognized through an open

²³⁵ Para. 28.

²³⁶ Chiang, *supra* note 229 at 96.

²³⁷ *Ibid.* at 98.

accreditation process.²³⁸ After the Rio Conference the General Assembly and ECOSOC passed resolutions regarding NGO participation in the work of the newly formed Commission on Sustainable Development, thereby allowing near automatic roster status to NGOs that had been accredited at the conference.²³⁹ Approximately 550 NGOs received ECOSOC Roster status without having to comply with the criteria set out in Resolution 1269.²⁴⁰ This access to ECOSOC Roster status essentially creates a second avenue bypassing the traditional consultative status accreditation path. Further, this move by the UN shows a recognition of the value of having broader NGO representation from a variety of NGOs. Precedent has been set for further stretching of the boundaries for NGO accreditation.

iii. Review of Arrangements for Consultation with Non-Governmental Organizations

There have been several efforts to review the role of NGOs within the UN. Major reviews of non-governmental organization consultative arrangements were undertaken in 1968 and in 1978, both of which attempted to deal with the political realities of the time.²⁴¹ In the 1990s, several factors led to the need for another review of how the UN interacts with NGOs. First, the number and variety of NGOs seeking consultative status with the UN had far exceeded the projections of the drafters of the Charter.²⁴² Second, it had been recognized that the input of NGOs is essential to many facets of the UN's work, and this

²³⁸ Otto, *supra* note 230 at 118; Antonio Donini, "The Bureaucracy and the Free Spirits: Stagnation and Innovation in the Relationship Between the UN and NGOs" in Leon Gordenker & Thomas G. Weiss eds., *NGOs, the UN, and Global Governance* (London: Lynne Rienner, Inc., 1996) 83 at 84.

²³⁹ Donini, *ibid.*

²⁴⁰ Otto, *supra* note 230 at 119.

²⁴¹ For a summary of the two reviews see *ibid.* 114ff. For a more in-depth review, see Chiang, *supra* note 229 at 171ff.

²⁴² Otto, *supra* note 230 at 109.

was not adequately reflected in the formal arrangements.²⁴³ Third, the traditional approach to granting status to NGOs favoured Western-based organizations as they are more likely to have the resources required to satisfy the stipulated criteria. Fourth, despite the fact that it was becoming increasingly common, not all states welcomed the contributions of NGOs to the work of the UN.²⁴⁴ And fifth, NGO participation had become more and more of a challenge to financial, administrative, and operational considerations within the UN.²⁴⁵

An Open-Ended Working Group was established under ECOSOC in February 1993,²⁴⁶ to review the question of how non-governmental organizations and the UN system can best work together.²⁴⁷ Its mandate was primarily to conduct a general review of arrangements for consultation with NGOs with a view to updating Council Resolution 1296 if necessary, creating coherence in the rules for NGO participation in international UN conferences, and improving practical arrangements for work of the Committee on Non-Governmental Organizations.²⁴⁸ As a result of the Working Group's efforts, ECOSOC adopted Resolution 1996/31²⁴⁹ updating Resolution 1296.

²⁴³ *Ibid.* at 121.

²⁴⁴ *Ibid.*

²⁴⁵ *Ibid.* at 122.

²⁴⁶ ESC Res. 1993/80, 30 July 1993 [Resolution 1993/80].

²⁴⁷ For a summary of previous reviews, and of the issues facing the Open-Ended Working Group see Otto, *supra* note 230 at 109ff.

²⁴⁸ Resolution 1993/80, *supra* note 246.

²⁴⁹ *Consultative relationship between the United Nations and non-governmental organizations*, ESC Res. 1996/31, 25 July 1996 [Resolution 1996/31].

There are changes in the new principles which, in some ways, broaden NGO access to the UN systems, yet other provisions continue to restrict that access.²⁵⁰ Organizations can now be recognized as NGOs if they function at national, subregional, regional, or international levels.²⁵¹ The new principles specifically encourage greater participation of non-governmental organizations from developing countries and countries with economies in transition.²⁵² At the same time, however, ECOSOC has maintained tight control over such organizations by requiring NGOs with general or special consultative status to file a report on their activities every four years.²⁵³ Further, the Council retains the right to suspend or withdraw consultative status of NGOs deemed not to be in compliance with principles set by the Council.²⁵⁴

Perhaps the most instructive result for non-governmental organizations is that the revised provisions for the consultative relationship between the United Nations and NGOs do not deviate from the original position on the matter of participation by NGOs. The UN Charter draws a clear distinction between participation without the right to vote – accorded only to States not members of the Council and to specialized agencies²⁵⁵ – and the arrangements for consultation with non-governmental organizations.²⁵⁶ This distinction has been maintained, indeed highlighted, in the revised provisions, effectively

²⁵⁰ Miko Lempinen, “Consultative Relationship Between the United Nations and Non-Governmental Organizations”, (1999) online: Institute for Human Rights <http://www.abo.fi/instut/imr/norfa/miko_ngo.pdf> at 5.

²⁵¹ Resolution 1996/31, *supra* note 249 at para. 4.

²⁵² *Ibid.* paras. 5-7.

²⁵³ *Ibid.* para. 61 (c).

²⁵⁴ *Ibid.* paras. 55-59. For a thorough review of the changes made by Resolution 1996/31, see Lempinen, *supra* note 250.

²⁵⁵ *UN Charter*, *supra* note 54 arts. 69-70.

²⁵⁶ *Ibid.* art. 71.

blocking NGOs from having a more formal avenue to participation in ECOSOC proceedings than a merely consultative one.²⁵⁷

b. NGO Participation in Other UN Bodies

Non-governmental organizations have the opportunity for limited participation in the principal organs of the United Nations. As seen above, NGOs can attend ECOSOC meetings, where they are allowed to submit agenda items and written statements, and to make speeches. Access to the General Assembly is somewhat more limited. It is current practice to allow NGOs with ECOSOC consultative status to attend meetings of the General Assembly's main committees.²⁵⁸ However, with very few exceptions where NGOs have addressed special sessions on specific topics, non-governmental organizations have not been permitted to participate in regular General Assembly sessions.²⁵⁹ The one notable exception is the International Committee of the Red Cross which was granted observer status by the General Assembly in 1990.²⁶⁰ The Security Council is even more restrictive to NGOs, and only rarely allows access to non-governmental organizations – as witnesses – for the purpose of reporting on violations of sanctions resolutions.²⁶¹

The previous sections have explored the systems in place for states to create international law, and the mechanisms used by NGOs to participate in the UN – the main international

²⁵⁷ For further thoughts on the distinction between consultation and the right of participation without a vote, see Lempinen, *supra* note 250 at 3, n. 10.

²⁵⁸ Donini, *supra* note 238 at 85.

²⁵⁹ *Ibid.*; Willetts, *Conscience*, *supra* note 230 at 279.

²⁶⁰ Donini, *supra* note 238 at 86; Donini also describes the informal monthly meetings between the president of the Security Council and the New York delegate of the ICRC.

²⁶¹ Willetts, *Conscience*, *supra* note 230 at 53, 279.

forum for states. Though not specifically granted even limited legal status by states, NGOs are impacted by – and themselves impact on – international law, much as international organizations, or corporations do. Indeed, many argue that NGOs are a segment of the larger group of non-state actors in the international arena.²⁶² Non-state actors are not automatically seen to be equal players with states in the field of international relations and the creation of international law. Despite not meeting the criteria of statehood, and therefore not being entitled to make international law, non-governmental organizations have nevertheless been recognized to make an increasingly valuable contribution at the international level. How then do non-governmental organizations insert themselves into the process of creating international law?

E. International Multilateral Negotiation Theory

There are several theories of multilateral treaty negotiations that consider how sovereign states arrive at international treaties.²⁶³ The approach of most interest in this study is how NGOs contribute to the development of international law through participating in international multilateral negotiations. Though multilateral negotiations typically involve

²⁶² For more on NGOs as non-state actors and their place in the international legal system see, e.g., Steve Charnovitz, "Nongovernmental Organization and International Law" (2006) 100 A.J.I.L. 348; Karsten Nowrot, "Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law" (1999) 6 Global Leg. Stud. J. 579; Rosalyn Higgins, "International Law in a Changing International System" (1999) 58 Cambridge L.J. 78; Theo van Boven, "The Role of Non-Governmental Organizations in International Human Rights Standard-Setting: A Prerequisite of Democracy" (1990) 20 Cal. W. Int'l L.J. 2007.

²⁶³ For example I. William Zartman, "Two's Company and More's a Crowd" in I. William Zartman ed. *International Multilateral Negotiation: Approaches to the Management of Complexity* (San Francisco: Jossey-Bass Publishers, 1994) [Zartman, "Two's Company"]; I. William Zartman, "Conclusion: Managing Complexity" (2003) 8 Int'l Negotiation 179; Larry Crump & I. William Zartman, "Multilateral Negotiations and the Management of Complexity" (2003) 8 Int'l Negotiation 1; Janet Martinez & Lawrence Susskind, "Parallel Informal Negotiations: An Alternative to Second Track Diplomacy" (2000) 5 Int'l Negotiation 569; R. Bruce Money, "International Multilateral Negotiations and Social Networks" (1998) 29 J. Int'l Bus. Stud. 695; and Fen Osler Hampson *et al.*, *Madness in the Multitude: Human Security and World Disorder*, (Toronto: Oxford University Press, 2002) [Hampson *et al.*, *Madness*].

only states, and in some instances intergovernmental organizations, non-governmental organizations have in the past two decades increasingly participated in such negotiations. NGOs have a solid track record of doing so indirectly, through offering support to states, but more interestingly, NGOs have become increasingly involved in international negotiations on their own behalf. Of particular interest is the recent phenomenon of NGOs working in coalitions with like-minded states to push forward certain goals and objectives on the international stage.

Multilateral negotiation theory is an approach to understanding the increasingly multifaceted negotiations that take place between states at the international level. International negotiations are becoming more and more complex as they involve a vast array of parties and cover a multitude of topic areas, sometimes within the same set of negotiations. Whereas international level negotiations have traditionally been between smaller groups of states, and frequently between only two states at a time, since the Second World War the variety of themes and the number of participants have continued to increase.²⁶⁴ Much attention has been given to the study of bilateral negotiations, but less so to more complex dynamics involving multiple parties. Multilateralism, then, is an approach to negotiations that takes into account more than two parties – and increasingly such negotiations involve up to 150 parties – in the discussion, each with possibly very different interests and purposes. Hampson points out that the “principal characteristic of these negotiations is complexity, involving not just large numbers of players but multiple

²⁶⁴ Fen Osler Hampson & Michael Hart, *Multilateral Negotiations: Lessons from Arms Control, Trade, and the Environment*, (Baltimore: The Johns Hopkins University Press, 1995) at 3.

interests, roles, issues, and hierarchies, all of which may vary over the duration of such negotiations.”²⁶⁵

Hampson goes on to describe several characteristics of multilateral negotiations as they occur in international politics. They usually involve groups or coalitions of states, and increasingly a variety of non-state actors – particularly in the context of negotiations in the field of public goods. Such negotiations often occur within the context of an international organization, such as the United Nations, which itself can influence the shape of the negotiations, and to some extent the outcome. Finally, the parties participating in the negotiations frequently do not maintain a steady level of interest and commitment to the negotiations over the duration of the talks.²⁶⁶ I. William Zartman puts forward a somewhat different list of characteristics. According to Zartman, multilateral negotiations generally encompass multiple parties, multiple issues, and multiple roles for the parties involved. In addition, multilateral negotiations involve variable values, parties, and roles, decisions are generally made by consensus, and they are characterized by parties working in coalitions.²⁶⁷

Regardless of the particular list of characteristics ascribed to the process groupings of state and other actors, coalitions are a central aspect of international multilateral negotiations. Within the framework of multilateral negotiation theory one line of study focuses entirely on coalitions and their role in facilitating the bargaining process that

²⁶⁵ *Ibid.* at 4.

²⁶⁶ *Ibid.* at 4-5.

²⁶⁷ Zartman, "Two's Company", *supra* note 263 at 5-6.

occurs with multiple players and multiple issues.²⁶⁸ This approach recognizes that coalitions are based not only on the parties involved in the negotiations, but also on the issues under consideration. Coalitions facilitate multilateral negotiations through simplifying the complexity of various aspects of the negotiations so that consensus can be sought and achieved.²⁶⁹

In international multilateral negotiations, coalitions have typically been composed primarily of state actors. Increasingly, however, non-state actors have begun to participate in such coalitions. Arguably, the participation of non-state actors has increased the success and good functioning of coalitions in which they have been involved. This study will explore two key ways in which non-governmental organizations contribute to the success of such coalitions: first, by contributing to the size and diversity of the coalition; and second, by facilitating and contributing to communication and the flow of information for the coalition.

1. Coalition Dynamics

In their examination of how coalitions work, Fen Osler Hampson and Holly Reid examine coalition dynamics that took place in the international negotiations for the Anti-Personnel Landmines Convention and for the International Criminal Court.²⁷⁰ They do so through the lens of four schools of thought in international negotiations: the *cosmopolitan* school, the *minilateralist* approach, coalitions of *middle powers*, and the *institutionalist*

²⁶⁸ While some see coalition analysis as the major approach to examining multilateral negotiations, others see it as one of many approaches; *ibid.* at 6.

²⁶⁹ *Ibid.* at 7.

²⁷⁰ Fen Osler Hampson & Holly Reid, "Coalition Diversity and Normative Legitimacy in Human Security Negotiations" (2003) 8 Int'l Negotiation 7 [Hampson & Reid, "Coalition Diversity"].

school, and the views of each with regard to treaty negotiation within the human security paradigm.²⁷¹

The cosmopolitan school places an emphasis on the role of non-state actors in setting the agenda for international negotiations. By using the media, lobbying governments, and conducting mass education campaigns non-state actors are becoming increasingly effective in having their concerns incorporated into the international agenda by pressing governments to include their issues among those being considered by states. Once discussions take place, non-governmental organizations are teaming up with states to influence how the negotiations themselves move forward. In addition, non-state actors are increasingly influencing the global public by providing education and learning opportunities – particularly through modern communications technologies, such as the internet and television.²⁷² For both states and the public what non-state actors offer is an alternative view, or framework, within which to consider the current state of affairs within any given issue.

The cosmopolitan view recognizes that civil society clusters of non-governmental organizations and social movements are becoming “inventors and providers of new social and political norms that are the building blocs of new forms of social and political discourse and, ultimately, political behaviours and institutions, national and international.”²⁷³ Non-state actors, including NGOs, are generally more efficient and more concerned with achieving equity and social justice than are states and international

²⁷¹ *Ibid.* at 9-10.

²⁷² Hampson *et al.*, *Madness*, *supra* note 263 at 54.

²⁷³ *Ibid.*

institutions.²⁷⁴ Cosmopolitans accept that civil society is a leader in both theory and practice of providing human security.

The minilateralist perspective focuses on the role played by states, especially states with the most global power.²⁷⁵ Under this approach it is these forces that have the power to create new norms and new regimes, and furthermore, the power to “make or break” their success. As a result, minilateralists argue that when the most powerful actors work together in coalitions²⁷⁶ they provide a balance to the complexity and uncertainty inherent in multilateral negotiations, and are thus successful in establishing new norms. When the most powerful actors in the international system have agreed, the norms are imposed from the top down to other actors within the system. Furthermore, minilateralists point out that without the endorsement of the major powers, any negotiated outcome among other parties risks collapse for lack of support and/or adherence. Minilateralists believe that the traditional power of hegemonic states is the key to successful norm-creation and implementation.²⁷⁷

The middle power perspective emphasises the role of coalitions made from small and middle power states in creating solutions that bridge impasses created by the most powerful international actors. Such coalitions of small and middle powers are particularly useful in situations where major powers are in negotiation deadlock as they can offer creative alternatives that constitute a genuine middle ground between positions held by

²⁷⁴ *Ibid.*

²⁷⁵ Hampson & Reid, "Coalition Diversity", *supra* note 270 at 9.

²⁷⁶ Minilateralists argue powerful states should never act on their own, even if they do bear the greatest burden in a coalition; Hampson *et al.*, *Madness*, *supra* note 263 at 57.

²⁷⁷ *Ibid.*

the major powers.²⁷⁸ This seems to work particularly well within the context of negotiations in formal institutional fora.²⁷⁹

Recently middle power coalitions have also begun to collaborate with powers outside the state-centered institutions hosting the negotiations. By working in alliance with NGOs and other civil society actors, middle powers can bring even more pressure to bear on states to consider the alternatives being proposed.²⁸⁰ As with the cosmopolitans, new forms of communication technologies have proven essential to the middle power efforts to share ideas and proposals quickly and efficiently with all interested parties. Another key factor for middle power multilateralists is a willingness to look beyond the traditions of existing institutions and to consider working partly or entirely outside the boundaries of established institutional structures. This in turn reinforces an openness among middle powers to working with non-state actors and other civil society representatives to promote their goals.

Despite their apparent similarities, Hampson clarifies a key difference between cosmopolitans and middle power multilateralists:

...whereas cosmopolitans argue that Transnational civil society can provide human security public goods without the direct involvement of states, middle-power multilateralists generally believe that middle-power states have a constructive role to play in advancing human security values and norms to bring about much-needed reforms in those international organizations where they are formal members.²⁸¹

²⁷⁸ *Ibid.* at 58.

²⁷⁹ Hampson & Reid, "Coalition Diversity", *supra* note 270 at 10.

²⁸⁰ Hampson *et al.*, *Madness*, *supra* note 263 at 58.

²⁸¹ *Ibid.* at 59.

It seems then, that the multilateral approach is more inclusive as to the roles played by various sectors of a coalition, whereas the cosmopolitians prefer to see the role of civil society as distinct from that of states.

The institutionalist school of multilateral negotiations places emphasis on the role played by international institutions in the context of international negotiations.²⁸² They believe that because they are state-based, formal international organizations have greater legitimacy in the international arena than do NGOs or other non-state actors.²⁸³ In addition, such institutions have access to vast resources and political sway through their international networks. Existing international institutions provide a forum for debate, and contribute to setting the rules and creating the shape of discussion. In addition they offer legitimacy to the negotiations by lending their reputation to the endeavour, and many institutionalists believe international institutions also benefit from a higher degree of collective political legitimacy than states.²⁸⁴ Institutionalists believe that the leadership within such institutions provides innovative thinking, and takes on the role of brokering deals among the negotiating parties.

a. Size and Diversity

While each of these approaches has something to say about the Landmines and ICC negotiations, Hampson and Reid argue that no approach independently can adequately explain the dynamics that took place in these two sets of multinational negotiations.²⁸⁵

²⁸² Hampson & Reid, "Coalition Diversity", *supra* note 270 at 10.

²⁸³ Hampson *et al.*, *Madness*, *supra* note 263 at 55.

²⁸⁴ *Ibid.* at 56.

²⁸⁵ Hampson & Reid, "Coalition Diversity", *supra* note 270 at 33-34.

Instead coalitions are most successful when elements from all four sources of power – cosmopolitans, minilateralists, middle powers, and institutionalists – work together, pooling their strengths and resources. The success of both sets of negotiations considered here can be attributed to the size and the diversity of the coalitions working to move the issues forward, and each of the four points of view contribute to understanding the dynamics of the various coalitions.

Hampson and Reid argue that such coalitions attain a certain stability once they are composed of sufficient numbers, and benefit from the varied strengths and resources brought to the effort by players from different sectors.²⁸⁶ Such contributions include “different capabilities, resources, levels of political legitimacy, and sources of leverage.” Indeed, size of coalitions is a key factor in their success, because if they are composed of enough participants they will be able to withstand the departure of some coalition members, even if those members are among the most powerful within the international community. In addition, the political and democratic legitimacy of such coalitions are greatly enhanced when the coalition membership is large and representative of many regional and interest-based communities.

Hampson and Reid point out that in the creation of new international norms, as negotiating treaties in fact are, the results of the negotiations will be stronger the larger the size, and the more diverse the membership, of the coalition supporting the norms, principles, and institutions upon which the results are founded.²⁸⁷ Coalitions that include

²⁸⁶ *Ibid.* at 34.

²⁸⁷ *Ibid.* at 11.

members from across the globe, and members that are seen to be leaders in their field, will benefit from greater perceived legitimacy.²⁸⁸ As a result, the larger and more diverse the coalition, the more successful this negotiation technique will be.

Hampson and Reid identify four features of diversity that contribute to coalition success. They are: 1) the capacity to 'name and shame'; 2) the capacity to bring different resources and bargaining skills to the negotiating table; 3) the capacity to take risks; and 4) the capacity to secure support from civil society and a wide array of non-governmental actors in order to leverage governments.²⁸⁹ It is primarily in this regard that NGOs make a major contribution to the coalitions in which they participate, and each of these will be explored in the context of the two sets of negotiations in following chapters.

b. Communication Functions

In his examination of negotiations that have taken place within the World Trade Organization, Peter Drahos explores the ways parties work in coalitions.²⁹⁰ He observes that states are taking part in more formal and informal groups, and that they clearly recognize that there are benefits to working in groupings with other actors.²⁹¹ Weaker states, and developing countries, can increase their bargaining power by working collectively, and increase the likelihood of positive results.²⁹² While working in coalition is increasingly recognized as a benefit for developing countries, strong developed

²⁸⁸ *Ibid.* at 34.

²⁸⁹ *Ibid.* at 11.

²⁹⁰ Peter Drahos, "When the Weak Bargain with the Strong: Negotiations in the World Trade Organization" (2003) 8 *Int'l Negotiation* 79. He focuses on the Uruguay Round.

²⁹¹ *Ibid.* at 87-88.

²⁹² *Ibid.* at 92.

countries also work in coalitions and benefit from the same advantages that come with strength in numbers.²⁹³ In this study Drahos suggests that developing states would benefit from adopting a more formal structure of collaboration. He develops an analysis of state bargaining power, and goes on to suggest elements of a possible formal structure for state collaboration. While Drahos focuses his observations on states, particularly developing countries, it is instructive to apply the patterns he identifies to other coalitions, including those composed of NGOs and middle power states.

Drahos describes how most groups that form in the context of trade negotiations are based on loose membership, temporariness, and pragmatism – that is, members come together on a temporary basis, come and go as they see the need to, and any sense of group membership is generally confined to the issue in question.²⁹⁴ Groups can form around regional perspectives, sectoral or issue-based concerns, and based on the operation of an international regime.²⁹⁵ Under this framework, Drahos examines what he sees to be the sources of bargaining power, and two in particular are of interest here as they increase when working in coalition with other parties. They are what Drahos calls commercial intelligence networks; and enrolment power.²⁹⁶

In the context of trade negotiations, Drahos considers commercial intelligence networks:

“networks that gather, distribute and analyze information relating to a state’s trade,

²⁹³ *Ibid.* at 81.

²⁹⁴ *Ibid.* at 88.

²⁹⁵ *Ibid.* at 89.

²⁹⁶ The other two sources of bargaining power are share of market power, and domestic institutions; *ibid.* at 82-83.

economic and business performance as well as similar information about other states.”

He further explains that “[t]he more integrated the network in terms of information sharing and analysis the more effective it is likely to be ...”²⁹⁷ As Drahos points out, the strength of a country’s commercial intelligence network determines a negotiator’s ability “to enter into an informed and persuasive dialogue with his opponent.”²⁹⁸

The second source of bargaining power Drahos mentions of interest here is enrolment power. He describes this as “the capacity of a state to enrol other actors, both state and non-state, in a coalition.”²⁹⁹ He goes on to explain that non-state actors such as business actors, and civil society actors are becoming increasingly important in international commercial negotiations.

After considering the sources of bargaining power, Drahos puts forward what he sees as three key functions of a formal organization composed of developing states. The first function must be taken on by some members within the organization, namely a leadership role, especially as regards facing those stronger elements outside the grouping. The second and third functions are monitoring capacity and analytical capacity.³⁰⁰ It is these latter two functions that are of specific interest in the context of this study. Drahos explains that by sharing the responsibilities for monitoring and analyzing developments participating countries will gain much more information and understanding than if they were to try to cover each of these functions on their own.

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.* at 84.

²⁹⁹ *Ibid.* at 83.

³⁰⁰ *Ibid.* at 93.

Throughout his analysis, Drahos emphasises the importance of strong communications for successful group collaboration, and while he doesn't frame them in this way, to some extent each of the factors highlighted above is a communication function. This applies not only to carrying out specific functions such as sharing monitoring and analytical responsibilities and results, but also to the strength and cohesion of the grouping in general. Drahos points to previous studies which have shown that high levels of communication among groups increase co-operation generally, and reduce defection rates from coalitions.³⁰¹ He observes that trust among group members goes up when there is more communication, and as a result he suggests that group members seek to increase communication processes that facilitate talking, debating, and deliberation among group members.³⁰² Ultimately, Drahos recommends that developing states working together institutionalize communications processes as this leads to increased trust and co-operation among group members.³⁰³

Drahos writes about groups and about coalitions without specifying what, if any factors may differentiate the two. For the purposes of this study, the two will be treated as equivalent. While the points raised by Drahos' exploration of international trade negotiations relate to groupings of states, and primarily to developing or weaker states, the same analysis can be applied to states working in coalitions composed of both strong and developing states, and of states and non-state actors. The benefits that flow from well-established intelligence networks, effective enrolment power, a sharing of

³⁰¹ *Ibid.* at 99.

³⁰² *Ibid.* at 102.

³⁰³ *Ibid.*

capacities, and strong and open communication would extend to all parties within a coalition.

Within the context of multilateral international negotiations, coalition theory is of particular interest to NGOs who work in collaboration with states to move certain items forward in the international arena. Within coalition theory the two perspectives explored above, size and diversity, and communication functions show that there are different points of view on what the key approaches are through which various parties make contributions to the process.

F. Conclusion

This chapter has put forward the key pieces that make up the international legal system as encountered by states and NGOs in the process of creating international law. Firmly rooted in the Westphalian tradition, the conventional understanding of international law places states as the primary actors, almost to the exclusion of all other participants.

Where other entities are granted some status in international law, it is qualified and at the discretion of states. As the key actors within the international legal system, only states have the authority to make international law.

The sections above have also explored the growing phenomenon of non-governmental organizations in the international arena, examined some of their key characteristics, and given a brief history of their participation in international law. The chapter then examined the formal status accorded to NGOs within the United Nations system. While NGOs are

recognized within some bodies of the UN, their status and their ability to participate is limited by a lack of clarity and lack of transparency.

The chapter concluded with an overview of international multilateral negotiation theory and its place in the processes of negotiation international law. Coalition theory, a sub-school of multilateral negotiation theory was explored, and two key elements of coalition dynamics set out, namely size and diversity, and communication functions.

The research in this dissertation focuses on how non-governmental organizations participate in international law creation processes. Under the rules of traditional international law, states are the only entities entitled to create law, and as such non-state actors such as NGOs are barred from creating international law. The current practical reality however, may not be totally in line with the traditional Westphalian perspective on international law. NGOs are increasingly involved in the various steps and processes that lead to new international law being made. Further, through their involvement they are influencing the outcome of international negotiations on certain issues and having an impact on the resulting international law. Given that non-governmental organizations are not states, and therefore not entitled to make international law, this study will seek to answer the question, do NGOs participate in the creation of international law, and if so, how?

This dissertation will suggest that NGOs are indeed, participating in creating international law, and that they are doing so by becoming involved in the international negotiations

that take place in conjunction with each issue. By participating in international multilateral negotiations, and in particular by becoming members of coalitions alongside states, NGOs are in a position to influence the outcome of those discussions. In order to test this theory, this research will examine two case studies where NGOs are recognized to have had a significant impact on the outcome of international negotiations: the Ottawa Process for a Land Mines Treaty, and the negotiations for an International Criminal Court.

The following chapters will examine how non-governmental organizations contributed to the size and diversity, as well as to the communication functions of the coalitions that developed around each of two cases. In each instance, NGOs participated along with states to move the international agenda towards a certain objective. In each instance, NGOs and states developed ways of working together within coalitions to improve the likelihood of their success. And in each instance, coalitions made up of both NGOs and states benefited – in ways that coalitions made up of either only NGOs or only states would likely not – from more robust size and diversity, and enhanced communications.

III. Chapter Three: Case Study – Ban Landmine Treaty – the Ottawa Process

A. Introduction

The Ottawa Process is a strong example of non-governmental involvement in an international multilateral negotiation situation. It is widely accepted that, had certain key NGOs not taken up the call to work for a landmines treaty, there would be no such international instrument today. The Ottawa Process – as the series of negotiations on the landmines issue came to be known – raises many questions about the role of NGOs in the development of international standards. Why was this case different from similar attempts in the past? Why did the participation of NGOs make such a dramatic difference to the outcome of the landmines treaty negotiations and finalization? How did NGOs contribute to the push for a treaty? Were there other key players who propelled the issue forward at critical moments?

In examining some of these questions, this chapter will give an overview of events leading up to the final treaty signing conference in Ottawa. The first section provides an understanding of the historical role landmines have played in war, as well as an understanding of their widespread use, and the devastating effect they have on individuals and communities. The next section explores the changing conditions within the global context that allowed for the topic of a landmines treaty to become an item on the international agenda. The following section examines the chronology of the negotiations as they took place up to and during the Ottawa Process. The final section considers who were the main players within the negotiations, including state and non-

state actors, before considering the four main categories of activities carried out by NGOs during the negotiations, namely advocacy, education and information sharing, field research, and media and public outreach functions. The chapter ends by briefly examining the forms of collaboration between NGOs, and between NGOs and states.

As will be seen below, NGOs participated to an unprecedented extent, and at a multitude of levels, within the negotiations. By working in coalition with states and with other non-state actors, NGOs were able to get the landmines issue on the international agenda, frame the discussions on the issue, and participate in seeing it through to a successfully negotiated international agreement. In examining the case of the Ban Landmines Treaty, this chapter will explore three aspects: first, how the negotiation process benefited from NGOs being part of the coalition of actors that moved the mine ban issue forward; second, how NGOs contributed to the size and diversity of the coalition; and third, how NGOs facilitated communication processes required for a successful coalition.

B. Walking through a Minefield – Landmines: What are they and how did they get here?

1. History and Statistics

Landmines have been in wide use during the better part of the 20th century. Landmines are inexpensive to produce, easy to deploy, and remain active without constant human supervision or action necessary. In addition, landmines have no expiry date; they lie in wait until triggered, even if hostilities have long ceased, making their indiscriminate

nature all the more poignant;¹ they cannot tell whether an armed combatant is passing over them or a civilian. When landmines were used exclusively in clearly delineated military battlefields, their effects – while limited to military personnel – were bad enough, but in current warfare landmines are often used in areas with high concentrations of civilian traffic.² In addition, since the 1960s, it has been possible to deliver landmines by rocket and by aircraft, expanding the possibilities for landmine use in enemy areas not easily accessed by military forces.³ This aspect of landmines, along with the fact that they are inexpensive and easy to manufacture, made them a staple of Cold War military strategy.⁴

Early forms of landmines have been in use since the American Civil War, and were perfected during the First World War as anti-tank mines.⁵ Anti-personnel (AP) mines were developed during the First World War to deter enemy troops from trying to steal

¹ Jody Williams & Stephen Goose, "The International Campaign to Ban Landmines" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 20 at 21.

² Kenneth R. Rutherford, "The Evolving Arms Control Agenda: Implications of the Role of NGOs in Banning Antipersonnel Landmines" (2000) 53 *World Politics* 74 at 81 [Rutherford, "Evolving"], citing Arms Project of Human Rights Watch and Physicians for Human Rights, *Landmines: A Deadly Legacy* (New York: Human Rights Watch and Physicians for Human Rights, 1993) at 9.

³ International Committee of the Red Cross (ICRC), "Anti-personnel Landmines – Friend of Foe?: a study of the military use and effectiveness of anti-personnel mines", (1996) online: ICRC <<http://www.icrc.org/Web/Eng/siteengO.nsf/iwpList74/C2951729922B4364C1256B6600599BF2>> at I para. 19 ["Friend of Foe?"]; J Marshal Beier & Ann Denholm Crosby, "Harnessing Change for Continuity: The Play of Political and Economic Forces Behind the Ottawa Process" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 269 at 275.

⁴ Beier & Crosby, *ibid.* at 275; Lloyd Axworthy, *Navigating a New World*, (Toronto: Alfred A. Knopf, 2003) at 128 [Axworthy, *Navigating*].

⁵ Miguel de Larrinaga & Claire Turenne Sjolander, "(Re)presenting Landmines from Protector to Enemy: The Discursive Framing of a New Multilateralism" (1998) 5 *Can. Foreign Pol'y* 125 at 130; Alex Vines, "The Crisis of Anti-Personnel Mines" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 118 at 118-19.

anti-tank mines.⁶ During the Second World War landmines were used by all parties; in total more than 300 million anti-tank landmines were employed.⁷ Despite their original defensive function, landmines have increasingly been used for offensive purposes, to keep sections of land from being passable by enemy forces, or usable by their civilian supporters.⁸ Both anti-tank and anti-personnel mines were soon used to demoralize troops and civilians, and not just to protect tanks.⁹

After World War II, technological advances made mines even more alluring to military forces. The United States developed mines that could be easily scattered from the air, and would land on the ground without detonating until triggered by being stepped on. These were used widely by American forces in Vietnam.¹⁰ Although it was recognized from early on that landmines are a particularly brutal weapon of war, they nevertheless became an entrenched piece of military strategy among nations worldwide, and were seen to be an essential implement of national defence.¹¹ Indeed, landmines were considered to be a conventional weapon and were not subject to any special standards or regulations for use, much like firearms or artillery shells.¹²

⁶ Jody Williams, "Landmines and measures to eliminate them" (1995) 307 Int'l Rev. Red Cross 375 at para. 4 [Williams, "Landmines"]; the size of original anti-tank mines made it easy for enemy troops to spot and remove the mines for their own use. As a result smaller anti-personnel mines were developed, and used alongside anti-tank mines, to deter enemy soldiers from entering a minefield.

⁷ Vines, *supra* note 5 at 118.

⁸ Williams, "Landmines", *supra* note 6 at para. 6.

⁹ Vines, *supra* note 5 at 119; Vines describes the practice by some troops of booby-trapping harmless, everyday objects such as radios and cans of fruit; in addition it was not uncommon to booby-trap the bodies of dead or wounded soldiers.

¹⁰ *Ibid.* at 120; because of shifting boundaries in the conflict American troops suffered immense casualties from their own mines.

¹¹ de Larrinaga & Sjolander, *supra* note 5 at 130.

¹² Richard Price, "Reversing the Gun Sights: Transnational Civil Society Targets Land Mines" (1998) 52 Int'l Org. 613 at 617.

The definition of an anti-personnel mine is itself gruesome: “a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.”¹³ There are two broad categories of landmine. Anti-tank mines are intended to be triggered by tanks or vehicles, and require a pressure of 100 to 300 kg to be activated. Anti-personnel mines – sometimes shortened to AP mines – are intended to be triggered by people, typically requiring between 5 and 50 kg of pressure to be activated.¹⁴ As time-delay weapons landmines are designed not to explode when deployed, but rather to lie dormant until triggered by a later event.¹⁵

The proliferation of anti personnel landmines is staggering. By the end of the 20th century tens of millions of mines were already in place,¹⁶ with an estimated 100-200 million mines stockpiled globally ready for deployment.¹⁷ Between 1980 and 1995 alone it is estimated that 65 million landmines had been sown.¹⁸ Mine-infested states are those that have recently seen conflict including Angola, Afghanistan, Bosnia-Herzegovina, Cambodia, Croatia, Ethiopia, Iraq, Mozambique, Rwanda, Somalia, Sudan, and Yugoslavia.¹⁹ Africa is the continent most impacted by landmines, particularly the

¹³ *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997, 36 I.L.M. 1507 art.2 [Ottawa Convention]. Mines have also been defined as devices placed under or near the ground or other surface area, and to be exploded by the presence, proximity or contact of a person, or vehicle; Rosy Cave & Richard Lloyd eds., *Explosive Remnants of War - A Global Survey* (London: Landmine Action, 2003) at 4.

¹⁴ “Friend of Foe?”, *supra* note 3 at I para. 5.

¹⁵ Williams, “Landmines”, *supra* note 6 at para. 6.

¹⁶ Some estimates are as high as 400 million landmines sown since the start of WWII; United States army estimate are referred to; *ibid.* at para. 1.

¹⁷ Williams & Goose, *supra* note 1 at 21.

¹⁸ Williams, “Landmines”, *supra* note 6 at para. 13, quoting Stephen Goose, “The Economics of Landmines”; the U.S. State Department estimates between 59 and 69 million landmines are currently deployed around the world; Rutherford, “Evolving”, *supra* note 2 at 82, citing U.S. Department of State, Bureau of Political-Military Affairs, Office of Humanitarian Demining Programs, *1998 Hidden Killers: The Global Landmine Crisis*, September 1998, at 8-9, 11.

¹⁹ “Friend or Foe?”, *supra* note 3 at I para. 1.

countries in Southern Africa,²⁰ but the problem exists also in Asia, Europe, Latin America, and the Middle East.²¹ Military forces of many countries still use landmines on a regular basis. Landmines are also used by non-state military forces in internal conflicts, such as in Afghanistan, Bosnia, Cambodia, Rwanda, Somalia, and Uganda, where landmines are being used to create social and economic chaos, or to dissuade refugees from returning.²² In addition, mines have been used by those involved in criminal activities such as drugs and gun-running as a mechanism to destabilize state control in the region.²³

The statistics on mine production are also shocking. More than 344 types of anti-personnel mines have been manufactured by over 100 companies and governments in 52 countries.²⁴ Accurate estimates are notoriously difficult in this field, however a 1993 report from Human Rights Watch and Physicians for Human Rights estimates that for the past 25 years 5-10 million AP mines had been manufactured every year – a number approximately ten times higher than previous estimates.²⁵ In the last quarter of the 20th century the top five mine producing countries based on number of models produced were, from highest to lowest, the United States, Italy, the Soviet Union, Sweden, and Vietnam. The countries that produced the largest number of landmines, as measured by the number

²⁰ Vines, *supra* note 5 at 125; in the last four decades of the past century, mines have claimed over 250,000 victims in southern Africa, and it is estimated that there are at least 20 million mines lying in wait throughout the region.

²¹ Williams, "Landmines", *supra* note 6 at para. 14.

²² Rutherford, "Evolving", *supra* note 2 at 82.

²³ particularly in Mozambique; Vines, *supra* note 5 at 126.

²⁴ *Ibid.* at 120.

²⁵ *Ibid.* citing *Landmines: A Deadly Legacy* (New York: Human Rights Watch, 1993) at 36.

of mines found around the world, were China, Italy, and the Soviet Union, with the United States close behind.²⁶

All the major producers exported landmines to other countries. This was done through military transactions or by sales directly from producing companies.²⁷ The Soviet Union distributed landmines around the world as a form of military aid,²⁸ and Russian AP mines have been found to be implicated in most conflicts around the world.²⁹ In addition to countries producing and exporting mines, many countries develop “locally improvised landmine-type devices” that are widely used. In addition to those states producing landmines, virtually all countries around the world have purchased and stockpiled landmines, with the possible exception of countries such as San Marino, Andorra, and Saint Lucia.³⁰ It is estimated that in the 1990s over a hundred countries were maintaining stockpiles of landmines.³¹

Since the end of World War II, every significant armed conflict has involved AP mines, and over time, their use increased.³² As one commentator has put it, “The overall result of this proliferation has been a world where few countries have not been touched by the

²⁶ *Ibid.* at 121.

²⁷ *Ibid.* at 122; three large mine producing companies in Italy were very aggressive exporters in the late 80s and early 90s.

²⁸ Robert J. Lawson, *Ban Landmines! The Social Construction of the International Ban on Anti-Personnel Landmines 1991-2001* Carleton University, 2002) [unpublished] at 76 [*Ban*]. Lawson’s PhD dissertation has provided a valuable resource for otherwise difficult to obtain detailed information.

²⁹ Vines, *supra* note 5 at 123.

³⁰ *Ibid.* at 121.

³¹ Lawson, *Ban*, *supra* note 28 at 76, citing *Landmines Monitor Report 1999*, p. 7-8.

³² Vines, *supra* note 5 at 123.

impact of landmines, from being directly affected to having aid workers or peacekeepers killed or maimed.”³³

2. The Effects of Landmines

While landmines may have originally been intended for use in the limited circumstances of the battlefield, they readily lend themselves to wider uses, and quickly become difficult to contain. Through widespread use, and because of the geographical circumstances in which landmines are frequently used, the initial impact of landmines on armed combatants has since come to affect masses of civilian victims.

Many militaries instruct their troops to map the locations of mines they put down,³⁴ but this is rarely complied with in the field.³⁵ On those occasions when mapping is conducted, the information often becomes meaningless as weather conditions, flooding, and shifting sands, move the landmines from their original positions.³⁶ Further, it is not uncommon for rival parties to sow landmines on top of those already placed by the enemy as lands are captured and recaptured by opposing sides in a conflict. Recent technological advances have allowed for mines to be scattered remotely at rates over

³³ *Ibid.*

³⁴ In STANAG 2036 – Minefield Laying and Recording, NATO has standardized the code for its armies that stipulates fencing, marking, recording, and mapping protocols for minefields; “Friend of Foe?”, *supra* note 3 at I para. 22ff.

³⁵ *Ibid.* at I para. 23.

³⁶ Williams, “Landmines”, *supra* note 6 at para. 18. Mines have been known to move as much as 30 cm from their original position; “Friend or Foe?”, *supra* note 3 at IV para. H.

1000 mines per minute.³⁷ While general locations of such drops can be recorded, it is impossible to note the site of such mines with any accuracy.³⁸

While landmines are cheaply made and easy to deploy, they are incredibly difficult and expensive to detect and deactivate.³⁹ Once made of metal, they are now more frequently made of plastic, and current technology does not permit reliable detection.⁴⁰ The process of detecting and disarming landmines is so cumbersome it takes 100 times as long to remove a landmine as to deploy one.⁴¹ If done by military experts, as is widely held to be the preferred method, each removed mine can cost as much as US \$800.⁴² Using figures at the upper range of estimates regarding the world's landmines would put the cost of demining globally up to \$110 billion.⁴³

The numbers of mines deployed and the costs of demining tell only a small part of the landmine story. Statistics cannot do justice to the terror experienced by landmine

³⁷ Williams, *ibid.* at para. 19.

³⁸ Williams gives the example of the Falklands/Malvinas conflicts of 1982 where British troops did keep detailed maps of drop locations, however after the war the mines could not be found in the locations specified, leaving danger zones in large areas of the islands; *ibid.* at para. 19, referring to Human Rights Watch Arms Project and Physicians for Human Rights, *Landmines: A Deadly Legacy* (New York: Human Rights Watch, 1993) at 27.

³⁹ Landmines can be made for as little as \$3.00 each, but cost between \$100 - \$1000 each to detect and remove; Ramesh Thakur & William Maley, "The Ottawa Convention on Landmines: A Landmark Humanitarian Treaty in Arms Control?" (1999) 5 *Global Governance* 273 at 278; Beier & Crosby, *supra* note 3 at 281, citing CIDA, *Anti-Personnel Mines and Development*, I, and noting that these are the figures used by the United Nations and major NGOs involved in the movement to ban landmines.

⁴⁰ "Friend or Foe?", *supra* note 3 at I para. 6; Williams, "Landmines", *supra* note 6 at para. 17; in fact, detection equipment from the 1940s is still being used to find landmines produced in the 1980s and 1990s.

⁴¹ Williams, *ibid.* at para 22. Williams points out further factors that cannot be conveyed by numbers alone: a field with one landmine is as unfit for cultivation as a field with 100 mines; and it can take as long for a team to clear a field of one mine as of 100 mines.

⁴² Bob Lawson, "Towards a New Multilateralism: Canada and the Landmine Ban" (1997) 54 *Behind the Headlines* 18 at para. 5 [Lawson, "Towards"].

⁴³ Beier & Crosby, *supra* note 3 at 281. Beier points out that demining contracts are extremely lucrative for technology experts, most of which come from the first world; *ibid.* at 283.

survivors.⁴⁴ The physical damage alone is unimaginable. As two prominent survivors have put it:

[L]ess well understood is the personal horror that each victim experiences in the moments after an explosion. Landmines tear off limbs and shoot shrapnel and dirt into the body. Even one's own bones become projectiles. If the eyes were not blinded during an explosion, a victim can see his own body torn, mangled, and bleeding. Without nearby help, the unfortunate victim usually dies alone.⁴⁵

When landmine explosions do not kill the victim, they usually result in amputation – either through the force of the explosion itself, or as a result of injuries and ensuing surgical amputation.⁴⁶ There are an estimated 250,000 landmines amputees worldwide. An estimated 2,000 victims are added to this number per month.⁴⁷

In the public mind, the typical image of a landmine survivor is a civilian – often a woman or child – whose body has been ravaged by the effects of a landmine. Being victimized by a landmine, however, can take many forms. The Landmine Survivors Network has proposed a broad to definition of victim to include those who suffer physical, psychological, social or economic harm or injury because of landmine explosions, and includes family members and dependents. In addition the definition considers those who cannot pursue normal activities because of landmines or the threat of mines.⁴⁸ This broad

⁴⁴ The vast majority of attention to survivors focuses on human survivors. Where the impact of mines on other beings is considered at all, it is usually in the context of the effect on humans, as for example, a discussion on the damage landmines cause to livestock and game; see Vines, *supra* note 5 at 128 & 130. Although it is beyond the scope of this research, the injuries to and loss of non-human life caused by landmines is equally worth consideration.

⁴⁵ Jerry White & Ken Rutherford, "The Role of the Landmine Survivors Network" in Maxwell A. Cameron, Robert J. Lawson & Brian W. Tomlin, eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 99 at 99.

⁴⁶ Vines, *supra* note 5 at 129.

⁴⁷ Beier & Crosby, *supra* note 3 at 284.

⁴⁸ White & Rutherford, *supra* note 45 at 104.

understanding of what constitutes a landmine victim shows how pervasive the negative effects of landmines can be on society.

Upon becoming the victim of a landmine a person may require any number of medical interventions in order to survive and recover. Assistance is usually required long-term if not life-long. The types of assistance survivors may need include:

care and rehabilitation provided for the immediate and long-term needs of mine victims, their family members and/or dependents, and mine affected communities. Victim assistance includes, but is not limited to, emergency and medical care; access to prosthetics, wheelchair and other assistive devices; social and economical reintegration; psychological and peer support; accident prevention programs; and legal and advisory services.⁴⁹

Roughly one third of all victims require prostheses, and adding other healthcare needs such as blood transfusions, nutritional assistance, treatment of disease, physical and psychological rehabilitation, treatment for blindness, burns, infection, and other blast related injuries, costs average between \$3,000 and \$5,000 per victim.⁵⁰ Most mine victims live in rural areas, and because the majority of treatment and assistance opportunities are based in urban centres, many survivors never receive adequate care.⁵¹

Because landmines often maim rather than kill their victims,⁵² their psychological impact on a population can be as damaging as their physical effect. Frequently maimed landmine survivors have no place in society and are left to fend for themselves, sometimes as

⁴⁹ *Ibid.* at 103.

⁵⁰ Beier & Crosby, *supra* note 3 at 284, citing 'Landmine-Related Injuries, 1993-1996, *Journal of the American Medical Association* 27, at 621, but pointing out that others regard these figures as too low. White & Rutherford quote UN figures of \$5000 to \$7000 for the average lifetime care of a landmine victim; White & Rutherford, *supra* note 45 at 104.

⁵¹ Mines Action Canada, "Anti-personnel Landmines – The Global Problem", online: Mines Action Canada <<http://www.minesactioncanada.com/landmines/index.cfm?fuseaction=Start>> at para. 8.

⁵² Williams, "Landmines", *supra* note 6 at para. 7.

“marauding gangs of ‘mutilados’.”⁵³ Because of the tremendous amount of medical and rehabilitative care required by mine victims, the effects of mines can easily overwhelm both local civilian and military support infrastructures.⁵⁴ The conflict zones in which mines are most commonly used tend to be in developing countries, where resources for de-mining, and assisting those affected, are scarce.⁵⁵ The cost of detecting and disarming mines, along with the cost of caring for victims is so prohibitive, post-conflict development itself is challenged by lack of funds in many poorer areas.⁵⁶

Because landmine use is no longer restricted to carefully defined military battlefields, civilian populations have increasingly become casualties of landmines. The most common estimates put the annual number of people killed or maimed by landmines, at 26,000 per year, the majority of which are civilians,⁵⁷ and the United Nations has estimated that civilians are at least ten times more likely to be killed or injured by landmines after a conflict, than combatants are during battle.⁵⁸ The most intense impact on civilians occurs immediately after a conflict when displaced people return home, and are killed or injured by mines on their lands and in their homes.⁵⁹ In addition to triggering a landmine detonation and suffering death or casualties in an explosion, women and

⁵³ Thakur & Maley, *supra* note 39 at 278.

⁵⁴ Williams, “Landmines”, *supra* note 6 at para. 7.

⁵⁵ Williams & Goose, *supra* note 1 at 21.

⁵⁶ Axworthy, *Navigating*, *supra* note 4 at 129; Axworthy gives the example of Mozambique, where it is estimated that the cost of treating landmine victims alone makes up thirty percent of the health budget.

⁵⁷ Price, *supra* note 12 at 618.

⁵⁸ “Friend or Foe?”, *supra* note 3 at 4. Many commentators are unequivocal in their position that landmines kill more civilians than soldiers, however, at least one author has pointed out that despite the increase in civilian death and injury caused by landmines, the majority of direct landmine victims are indeed combatants. Global estimates of civilian casualties vary from 30% – 40%; see de Larrinaga & Sjolander, *supra* note 5 at 136.

⁵⁹ Thakur & Maley, *supra* note 39 at 278; “Friend or Foe?”, *ibid.* at V 2. para. 80. As recently as 1999 Serbian forces used landmines in Kosovo to target Kosovar refugees returning to their homes; Rutherford, “Evolving” *supra* note 2 at 82.

children also become secondary victims of landmines when the family breadwinners are injured, and when crop lands become unusable because of landmines.⁶⁰ A vicious circle quickly ensues: with large areas of land polluted by landmines and therefore not usable for farming, housing, or other forms of development, masses of people face poverty and starvation, and are forced to flee their homes yet again.⁶¹

Even if not directly caught in a mine explosion, the threat of landmines can have a devastating effect on a community. Whether mines are present or not, the threat of landmines can prevent a community from returning to their homes, and using the land, thereby impeding reconstruction efforts long after a war has ended. As one commentator has said, “[a] simple rumour that an area has been mined can deny land for agriculture production for years...”⁶² The impact of landmines is far-reaching. As Jody Williams describes it:

“[u]sed offensively, landmines are deployed to depopulate areas, to disrupt agriculture and to interrupt the flow of goods and services. Transportation systems are affected, as are power systems, agricultural and grazing lands, religious sites, national parks and forests, and villages and the people living in them or fleeing from them. In short, all that makes up the fabric of a country can be contaminated by landmines.”⁶³

Thus the impact of landmines is particularly devastating as societies are forced to deal with landmines and their effects for generations.

⁶⁰ Price, *supra* note 12 at 618.

⁶¹ Lawson, "Towards", *supra* note 42 at para. 5.

⁶² Vines, *supra* note 5 at 129; Vines describes how spreading rumours about mines can depopulate an area for years.

⁶³ Williams, "Landmines", *supra* note 6 at para. 8.

C. A Changing Reality

While landmines had long been causing untold suffering, the humanitarian toll of landmines had been seen as a necessary cost of this piece of national security. In the mid 1990s two key factors contributed to a changing mood in the global consciousness that allowed the issue of landmines to come to the top of the international agenda. These factors were firstly, the end of the Cold War and the concomitant rise in influence of non-governmental organizations; and secondly, the shift in perspective precipitated by NGOs from one of arms control to one of humanitarian concerns.

1. End of Cold War and Increased NGO Influence

The end of the Cold War in the early 1990s allowed for several changes in perceptions and practices. As described above, the inclusion of landmines in the military arsenals of armies around the world was simply not questioned during the Cold War. Landmines were generally accepted as exclusively defensive military equipment, and were not considered a threat to global security.⁶⁴ However, as the Cold War thawed, the use of landmines in localized conflicts became more apparent. Smaller clashes, frequently playing a role in the greater context of the Cold War itself, came to light in ways that were not possible during the Cold War, when war was defined largely in the context of state security of major powers. As two Canadian academics have put it, “where the Cold War, with its omnipresent threat, was constructed as a period in which State military security was the primordial axis through which international relations were given

⁶⁴ David C. Atwood, “Tackling the Problem of Anti-personnel Landmines: Issues and Developments” (October 1998), online: International Security Forum <http://www.isn.ethz.ch/securityforum/Online_Publications/WS5/WS_5D/Atwood.htm> at para. 6.

meaning, the post-Cold War period appeared to lift the veil cast over the way wars are ‘really’ fought.”⁶⁵ When the Cold War perspective of state security began to ebb, space was created for an alternative view of security as a question of human security.⁶⁶

As pressure eased on the global concern about potential nuclear war,⁶⁷ world attention began to shift to places such as Afghanistan, Mozambique, and Cambodia, where conflicts raged during the late 1980s and early 1990s,⁶⁸ and where the use and destruction of AP landmines had become commonplace. In addition, the relaxing of long-standing barriers with the end of the Cold War meant that NGOs were able to gain access to areas they had previously been unable to enter. As a result they were able to gather precise data and more accurately access the use and effects of landmines in landmine infested areas.⁶⁹ This in turn led to louder NGO reports about the impact of landmines as the weapons and methods of warfare that had “the most significant impact on the lives of civilians.”⁷⁰

The global mood after the end of the Cold War shifted to one of cooperation, and, as Lawson says, a desire “to repair the humanitarian collateral damage caused by the Cold War....”⁷¹ The realities of post-Cold War politics also meant that a coalition of small and medium-sized states, in partnership with NGOs, could initiate, and carry through a process that led to the Ottawa Treaty, without the support – indeed in face of opposition – from

⁶⁵ Larrinaga & Sjolander, *supra* note 5 at 132.

⁶⁶ *Ibid.* at 133.

⁶⁷ Price, *supra* note 12 at 619; Jody Williams, “The International Campaign to Ban Landmines – A Model for Disarmament Initiatives?”, online: Nobelprize.org <<http://www.nobel.se/peace/articles.Williams>> at para. 4 [Williams, “Campaign”].

⁶⁸ Atwood, *supra* note 64 at para. 6.

⁶⁹ Rutherford, “Evolving” *supra* note 2 at 86.

⁷⁰ Williams, “Campaign”, *supra* note 67 at para. 4.

⁷¹ Lawson, *Ban*, *supra* note 28 at 79.

the traditional super powers.⁷² There was greater flexibility for diplomatic manoeuvring once states were no longer expected to align themselves with one of the superpowers.⁷³ Furthermore, as Cold War politics gave way to issues such as the environment and humanitarian crises on the international diplomatic scene, non-governmental organizations found more latitude to participate in the debates.⁷⁴

2. Shift from Arms Control to Humanitarian Perspective

Until the 1990s the discussion around the use and effects of landmines was firmly grounded in a perspective of state security and state sovereignty. The argument went that as long as states needed to protect themselves with military strategies, they had the right to use such weapons as landmines. As one commentary puts it, “[l]andmines were ‘necessary’ to the preservation of the State, and the possibility of their removal from State arsenals was conceived as a threat to the State.”⁷⁵ With the end of the Cold War, the until-then persistent state security tension also began to loosen its hold. It became possible for NGOs to suggest that the need to use landmines may no longer be unquestionable and that, in fact, landmines were not a question of military utility, but one of humanitarian concern.⁷⁶ If the world was no longer seen through the prism of Cold War dynamics, some space opened up for a reframing of the landmine problem. The

⁷² Don Hubert, *The Landmine Ban: A Case Study in Humanitarian Advocacy*, (Providence: Thomas J. Watson Jr. Institute for International Studies, 2000) at 30; Maxwell A. Cameron, "Global civil society and the Ottawa process: Lessons from the movement to ban anti-personnel mines" in Andrew F. Cooper, *et al.* eds., *Enhancing global governance: Towards a new diplomacy?* (New York: United Nations University Press, 2002) 69 at 79 [Cameron, "Global"]; for example, all five permanent members of the UN Security Council opposed the landmine ban, and the Ottawa Process.

⁷³ Ken Rutherford, "The Hague and Ottawa Conventions: A Model for Future Weapon Ban Regimes?" (1999) spring/summer Nonproliferation Rev. 36 at 44 [Rutherford, "Hague"]. See also Lawson, "Towards", *supra* note 42 at para. 19.

⁷⁴ Thakur & Maley, *supra* note 39 at 281.

⁷⁵ de Larrinaga & Sjolander, *supra* note 5 at 130.

⁷⁶ *Ibid.* at 132-33.

campaign to ban landmines started not from the perspective that landmines were a disarmament issue, but that landmines were a humanitarian issue.⁷⁷ It became possible to see them for what they really are: “a scourge against humanity.”⁷⁸

As long as landmines were discussed in the context of state security, it was in the best interest of governments to hold on to their right to produce and use landmines. However, once the focus shifted to seeing landmines from a humanitarian perspective, it became possible for states to look for cooperative solutions to a global problem.⁷⁹ By contrast, the ongoing UN-based negotiations on disarmament clearly remained framed in the context of state security.⁸⁰ By taking the focus away from state security, and reframing the landmines issue as one of security as harm to individual citizens, NGOs allowed governments to perceive of landmines discussions as something other than one determining their own state interests.⁸¹

NGOs used a two pronged approach based on international humanitarian law when approaching governments in an attempt to shift the discourse a humanitarian perception. The first was to point out that landmines were already illegal under existing international humanitarian law. Because they caused so many casualties among civilians, and because

⁷⁷ Lloyd Axworthy, "Towards a New Multilateralism" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 448 at 451 [Axworthy, "Towards"].

⁷⁸ de Larrinaga & Sjolander, *supra* note 5 at 134.

⁷⁹ Cameron, "Global", *supra* note 72 at 72.

⁸⁰ Iver B. Neumann, "Harnessing Social Power: State diplomacy and the landmines issue" in Andrew F. Cooper, *et al.* eds., *Enhancing Global Governance: Towards a new diplomacy?* (New York: United Nations University Press, 2002) 106 at 118. For more on these talks see section D.1.a, below.

⁸¹ Lesley Wexler, "The International Deployment of Shame, Second-Best Responses, and Norm Entrepreneurship: The Campaign to Ban Landmines and the Landmine Ban Treaty" (2003) 20 *Ariz. J. Int'l & Comp. L.* 561 at 569.

they caused unnecessary suffering to both civilians and non-combatants, they failed the proportionality test,⁸² and were therefore illegal under existing international law.

The second argument was to point out that landmines were illegal under international humanitarian law because they caused damage indiscriminately – once deployed anyone could become a target.⁸³ The perhaps unforeseen benefit of this strategy was that by shifting the landmine debate from a military one to a humanitarian one, NGOs created an opening for their further involvement in the political debate.⁸⁴ Had the debate remained one of state security it would have been difficult for NGOs to share with governments their knowledge and expertise on the subject.

In Canada, Mines Action Canada⁸⁵ faced this conceptual split in a concrete way because the different aspects of the discussion fell under the ambit of different government departments. The technical/military and legal aspects of the ongoing Certain Conventional Weapons (CCW) negotiations⁸⁶ fell under the domain of the Arms Control and Disarmament Division of the Department of Foreign Affairs and International Trade (DFAIT), along with the Department of National Defence. The humanitarian implications of landmines, on the other hand, were handled by the Human Security Division of

⁸² This principle states that “an attack, which may cause more harm to non-combatants than necessary to fulfill the military objective, is illegal;” Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art 51; see also Rutherford, “Evolving”, *supra* note 2 at 92-93; de Larrinaga & Sjolander, *supra* note 5 at 134.

⁸³ Rutherford, *ibid.* at 93; de Larrinaga & Sjolander, *ibid.* at 134.

⁸⁴ Rutherford, *ibid.* at 94.

⁸⁵ For more on MAC, see section E.2.c, below.

⁸⁶ For more on these talks, see section D.1.a.ii, below.

DFAIT.⁸⁷ To further compound the difficulties, only the Defence and Arms Control Division of DFAIT was represented at the CCW negotiations; the Human Security Division did not participate.⁸⁸ In discussions with the Canadian Government, MAC took the position that separating the humanitarian considerations from the technical aspects of AP landmines meant that the Canadian response to the landmine crisis would be incomplete. Indeed it was as a result of the argument that there had to be someone with a humanitarian background on the delegation to the CCW Review Conference that Valerie Warmington, a member of MAC, was invited to join the Canadian delegation in March 1996.⁸⁹ This shift in perception is also apparent in the landmine-related publications of the time,⁹⁰ as well as the changes in the discourse among NGOs and the public.

The humanitarian aspects of landmine use became clear to some governments in the early 1990s as their military forces became involved in landmine clearing efforts of UN peacekeeping operations.⁹¹ In Canada this shift was epitomized by the transition made by Minister of Foreign Affairs, Lloyd Axworthy, in his approach to the issue of security. Axworthy argued that “the end of the Cold War had fundamentally changed the nature of security, and the question of security for whom.”⁹² Indeed, Axworthy’s perception on the question of security for whom was to shape the global landmines debate.

⁸⁷ Valerie Warmington & Celina Tuttle, “The Canadian Campaign” in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 48 at 50.

⁸⁸ *Ibid.* at 51.

⁸⁹ Maxwell A. Cameron, “Democratization of Foreign Policy: the Ottawa Process as a Model” (1998) 5 Can. Foreign Pol’y 147 at 155 [Cameron, “Democratization”]; the Canadian government had frequently included NGO members (including Warmington) in delegations to various meetings, but this was the first time an NGO was included in CCW negotiations.

⁹⁰ de Larrinaga & Sjolander, *supra* note 5 at 134.

⁹¹ Atwood, *supra* note 64 at 3.

⁹² de Larrinaga & Sjolander, *supra* note 5 at 132; see 132ff for more on Axworthy’s perceptions.

D. To Walk without Fear – the Ottawa Process: Politics and Progress

The Ottawa Process refers to the international diplomatic work done between the October 1996 Conference held in Ottawa and the Signing Conference that took place in Ottawa thirteen months later. Though a myriad of factors contributed to its success, the three main aspects of the Ottawa Process are “a partnership between states and NGOs in the conduct of international diplomacy; the practice of bringing together small and medium-sized like-minded states into a coalition; and a willingness to operate outside of the normal channels and fora on a diplomatic ‘fast track’ to ban mines.”⁹³

In addition to the contribution made by NGOs, core group governments, and UN agencies, as described above, other factors contributed to the time being right for the emergence of landmines as a serious international issue. Commentators generally agree that events would not have unfolded in the same way had this taken place during the Cold War.⁹⁴ After the Cold War activists were able to shift the perspective of landmines from a military security view to a humanitarian perspective. Based on the new understanding of the landmines problem, states in favour of a ban began to share ideas, eventually forming the core group of Nations that carried the Ottawa Process to its successful conclusion. These changes in perspective took place in global society from the start of the 1990s, and created favourable conditions for a shift in approach to landmines.

⁹³ Cameron, "Global", *supra* note 72 at 76-77.

⁹⁴ *Ibid.* at 79.

1. The Chronology of a Negotiation

The course of events that led to the successful negotiation of the Ottawa Convention started from a place of stagnation and frustration within international arms talks circles. As interested states and non-state actors began to talk with one another, gradually the territory began to shift, and became more receptive to the idea of a landmine ban. From the stalemate at the CCW and CD talks, through the first murmurings of a possible way forward and the early discussions among interested parties, to the ultimate success of the Ottawa Process, the journey was a remarkably fast one.

a. Stalemate of CCW and CD

i. CCW

The concept of restricting the use and production of landmines was not a new one. Limited restrictions on landmine use had been incorporated into the 1980 *Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects* (CCW) and its Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices.⁹⁵ Despite the fact that Protocol II prohibited the use of mines against civilians in international armed conflicts, it had done little to change landmine use among states, and even less among non-state actors,⁹⁶ nor did it apply to domestic conflicts.⁹⁷

As global consciousness of the effect of landmines grew, so too did the call for changes to the CCW. Several nations had already begun to take steps to reduce or end production,

⁹⁵ 1342 U.N.T.S. 137, 19 I.L.M. 1523 (10 October 1980).

⁹⁶ Atwood, *supra* note 64 at 2.

⁹⁷ Wexler, *supra* note 81 at 582; Hubert, *supra* note 72 at 6.

or end use of landmines. NGOs working in this area and some states were starting to think in terms of going further than what was contemplated by the CCW, and calling for a total ban on landmines. The French partner in the ICBL⁹⁸ conglomerate, Handicap International, convinced the government of France to push the UN secretary general for a review conference for Protocol II of the CCW.⁹⁹ The fact that the Review Conference was called at all was an indication that the global mood on the topic of anti-personnel landmines was shifting.

The first step in the review process was a meeting of Governmental Experts in Geneva over seven weeks divided into two sessions in 1994. The task of this Expert Group was to consider three priority areas: strengthening the restriction on the use of anti-personnel mines to include various types of mines; the creation of a verification system; and the possibility of including non-international armed conflicts within the scope of the protocol.¹⁰⁰

Between 25 September and 13 October, 1995, 44 states, 40 non-state entities, four UN agencies, and the ICRC met in Vienna for the first formal session of the Review Conference.¹⁰¹ The first Review Conference session was an attempt to come to some agreements about strengthening limitations on landmine use, but it was a difficult discussion and what was supposed to be a single three-week period eventually spread over the course of three sessions starting in Vienna and ending in Geneva in May 1996.

⁹⁸ For more on the International Campaign to Ban Landmines see section E.2.b, below.

⁹⁹ Thakur & Maley, *supra* note 39 at 284.

¹⁰⁰ United Nations, CCW/CONF.I/GE/4, p.2, cited in Lawson, *Ban*, *supra* note 28 at 155.

¹⁰¹ Lawson, *Ban*, *ibid.* at 167; by this point ten states had formalized their pro-ban status.

The talks in Vienna were stalled by states such as China, India, Pakistan, and Russia which were dragging their heels on the small advances being made. In addition, the US was adamant that the right next step was to pursue the path of so-called 'smart mines'.¹⁰² Nevertheless, the number of states declaring themselves to be pro-ban continued to grow. In addition, the disconnect between the CCW Review Conference goals and the increasing pressure from the ICBL and civil society to accept nothing less than a total ban was also increasing. Ultimately there was no tangible progress and the Vienna Conference ended in deadlock.¹⁰³ The following two sessions in Geneva were no more productive than the first in Vienna. The ICBL and the International Committee of the Red Cross continued to call upon states to support a total ban, using a number of different strategies and approaches.¹⁰⁴

In the end, the Conference was not a resounding success. The United States, Russia, and China were the strongest voices, and arguments of state sovereignty were frequently made. These states had little to fear as decision-making was on the basis of consensus.¹⁰⁵ In addition, because of the conflicting agendas of those who wanted more dramatic changes, and those who resisted serious changes to Protocol II, "[t]he protocol that emerged was a weak, watered-down document."¹⁰⁶ Jody Williams, the coordinator of the ICBL was characteristically direct when she said, "it was a useless treaty, with loopholes

¹⁰² *Ibid.* at 174.

¹⁰³ *Ibid.* at 175.

¹⁰⁴ For detailed treatment on the activities of the ICBL and the ICRC, see section E.2.a & b, below.

¹⁰⁵ Michael Dolan & Chris Hunt, "Negotiating in the Ottawa Process: The New Multilateralism" (1998) 5 *Can. Foreign Pol'y* 25 at 25; Wexler, *supra* note 81 at 583.

¹⁰⁶ Axworthy, *Navigating*, *supra* note 4 at 133.

so big that you could drive a tank through them.”¹⁰⁷ The results emerging from the Vienna discussions were so poor that NGOs present called for the negotiations to be cancelled rather than accept small changes with little practical benefit.¹⁰⁸

Because the Review Conference was drawn out over such a long period, states and NGOs lobbying for change were able to use the time to push for greater public awareness, and to make connections among themselves. The NGOs involved began making suggestions that pro-ban governments work as a bloc, and consider establishing a more comprehensive agreement among themselves.¹⁰⁹ The idea was that with only the like-minded nations working together, it would be easier to develop an agreement that was stronger than what was being considered at the Review Conference.¹¹⁰

Several states and NGOs started holding “back room” meetings during the Geneva Conference to strategize how NGOs and governments could work together to promote a total international ban on landmines.¹¹¹ It was during these initial discussions that NGOs and the states that would come to be known as the ‘core group’ identified the main elements missing from the current CCW negotiations. There were three: first, shifting the discussion from military utility of landmines to their human cost; second, the key role to

¹⁰⁷ Julian Davis, “The Campaign to Ban Landmines: Public Diplomacy, Middle Power Leadership and an Unconventional Negotiation Process”, online: Journal of Humanitarian Assistance <<http://www.jha.ac/articles/a134.htm>> at para. 3, citing D’Arcy Jenish, “Landing the Prize: Peace Activist Share in the 1997 Nobel Prize” *Maclean’s* (29 October 1997) 33.

¹⁰⁸ Celina Tuttle, “Landmine ban proposed” *Ploughshares Monitor* (December 1996) at para. 4.

¹⁰⁹ Davis, *supra* note 107 at 4, citing Norma Greenway “Anatomy of a Landmine Agreement” *Vancouver Sun* (29 November 1997) H6; Lawson, *Ban*, *supra* note 28 at 182.

¹¹⁰ Davis, *supra* note 107 at 4.

¹¹¹ Dolan & Hunt, *supra* note 105 at 34; Lawson, *Ban*, *supra* note 28 at 184; the first eight states to participate were Austria, Belgium, Canada, Denmark, Ireland, Mexico, Norway, and Switzerland. All except for Denmark later became members of the Ottawa Process core group.

be played by regions through initiatives and institutions; and third, the importance of education for the general public and for officials in order to draw attention to the issue of landmines.¹¹² These elements would eventually become the cornerstones of the Ottawa Process.

The result of these back-room meetings was a strengthened commitment among pro-ban governments and NGOs to push for change by working outside the Review Conference.¹¹³ Indeed, it was because of this series of backroom meetings – and related events within Canada – that the Canadian government made the proposal to host a conference bringing “together pro-ban governments, the NGO community, and international organizations to strategize on how to advance the cause of the ban.”¹¹⁴ The announcement of this conference, scheduled for the fall of the same year, signalled a shift in the Canadian approach to the issue of a landmines ban. Canada was willing to take on diplomatic leadership of the other core group countries in order to promote the cause. While the CCW Review Conference was seen as a failure by the ICBL, this new path towards a total landmines ban was a positive result, and marked the beginning of the Ottawa Process.¹¹⁵

ii. CD

¹¹² Dolan & Hunt, *ibid.* at 34.

¹¹³ Atwood, *supra* note 64 at 3, 4.

¹¹⁴ Williams & Goose, *supra* note 1 at 33.

¹¹⁵ Dolan & Hunt, *supra* note 105 at 34. Canada had already signaled a shift in policy on landmines on 17 January 1996, when it announced its support for a total ban and a unilateral comprehensive moratorium on the production, transfer, and use of anti-personnel mines; Lawson, "Towards", *supra* note 42 at para. 9; Warmington & Tuttle, *supra* note 87 at 54.

A second track of talks that touched on landmines use was also underway. The Conference on Disarmament (CD) was established by the UN General Assembly in 1978.¹¹⁶ The CD is the only official forum for multilateral negotiation on global disarmament issues; it moves very slowly, and because it is constrained by consensus rules it follows, it is not very effective.¹¹⁷ When the CCW negotiations didn't produce a total ban on landmines, many nations shifted their focus to the Conference on Disarmament in hopes of reaching the desired results through this avenue. However, even those countries that were the most active in seeking a total ban through the Ottawa Process were members of the CD,¹¹⁸ and there were those who argued that following the Ottawa Process would in effect sabotage the efforts of the CD process.¹¹⁹ In addition, some states claimed that any international agreement that was concluded by like-minded states with no buy-in from major exporters of anti-personnel landmines would not be an effective treaty,¹²⁰ and that such negotiations should involve the major users and producers of landmines, as would be the case within the CD process.¹²¹

Not surprisingly, NGOs spoke harshly of the Conference on Disarmament, based on its track record, and on the fact that members such as China could derail any progress through a veto.¹²² Many NGOs advocated for the landmines issue to be negotiated as a

¹¹⁶ Thakur & Maley, *supra* note 39 at 285.

¹¹⁷ *Ibid.* at 285; Wexler, *supra* note 81 at 583.

¹¹⁸ Including the four countries most active in organizing and hosting Ottawa Process meetings, Austria, Belgium, Canada, and Norway; Thakur & Maley, *supra* note 39 at 286.

¹¹⁹ *Ibid.*

¹²⁰ Nicola Short, "A Review of the Ottawa Process to Ban Landmines", online: Columbia International Affairs <<http://www.ciaonet.org/wps/shn01>> at 3.

¹²¹ Hubert, *supra* note 72 at 19.

¹²² Short, *supra* note 120 at 3.

humanitarian question rather than a security matter.¹²³ Furthermore, not all states had joined the CD process, including some of the most mine-affected states.¹²⁴ It was also recognized by many that any ban negotiations that took place under CD would have progressed at a snail's pace.¹²⁵

As talks in the Ottawa Process progressed, states began to recognize that the CD process and the Ottawa Process need not be mutually exclusive. In fact, many came to see the CD as an avenue for "universalizing" the Ottawa Process, or as a way to codify the export ban that had developed in the years immediately following the CCW Review Conference.¹²⁶ Ultimately, however, the CD negotiations stalled, leaving the Ottawa Process the best alternative for pro-ban energies.¹²⁷

b. From CCW to Ottawa Conference, October 1996

On the final day of the CCW Review Conference in Geneva in May 1996, the ICBL, the UN Department on Humanitarian Affairs, UNICEF and the government of Canada held a joint press conference declaring their conviction that the only solution to the landmine problem was a total ban.¹²⁸ This press conference signalled the start of a partnership between NGOs and government that was to become the backbone of the campaign to ban

¹²³ Hubert, *supra* note 72 at 20.

¹²⁴ *Ibid.* at 19.

¹²⁵ Dolan & Hunt, *supra* note 105 at 26; or "tortoise pace", as Dolan has said of the CCW.

¹²⁶ Short, *supra* note 120 at 3.

¹²⁷ Andrew Latham, "The Politics of Stigmatization: Global Cultural Change and the Transnational Campaign to Ban Antipersonnel Landmines" (Address Before the International Studies Association, February 1999) online: Columbia International Affairs <<http://www.ciaonet.org/isa/laa01>> at 1; Lawson, *Ban*, *supra* note 28 at 254. In fact the CD held no negotiations whatsoever between 1999 and 2001; Wade Boese, "Conference on Disarmament Begins 2002 Session" *Arms Control Today* 32:2 (March 2002) online: Arms Control Association <http://www.armscontrol.org/act/2002_03/cdmarch02.asp> at para. 1.

¹²⁸ Williams & Goose, *supra* note 1 at 33; Hubert, *supra* note 72 at 17.

landmines. The Canadian government announced its plan to host a conference in Ottawa in October, a mere five months away. The purpose of the conference would be “to develop a strategy for achieving a comprehensive ban on AP mines.”¹²⁹

It was here that the theory of collaboration between the Canadian government and NGOs was first tested, as the ICBL and the government together worked out the details for the conference.¹³⁰ The Ottawa Conference of October 1996 was designed in close collaboration with NGOs, particularly those within the ICBL, and Mines Action Canada, as well as with the ICRC and states.¹³¹ Their input to the formulation of the Conference was key, and the Canadian government saw the benefit of having NGOs participate fully in the discussions.

A conscious decision was taken not to follow the traditional diplomatic approaches to negotiation.¹³² Despite initial difference of methods, it was ultimately agreed to circulate a draft final declaration which would commit states to seek a ban on antipersonnel mines as quickly as possible.¹³³ The states that supported such a goal were invited to attend as participants, and those who did not could attend as observers. This required states to self-select, and ensured that there would be maximum support for the initiative at the conference. Canada circulated the Criteria for Participation among states in June and July

¹²⁹ Lawson, "Towards", *supra* note 42 at para. 9.

¹³⁰ Axworthy describes some of the challenges faced by government and NGOs in working closely together, including mistrust, and frustration at bureaucratic delays; Axworthy, *Navigating*, *supra* note 4 at 138-39.

¹³¹ Lawson, *Ban*, *supra* note 28 at 209.

¹³² *Ibid.* at 215.

¹³³ Hubert, *supra* note 72 at 17.

1996, which outlined how states could participate based on their support for a mine ban. Full participants would be those who fully supported the goals of the mine issue.¹³⁴

Trust and respect between NGOs and the Canadian government grew over a summer of working together, and the Canadian government wanted the ICBL to participate at the conference as a full participant.¹³⁵ As Lawson writes:

The full integration of the ICBL, ICRC and key UN agencies into the Ottawa Conference program was undertaken to increase civil-society pressure on state decision-makers. In an ironic reversal of the CCW dynamic, some states lobbied Canada to ensure that at least some conference time be allotted for confidential state-to-state discussions.¹³⁶

The original intention was to include government and NGO delegations on equal footing in the negotiations, but this was too ambitious for most countries who accused Canada of “selling out to the NGOs.”¹³⁷ The compromise was a two-track meeting with one for NGOs and the other for governments, while NGO representatives included on state delegations were invited to the government track, like at the CCW negotiations. Despite the split sessions, 20 NGO delegates attended, and 15 governments included NGOs on their state delegations. It was certainly not the typical scenario in which international negotiations take place.

¹³⁴ The goals included: “1. A Commitment to work towards the earliest possible conclusion of an international agreement to ban the operational use, production, stockpiling and export of AP mines; 2. Support for an UN General Assembly resolution calling upon member states to support a global ban on anti-personnel mines and encouraging bans and moratoria on the production, operational use and export of anti-personnel mines; and 3. A commitment to regional and sub-regional action in support of a global ban;” Canada, “Towards a Global Ban on Anti-Personnel (AP) Mines, International Strategy Conference – Ottawa, October 3-5, 1996, Criteria for Participation,” June 1996, cited in Lawson, *Ban*, *supra* note 28 at 210.

¹³⁵ Hubert, *supra* note 72 at 18.

¹³⁶ Lawson, *Ban*, *supra* note 28 at 215.

¹³⁷ Cameron, “Democratization”, *supra* note 89 at 158.

The Conference was designed to include all participants as equals, and representatives of nation states, of NGOs, of UN agencies, and the ICRC, were all meant to have an equal say during the deliberations.¹³⁸ As Bob Lawson has put it, “ministers and officials shared plenary and workshop platforms with mine-victims, parliamentarians, and NGO representatives.”¹³⁹ NGOs were in the room and were encouraged to participate. Indeed, there was a fair bit of discomfort as the Conference got under way, as there were direct confrontations between NGOs and government representatives.¹⁴⁰ The first example of this departure from typical protocol happened on the first day of the Conference when Jody Williams, coordinator of the ICBL, took the floor immediately after the French announcement of a new landmine policy, and proceeded to criticize the policy as inadequate.¹⁴¹ This was a marked change from the discussions that had taken place until then under the CCW Review process, where only states were at the negotiating table.

Participation in the Ottawa Conference, Towards a Global Ban on Anti-Personnel Mines, was infinitely more successful than had originally been predicted:¹⁴² 50 governments pledged their support for a complete ban, and 24 observer states attended, along with dozens of NGOs under the ICBL umbrella, several UN agencies, the ICRC, as well as

¹³⁸ Axworthy, *Navigating*, *supra* note 4 at 127.

¹³⁹ Lawson, “Towards”, *supra* note 42 at para. 10.

¹⁴⁰ Axworthy, *Navigating*, *supra* note 4 at 135. Axworthy describes how Jody Williams, of the ICBL, challenged the U.K., French, U.S., and Russian position that negotiations could proceed only through established channels.

¹⁴¹ Lawson, *Ban*, *supra* note 28 at 217; Brian W. Tomlin, “On a Fast-Track to a Ban: The Canadian Policy Process” (1998) 5 Can. Foreign Pol’y 3 at 17; Williams said, “Your policy is contradictory. You are saying that you want to ban land mines, except when you want to use them. I suppose this is better than a stick in the eye, but it is not what we are looking for here.”

¹⁴² 15–20 states had initially been expected; Hubert, *supra* note 72 at 17; Cameron, “Democratization”, *supra* note 89 at 158.

other organizations.¹⁴³ Such a wide range of issues concerning the landmine crisis were discussed during the conference, that some ban proponents became concerned that the talks were not getting any closer to a ban. Indeed, some delegates began speaking in favour of incorporating further negotiations to the CD negotiations.¹⁴⁴ The energy of the delegates seemed to be falling into two camps: those who recognized the importance and urgency of securing a ban, and those who felt growing frustration with the process.¹⁴⁵

The tide turned on the last day of the conference when, in closing the proceedings, Lloyd Axworthy made a surprise announcement. The final decision to make this move came just hours before the close of the meeting, when Axworthy was briefed about the risks and opportunities of the proposal.¹⁴⁶ He and his officials were aware that the course of action they were choosing flew in the face of traditional diplomatic procedure, and that it was likely to be immensely unpopular with permanent members of the UN Security Council. Nevertheless, Axworthy felt strongly that someone had to take a stand in order to move the ban process forward. Axworthy said simply "It's the right thing. Let's do it,"¹⁴⁷ and he issued a challenge to the gathered states and NGOs.¹⁴⁸ At the podium, Axworthy ended his remarks with the following:

The challenge is to see a treaty signed no later than the end of 1997. ... The challenge is to the governments assembled here to put our rhetoric into action The challenge is also to the International Campaign to ensure that governments around the world are prepared to work with us to ensure that a treaty is developed and signed next year.¹⁴⁹

¹⁴³ Williams & Goose, *supra* note 1 at 34; Hubert, *supra* note 72 at 18; Lawson, *Ban*, *supra* note 28 at 217.

¹⁴⁴ Hubert, *ibid.* at 18; Lawson, *ibid.* at 218.

¹⁴⁵ Axworthy, *Navigating*, *supra* note 4 at 135.

¹⁴⁶ Lawson, *Ban*, *supra* note 28 at 219.

¹⁴⁷ Tomlin, *supra* note 141 at 20.

¹⁴⁸ See generally, Axworthy, *Navigating*, *supra* note 4 at 136ff.

¹⁴⁹ Lloyd Axworthy, "Address at the Closing Session of the International Strategy Conference Towards a Global Ban on Anti-personnel Land Mines" (Ottawa, October 1996).

The Ottawa Conference attendees were not expecting this move.¹⁵⁰ Williams and Goose describe the scene:

Amid the cheers of the ban campaigners, the silence of the diplomats was deafening. Even the clearly pro-ban states were horrified. Canada had stepped outside of the diplomatic processes and procedures and put them between a rock and a hard place. ... The foot soldiers of the campaign stood up and cheered while many diplomats literally hung their heads and wrung their hands.¹⁵¹

The Ottawa Process was well under way. No one knew for certain how to make the mine ban treaty a reality within the space of 14 months. Most doubted it was possible, and many thought the endeavour foolhardy. Even pro-ban states were reluctant to participate, perhaps out of resentment that they hadn't been consulted prior to Axworthy's challenge.¹⁵² Yet a handful of committed states soon joined the process and, along with a supportive NGO community, made it happen.

c. From Ottawa Conference to Oslo, and Back to Ottawa

Immediately after the Ottawa Conference, a steering committee comprised of states and NGOs came together to plan a strategy.¹⁵³ There were two avenues of approach that needed to be pursued simultaneously. What became known as Track One comprised the actual steps needed to successfully negotiate the ban treaty. This involved several meetings and conferences all with the goal of producing a satisfactory draft treaty. Track Two was geared towards garnering political and diplomatic support for a total ban. This

¹⁵⁰ The senior representative from the US, assuming nothing new would transpire, left for an early flight before the close of the Conference; Lawson, *Ban*, *supra* note 28 at 221.

¹⁵¹ Williams & Goose, *supra* note 1 at 34-35.

¹⁵² Hubert, *supra* note 72 at 19.

¹⁵³ *Ibid.*

support was achieved through strategically planned regional conferences, consultations, and campaigning.¹⁵⁴ Both of these Tracks led to Oslo, where states gathered to negotiate the final version of the mine ban treaty.

i. Track One

Some initiatives had already been taken under Track One. Austria had already started to develop a draft ban treaty, based on the core principles of International Humanitarian Law, and striving to be concise and clear.¹⁵⁵ After the Ottawa Conference, Austria circulated the draft text through its embassies, and received comments and feedback from other states. Subsequently, Austria hosted an experts meeting in February 1997. Lawson points out that the Vienna meeting fulfilled two purposes: first, it tested how many countries were truly supportive of a total ban, and second, it demonstrated the viability of the new Ottawa Process.¹⁵⁶ It was also in February 1997 that the Ottawa Process core group nations first met officially; Canada, Norway, Belgium, Austria, Switzerland, Ireland, Mexico, South Africa, the Philippines, Germany, and the Netherlands participated.¹⁵⁷

The vision of the Ottawa Process was a strong factor at the Vienna meeting. Canada worked closely with Austria to encourage states to participate in the Vienna meeting, and several core group members supported delegations from the developing world to attend

¹⁵⁴ See generally Lawson, *Ban*, *supra* note 28 at 231; Hubert, *supra* note 72 at 21ff.

¹⁵⁵ Lawson, *Ban*, *supra* note 28 at 232.

¹⁵⁶ *Ibid.* at 233.

¹⁵⁷ Robert J. Lawson & et al., "The Ottawa Process and the International Movement to Ban Anti-Personnel Mines" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 160 at 167.

the meeting. The efforts paid off when 111 states, the ICBL, ICRC, and several UN agencies participated in the meeting.¹⁵⁸ The high rate of participation at the Vienna meeting was seen by many to indicate support for the Ottawa Process, and for the goal of signing a treaty in December 1997. A further carry-over from the Ottawa Conference was the high degree of participation by NGOs in the process. The ICRC and the ICBL were present at the Vienna meeting, and indeed, the ICBL contributed draft text for the ban treaty. There were also several elements of the negotiations for which states and the ICBL lobbied jointly, such as the need for a new definition of an anti-personnel mine. In addition, the ICBL and the ICRC argued for an independent fact-finding mechanism to be included in the terms of the treaty.

After the Vienna meeting, the Ottawa Process continued on through a meeting in Bonn, and one in Brussels. The final negotiations were hosted by Norway in Oslo in early September. The procedural elements of the negotiation such as – would decisions be taken by consensus or by vote? would all UN languages be used for the negotiations? – were largely resolved by the rules of procedure for the negotiations drafted by Norway.¹⁵⁹

The “Experts Meeting on Possible Verification Measures” in Bonn, Germany, in April 1997, focused exclusively on the issue of compliance mechanisms.¹⁶⁰ 120 states attended this meeting, as well as the ICBL, the ICRC, and UN agencies. Like in Vienna, core

¹⁵⁸ Lawson, *Ban*, *supra* note 28 at 234; the most important factor for many was that a good number of mine-affected states were at the meeting.

¹⁵⁹ *Ibid.* at 238.

¹⁶⁰ *Ibid.* at 251.

group states ensured that there was support for delegates from developing countries to attend. The core group, along with the ICBL and the ICRC, promoted an approach to verification that was grounded in international humanitarian law, focusing on monitoring and cooperation to shift state behaviour, rather than the harsher verification and inspection approach supported by some states. The debate was not resolved in Bonn, but support shifted over the course of the meeting, towards the 'cooperative compliance model', and the discussions contributed to the meeting in Brussels.

By the time of the Brussels meeting in June 1997, the number of states openly supporting the Ottawa Process had leapt from the March figure of 30, to 70. The principle of including in the negotiations only those states that supported a ban continued when states were advised that in order to be full participants in the final negotiations in Oslo they had to support the Brussels Declaration.¹⁶¹ The biggest addition to the negotiations in the Brussels Declaration was the discussion and eventual inclusion of a provision requiring "international cooperation and assistance in the field of mine clearance in affected countries."¹⁶² This was a factor supported wholeheartedly by NGOs, as well as by core group countries many of whom provided large amounts of funding to mine-clearance operations.

The Brussels meeting was crucial to the ICBL campaign in the lead up to the Oslo negotiations. NGOs' main message to the media and state delegates was "no exceptions, no reservations and no loopholes," a message aimed at signalling that strength of the

¹⁶¹ Belgium, "Final Declaration of the Brussels International Conference for a Global Ban on Anti-Personnel Landmines," Brussels, 27 June, 1997, cited in Lawson, *Ban*, *ibid.* at 254.

¹⁶² *Ibid.*

existing draft text was crucial.¹⁶³ To support this message, the over 130 ICBL representatives from over 40 countries staged a number of events to get the attention of delegates, and to convince them of the seriousness of the ICBL message. Lawson describes “a cycle race from Paris to Brussels with the participation of landmine survivors, who pushed rickshaws carrying likenesses of Boris Yeltsin and Bill Clinton.”¹⁶⁴ There was also a simulated minefield in front of the conference facility, and International Days of Prayer for the Victims of Landmines. Another significant element of landmine reality came into play at the Brussels meeting as well. The issue of survivor assistance became a topic of discussion, spearheaded by an American NGO, and supported by some core group states.¹⁶⁵

ii. Track Two

In tandem with the official negotiations taking place within the Ottawa Process, so called Track Two initiatives were also occurring. This track focused on holding global, regional, and sub-regional multilateral meetings, and ultimately ten such meetings took place between the Ottawa Conference and the Oslo Meeting.¹⁶⁶ These initiatives were a combined effort between states, the ICBL, the ICRC, and the UN, and as Lawson describes, they tended to follow a characteristic formula:

1. Public academic, cultural and media events surrounding the meeting itself, most often organized by national ICBL campaigns with the support of the ICBL’s core international staff;
2. A high profile opening plenary featuring prominent international as well as local ban supporters;
3. Diplomatic exchanges of information which enabled pro-ban forces to

¹⁶³ ICBL Press Release, “No Exceptions, No Reservations, No Loopholes,” Brussels, 24 June 1997; cited in *ibid.* at 257.

¹⁶⁴ *Ibid.* at 256.

¹⁶⁵ *Ibid.* at 258-59; the NGO was Landmine Survivors Network.

¹⁶⁶ *Ibid.* at 238.

carefully track any developments in national positions with respect to the Ottawa Process; 4. Expert panels with representatives from states, the ICBL, the ICRC as well as local ban supporters, dealing with issues such as the military utility versus humanitarian aspects of landmines; 5. A review of the existing Austrian ban text designed to ensure all states were engaged in its development; 6. ICBL sponsored workshops designed to develop the advocacy capacities of local NGOs; and 7. A political declaration or Action Plan which, depending on the political mix of the meeting, called upon participants to support the Ottawa Process.¹⁶⁷

These meetings were held in all regions on the globe. In Africa, by some estimates the most mine-affected region of the world, three meetings took place: Maputo, Mozambique from 25-28 February, 1997, hosted by the ICBL as its 4th International NGO Conference; Harare, Zimbabwe from 21-23 April, 1997, organized by the ICRC in conjunction with the OAU and Zimbabwe; and Kempton Park, South Africa, from 19-21 May, 1997, hosted by South Africa in conjunction with the OAU and Canada.¹⁶⁸ Over the course of these meetings a strong group of African states developed which would play a significant role in the success of the Oslo conference. In Kempton Park, all but one state agreed to the OAU backing the Ottawa Process.¹⁶⁹

The main seminar that took place in the Americas was sponsored by the ICRC and supported by the government of Nicaragua and the Nicaraguan Red Cross. It took place in Managua from 28-29 May 1996, and focused on the states of Central America and Mexico.¹⁷⁰ The Americas had fewer conferences in Track Two, favouring regional organizations working closely with pro-ban states, core group states, and the ICRC. Though there was growing support within the region for a mine ban, because of US

¹⁶⁷ *Ibid.* at 239.

¹⁶⁸ *Ibid.* at 240-42.

¹⁶⁹ The hold-out state was Egypt; *ibid.* at 242.

¹⁷⁰ *Ibid.* at 243.

opposition the General Assembly of the Organization of American States was unable to offer its support.¹⁷¹

The reality in Europe included three of the most reluctant participants of the ban: France, Germany, and the UK. As a result, much of the Track Two focus within Europe was put into avoiding a European Union consensus policy on the ban treaty, which, as Lawson puts it, “would most likely have been driven to the lowest common denominator by Ottawa critics such as France and the UK...”¹⁷² The only regional meeting held in Europe, other than all of the Track One meetings, was held in Stockholm on 23-25 May 1997. The goal of this meeting was to encourage Eastern, Central, and Southern European countries to engage with the Ottawa Process, and the meeting was known as the “Baltics to Balkans” Conference.¹⁷³

There were four significant Track Two meetings in the rest of the world, regions where there was less general support for the Ottawa Process.¹⁷⁴ From 6-7 March 1997, Tokyo hosted the “Tokyo Conference on Anti-Personnel Landmines”. While this meeting focused on demining and assistance to victims, the Ottawa Process was nevertheless a constant presence. Indeed, the ICBL hosted a conference of its own immediately after the Tokyo meeting, and increased support for the Ottawa Process in that way. Four months later the ICBL held a meeting in Sydney, Australia from 14-17 July, 1997, which was effective in sending a clear pro-ban message to the reluctant Australian government. Two

¹⁷¹ *Ibid.* at 245; nevertheless, in the end all American states with the exception of the USA and Cuba signed the Mine Ban Treaty.

¹⁷² *Ibid.* at 246.

¹⁷³ *Ibid.* at 247.

¹⁷⁴ *Ibid.*

more regional meetings followed. The first was a conference in Manila, hosted by the ICRC and with the cooperation of the Philippine government and the Philippine Red Cross from 20-23 July, 1997. This meeting explored the tension between the military and humanitarian aspects of the use of mines, and called on participant states to support the Ottawa Process. Finally, in the region encompassed by the former Soviet Union, a meeting was held in Ashgabat, Turkmenistan from 10-12 June 1997. This meeting focused on raising awareness of the basic issues among regional authorities, and supporting what small sources of support there were in the area.¹⁷⁵

iii. Oslo

The two tracks paved the way for the meeting in Oslo at the start of September, 1997, where 85 states met to negotiate the final details of the treaty to ban the use, stockpiling, production, and transfer of anti-personnel mines. The atmosphere in Oslo was impacted by the fact that the day prior to the opening of the Conference, Princess Diana had been killed, and a sombre mood pervaded.¹⁷⁶ Adding to the mood in favour of supporting a ban, while negotiations were taking place in Oslo, the Norwegian media reported that the ICBL was likely to be awarded the Nobel Peace Prize. And indeed the prize was awarded to the ICBL and Jody Williams as its coordinator, in October 1997.¹⁷⁷

The negotiations were very much influenced by the demands of the United States and supporters who had significant differences with the majority of states present who were

¹⁷⁵ *Ibid.* at 250.

¹⁷⁶ Lawson describes in some detail the Diana Factor – how Diana’s interest in the landmines issue impacted particularly public attention to the problem of landmines; *ibid.* at 259ff.

¹⁷⁷ Williams & Goose, *supra* note 1 at 45-46.

on board with the proposed Austrian text for the treaty.¹⁷⁸ The US made proposals for several changes to the draft treaty, including an exception for the treaty on Korea where there were ongoing military activities; a nine-year deferral for entry into force of the treaty for states that request it; and changes facilitating state withdrawal from the treaty.¹⁷⁹ Though the US didn't make the sort of inroads it had hoped with convincing other states of the proposed amendments, the US delegation nevertheless requested a 24 hour delay to the closure of the conference, ostensibly to consult with other states.¹⁸⁰ Ultimately, however, the US was unable to garner the support it sought for changes, and the conference closed on September 18, with the revised draft text being adopted.

The ICBL was a major force in Oslo, with over 225 representatives of 130 NGOs, in 45 countries.¹⁸¹ A four-day NGO forum took place at the same time as the Oslo conference, where the ICBL started to plan for NGO activities after the Convention was signed.¹⁸² The ICBL campaign office and meeting rooms were well-placed on the negotiation site, giving all NGO representatives good access to government delegations over the course of the conference. The rules of procedure adopted in Oslo allowed the ICBL to participate as an official observer of the negotiations, enabling ICBL representatives to attend all sessions and to make oral interventions as they saw fit.¹⁸³

¹⁷⁸ Lawson, *Ban*, *supra* note 28 at 269.

¹⁷⁹ Dolan & Hunt, *supra* note 105 at 41-42; Lawson, *Ban*, *supra* note 28 at 270-76.

¹⁸⁰ Lawson, *Ban*, *ibid.* at 278.

¹⁸¹ *Ibid.* at 267.

¹⁸² Williams & Goose, *supra* note 1 at 42.

¹⁸³ Lawson, *Ban*, *supra* note 28 at 268; Williams & Goose, *ibid.* at 43; Goose and Williams explain that the rules of procedure were agreed to on the first day of the negotiations.

ICBL representatives also participated in other aspects of the negotiations, both within the official negotiations and the associated activities. As Lawson describes, NGOs focused on engaging with local and international media to help shape the political environment, and to encourage states to live up to their word to adopt a comprehensive ban treaty. The ICBL carefully monitored states' positions on key issues and reported on the progress of negotiations. NGOs held activities like demining demonstrations, street theatre, films and music, and publicizing the participation of mine victims in local activities.¹⁸⁴ The ICBL boiled its central message down to one slogan which it publicized by a banner placed prominently at the entrance to the negotiations, through its letterhead, and on the masthead of the conference newsletter it produced. The slogan "No Exceptions, No Reservations, No Loopholes" succinctly encapsulated the ICBL position at Oslo, and ultimately, the agreement reached by states on landmines.

d. Ottawa Treaty Signing Conference

When participants met in Ottawa to sign the Convention in December 1997 there were approximately twenty-four hundred people present.¹⁸⁵ There was a very different atmosphere in the conference centre than had prevailed thirteen months earlier. There were several powerful speeches reminding those present of the magnitude of their accomplishment. The keynote speeches were made by Canada, the UN, the ICRC, and the ICBL highlighting the collaboration between states and civil society throughout the Ottawa Process.¹⁸⁶ Jody Williams described the growing power of civil society as a

¹⁸⁴ Lawson, *Ban*, *ibid.* at 267.

¹⁸⁵ Axworthy, *Navigating*, *supra* note 4 at 148.

¹⁸⁶ Lawson, *Ban*, *supra* note 28 at 298-99.

“form of superpower in the making.”¹⁸⁷ She reminded those in attendance that Canada “had challenged the world to work openly with civil society ... to work together for change.”¹⁸⁸ After Axworthy signed the Convention on behalf of Canada, another 121 countries placed their signatures on the document.¹⁸⁹

In parallel with the treaty signing Conference the Mine Action Forum was being attended by hundreds of representatives from governments, NGOs, and international organizations.¹⁹⁰ These sessions involved over 2000 people interacting in roundtable format, including 91 mine action experts from around the world, and representing 21 states, 12 intergovernmental organizations, and 43 NGOs.¹⁹¹ The purpose of the Mine Action Forum was to focus on the ratification, universalization, and implementation of the Ottawa Convention.

Support for the Convention remained strong beyond the signing ceremony in Ottawa. Fifteen months later the required sixty ratifications had been deposited, and the treaty came into force on 1 March 1999. By July 2002, 125 states had ratified the Convention, and as of 15 August 2007 there were 155 States Parties to the Convention.¹⁹²

¹⁸⁷ Axworthy, *Navigating*, *supra* note 4 at 148.

¹⁸⁸ Jody Williams, “Statement to the Ottawa Treaty Signing Conference and Mine Action Forum”, 3 December 1997, cited in Lawson, *Ban*, *supra* note 28 at 299.

¹⁸⁹ Axworthy, *Navigating*, *supra* note 4 at 148; Williams & Goose, *supra* note 1 at 46.

¹⁹⁰ Atwood, *supra* note 64 at para. 40.

¹⁹¹ Lawson, *Ban*, *supra* note 28 at 306.

¹⁹² Axworthy, *Navigating*, *supra* note 4 at 149; online: International Campaign to Ban Landmines. <<http://www.icbl.org/treaty/members>>.

E. The Long Walk to Ottawa – Getting to the Ottawa Process: Key Players

Efforts to reduce the use of landmines had been ongoing for some time before it received renewed attention in the 1990s. Attention to the question of the landmines problem happened in several places.¹⁹³ As seen above, several states also began to rethink their existing approach to the use of landmines. The International Committee for the Red Cross began urging governments to consider their use of weapons that were indiscriminate, caused unnecessary suffering, or excessive injury.¹⁹⁴ At the same time, non-governmental organizations came together under the ICBL, an umbrella organization, and began working in collaboration to push for a total ban. And within Canada, the NGO coalition called Mines Action Canada began working closely with the Canadian government.

1. Core Group States

A key element that precipitated the realization of the ban on landmines to come together was the willingness of a handful of governments to work towards a goal outside the traditional UN venues for diplomatic negotiation. At the end of 1994 there were already ten states on the record as speaking in favour of a complete landmine ban.¹⁹⁵ By the end of 1995 there were 18 states in this group of ‘pro-ban’ states.¹⁹⁶

As described above, several states began holding backroom meetings at the CCW Review Conference in an attempt to move closer to a total ban. It was this group of pro-ban

¹⁹³ Lawson treats the United Nations, the ICRC, NGOs, and states as separate forces within the constellation of players that moved the mine ban forward. The research here focuses on the roles played by states and NGOs. Lawson, *Ban*, *supra* note 28. See also Hubert, *supra* note 72.

¹⁹⁴ Williams & Goose, *supra* note 1 at 21.

¹⁹⁵ Lawson, *Ban*, *supra* note 28 at 143.

¹⁹⁶ Lawson points out that most were directly or indirectly mine affected. The 18 were: Austria, Belgium, Cambodia, Colombia, Denmark, Estonia, Iceland, Ireland, Laos, Malaysia, Mexico, Mozambique, New Zealand, Nicaragua, Norway, Peru, Slovenia, and Sweden; *ibid.* at 143.

governments that pooled their energies and resources to form what came to be known as the core group, an “identifiable, cohesive bloc,” committed to advancing a domestic, regional, and international ban on landmines.¹⁹⁷ Over the course of the September 1995 meeting of the CCW Review Conference the number of states willing to support a total ban increased from 14 to 41.¹⁹⁸

Members of the core group advocated to convince other governments of the need for a total ban.¹⁹⁹ They took on leadership roles, and worked in close collaboration with the ICRC, and the ICBL, towards the common goal of a complete ban on landmines.²⁰⁰ Recognizing the difficulties they would face if they followed traditional negotiating avenues, interested governments focused on adopting a new method for negotiating a treaty²⁰¹ based on a bold shared vision, rather than on finding middle ground between disparate views.

Over the course of the Ottawa Process the core group came to be a strong, cohesive coalition. Lawson describes how this developed over time:

Each of the key meetings within the Ottawa Process was preceded by intensive telephone, fax and e-mail consultations through which strategic objectives were established and tactical approaches developed. Hours were spent discussing possible scenarios for each meeting, ensuring that the group would be on the same page in dealing with any difficulties. Initiatives developed in Brussels, Pretoria, Oslo, Ottawa, and Vienna were quickly shared with capitals throughout the world through joint or reinforcing diplomatic *démarches* using common speaking notes.

¹⁹⁷ Williams & Goose, *supra* note 1 at 33. Lawson highlights that being pro-ban came to be equated with being pro-Ottawa Process; Lawson, *Ban*, *supra* note 28 at 208.

¹⁹⁸ Williams & Goose, *ibid.* at 33.

¹⁹⁹ Price, *supra* note 12 at 633.

²⁰⁰ Atwood, *supra* note 64 at para. 22.

²⁰¹ Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society" (2000) 11 E.J.I.L. 91 at 107.

Embassies were also instructed to co-ordinate their actions with local NGOs and ICRC delegates.²⁰²

Core group states worked to generate support for the Ottawa Process within their regions as well as within various international fora and multilateral organizations.²⁰³

As their contribution became more crucial to the campaign, two factors emerged as key to the success of the core group promotion of the Ottawa Process. First, the core group was composed of members from around the globe, which allowed for effective regional representation of the campaign goals. Core group governments were responsible for bringing other states in their regions on-line with the ban proposal.²⁰⁴ In addition, the fact of there being a diversity of regional representation within the core group, meant that it would not be seen as an idea being imposed on the global South by the global North.²⁰⁵ This was crucial to increasing membership and ultimately to the success of the campaign.

The second factor was that the core group organized the Ottawa Process as a set of negotiations completely separate from the existing CCW and CD processes.²⁰⁶ This move ensured that a fresh view and new approach could be taken to the ban negotiations, without incorporating the entrenched positions and dynamics of the other fora. In addition, this independence from established patterns and venues allowed the core group to determine the best timing and most helpful procedures for the Ottawa Process negotiations.

²⁰² Lawson, *Ban*, *supra* note 28 at 228-29.

²⁰³ *Ibid.* at 227.

²⁰⁴ Hubert, *supra* note 72 at 36.

²⁰⁵ Cameron, *supra* note 72 at 80.

²⁰⁶ Hubert, *supra* note 72 at 36.

2. Anti-Mine Movement

Since landmines were first used in combat there have been those who recognized their destructive effect on human lives. It wasn't until the late twentieth century, however, that people began to mobilize around the notion of limiting, or even entirely eliminating landmines. It is debatable whether singly any NGO or core group state was the prime factor in moving the landmine ban from dream to reality. What is not under debate is that the outcome would not have been what it was had NGOs not played the role they did. Beginning with the International Committee of the Red Cross, and later the International Coalition to Ban Landmines which joined together various pockets of work on the topic globally, NGOs acted as conduits between civil society and states as the movement to ban landmines grew.

a. International Committee of the Red Cross (ICRC)

The International Committee of the Red Cross had been trying to raise awareness of the damage and destruction caused by landmines since the 1950s.²⁰⁷ At the time landmines were an accepted component of the military arsenal, and states were not inclined to accept any degree of control or restriction placed on their methods of warfare.²⁰⁸ In the 1960s the ICRC again tried to raise awareness of the international humanitarian law problems caused by the growing use of new weapons, including landmines, and again they were largely ignored.

²⁰⁷ Lawson, *Ban*, *supra* note 28 at 63-64.

²⁰⁸ Stuart Maslen, "The Role of the International Committee of the Red Cross" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 80 at 82.

In 1973 the ICRC published a report, based on meetings with 21 states, the UN, and various non-governmental experts,²⁰⁹ that focused on weapons that caused prolonged hazardous conditions for non-combatants.²¹⁰ In 1974, the ICRC held a follow-up Governmental Experts Conferences to discuss the Use of Certain Conventional Weapons. The ICRC wanted to frame the discussion in the context of the long tradition of international humanitarian law.²¹¹ At that conference there was a guarded interest among some experts in the possibility of banning some types of landmines. In 1976 a conference of experts from three countries²¹² presented a working paper that proposed the regulation of landmines and booby-traps.²¹³ The proposals raised in this working paper went on to form the starting point for Protocol II to the 1980 *Convention on Certain Conventional Weapons*.²¹⁴

Throughout the 1980s landmine use went up at an extraordinary rate; they were being used with abandon in the myriad of internal conflicts around the globe.²¹⁵ The effects of landmines began to be felt directly in Europe and Central Asia in the early 1990s when conflicts erupted in the former Yugoslavia and in various parts of the former Soviet Union. The ICRC was on the front line of treating victims of these conflicts, and gathered data that clearly showed that the number of injuries from landmine incidents – both

²⁰⁹ Lawson, *Ban*, *supra* note 28 at 68.

²¹⁰ *Weapons That May Cause Unnecessary Suffering or Have Indiscriminate Effect: Report on the Work of Experts* (Geneva: ICRC, 1973).

²¹¹ John English, "The Ottawa Process: Paths Followed, Paths Ahead" (1998) 52 *Austl. J. Int'l Aff.* 121 at 122.

²¹² They were France, the Netherlands, and the United Kingdom.

²¹³ "Land Mines and Booby-Traps and Proposals for the Regulation of Their Use" cited in Maslen, *supra* note 208 at 82.

²¹⁴ *Ibid.* at 83; for more on the CCW Process, see section D.1, above.

²¹⁵ *Ibid.* at 84.

during and after conflict situations – was rising.²¹⁶ Not only were numbers of injuries rising dramatically, the ICRC also noted that the types of injuries caused by landmines were different to those caused by conventional weapons, and that a growing number of mine victims were women, children, and unarmed men.²¹⁷ In addition, the ICRC drew attention to the growing number of its own staff and members of other relief organizations being killed or wounded by mines.

By the time the ICRC hosted an international symposium in Montreux, Switzerland, in April 1993, attitudes regarding the use of landmines were starting to shift. The symposium “included military strategists, mines specialists and manufacturers, experts in international humanitarian law and disarmament, surgeons and orthopedists, representatives of demining organizations, NGOs, and the media.”²¹⁸ There was a growing group of participants that agreed that the best solution would be a total ban on the use of anti-personnel landmines.²¹⁹ In addition to the humanitarian perspective, there were some who supported a ban because it would be easier to enforce than trying to monitor restrictions on the use of landmines.²²⁰ Despite continuing reluctance on the part of many participants who believed a complete prohibition was unrealistic, it was at this symposium that the ICBL made plain its support of a total prohibition of all anti-personnel mines.²²¹ Later that year the ICRC released a publication entitled *Mines, A Perverse Use of Technology*,²²² that included “powerful and shocking photographs of

²¹⁶ *Ibid.*; English, *supra* note 211 at 122.

²¹⁷ Lawson, *Ban*, *supra* note 28 at 122-23.

²¹⁸ Price, *supra* note 12 at 620.

²¹⁹ Maslen, *supra* note 208 at 84.

²²⁰ *Ibid.* at 85.

²²¹ *Ibid.* at 85.

²²² (Geneva: 1993)

mine victims ... [that] were, sadly, no more than a simple reflection of the daily reality in the field.”²²³ The ICRC produced case after case documenting the physical and psychological trauma suffered by victims of landmines.²²⁴ This strategy of making public what was otherwise private suffering was a key contribution to the ban effort.

The ICRC followed the 1993 symposium with a gathering of military experts in January 1994, to consider the current use of anti-personnel landmines, and possible alternatives.²²⁵ Not surprisingly, the participants at this meeting focused on the military aspects of mine use, and not on the humanitarian realities. As a result they unanimously agreed that there were no viable alternatives for mines and that they remained legitimate weapons.²²⁶ Despite – or perhaps partially because of – these expert meetings, in February 1994, the ICRC departed from its tradition of quiet diplomacy and declared that it was supporting “a global ban on antipersonnel mines as the only effective solution to the humanitarian disaster.”²²⁷ In a subsequent address to the UN International Meeting on Mine Clearance in July 1995, the President of the ICRC included what was to become a much-quoted statistic in the campaign. He told the meeting that, “each and every year more than twenty thousand men, women and children are injured or killed by anti-personnel mines.”²²⁸ Indeed, this statistic was reframed by the ICBL as “a victim every 20 minutes” and was later used for such activism stunts as the mine victim clock that

²²³ Maslen, *supra* note 208 at 84.

²²⁴ Axworthy, *Navigating*, *supra* note 4 at 131.

²²⁵ Price, *supra* note 12 at 620.

²²⁶ “Friend of Foe?”, *supra* note 3 at I para. 10, citing ICRC Report, Symposium of Military Experts on the Military Utility of AP Mines, Geneva, 10-12 January, 1994.

²²⁷ *Ibid.* at I para. 8.; ICRC, “Statement of Cornelio Sommaruga, President of the ICRC,” Geneva, 24 February, 1994, cited in Lawson, *Ban*, *supra* note 28 at 127; Hubert, *supra* note 72 at 10.

²²⁸ Cornelio Sommaruga, “Statement to the UN International Meeting on Mine Clearance,” 6 July, 1995, cited in Lawson, *Ban*, *supra* note 28 at 127.

added the number of people injured or killed during the CCW process, and the ringing of a church bell every 20 minutes during the Ottawa Process.²²⁹

Despite the strong position taken by most military experts at the 1994 meeting, the ICRC recognized that there was a lack of evidence obtained through systematic studies as to the military value of landmines²³⁰ and, as a result, commissioned a study that reviewed the military utility of landmines. Indeed, the 1996 study revealed, among other things, that “[s]adly, the only purpose for which mines have been used with total success ... is for the containment or harassment of civilians.”²³¹ The study concluded that “[t]he military utility of AP mines is far outweighed by the appalling humanitarian consequences of their use in actual conflicts.”²³² This was the first formal study of the military use of landmines and its findings were surprising to many.

Though many organizations and individuals were active in trying to reduce the damage done by landmines, the consistent efforts of the International Committee of the Red Cross were crucial in preparing the way for the changes to come.²³³ Indeed, it has been recognized that the fact of the scrupulously neutral ICRC coming out publicly in favour of a landmine ban signalled to the world that being pro-ban was simply being humanitarian.²³⁴

²²⁹ *Ibid.* at 127-28.

²³⁰ “Friend or Foe?”, *supra* note 3 at I para. 11.

²³¹ *Ibid.* at V 2. para. 74.

²³² *Ibid.* at XI para. 8.

²³³ Price, *supra* note 12 at 620.

²³⁴ Lawson, *Ban*, *supra* note 28 at 128.

b. The International Campaign to Ban Landmines (ICBL)

The ICRC continued to push the issue of landmines, however it wasn't until a coalition of international NGOs working to stop the destruction being caused by landmines joined in the effort, that public attention to the matter increased.²³⁵ Indeed, it has been said that "the international campaign to ban landmines began entirely ... as an effort of international NGOs."²³⁶ Much of the credit for the landmines initiative in general, and the creation of an NGO coalition in particular, goes to Jody Williams. Williams had been active in landmines work in El Salvador²³⁷, and was hired on a three month contract to explore the possibility of an advisory board to organize an international campaign.²³⁸ Ultimately Williams succeeded in bringing together the various organizations working on mine issues, which, despite having different focuses, found a core strategy with which they could all agree.

Six NGOs met in October of 1992, with the encouragement of Williams; they were Handicap International (France), Human Rights Watch (US), Medico International (Germany), Mines Advisory Group (UK), Physicians for Human Rights (US), and the Vietnam Veterans of America Foundation²³⁹ (US).²⁴⁰ This meeting was later

²³⁵ Anderson, *supra* note 201 at 105.

²³⁶ *Ibid.* at 104. See also Price, *supra* note 12 at 619, who states that "[m]embers of civil society have been the primary movers in generating worldwide concern about AP land mines."

²³⁷ Williams was working with Medical Aid for El Salvador.

²³⁸ Lawson, *Ban*, *supra* note 28 at 94.

²³⁹ It was the Vietnam Veterans of America Foundation that originally hired Jody Williams to work with them towards a mine ban; Cameron, "Global", *supra* note 72 at 75; English, *supra* note 211 at 122.

²⁴⁰ Lawson, *Ban*, *supra* note 28 at 97ff; Williams & Goose, *supra* note 1 at 22. The Vietnam Veterans of America Foundation secured significant support and funding for this work through the office of US Senator Patrick Leahy of Vermont.; Fen Osler Hampson & et al., *Madness in the Multitude: Human Security and World Disorder*, (Toronto: Oxford University Press, 2002) at 82.

acknowledged as the genesis of the International Campaign to Ban Landmines.²⁴¹ These initial six organizations remained the central steering group for the campaign for the duration, and the Vietnam Veterans of America Foundation took on the role of facilitating communications and cooperation among all the NGOs,²⁴² with Williams as the coordinator of the ICBL.

The first major initiative of the ICBL was to hold an NGO conference on landmines in London, in May 1993.²⁴³ This conference was followed by two further major NGO conferences in Geneva in May 1994, and in Phnom Penh, Cambodia, in June 1995.²⁴⁴ These meetings were a key recruitment tool for the ICBL. At the London conference 40 NGOs joined the campaign calling for a ban on landmines.²⁴⁵ The ICBL eventually became the umbrella organization for over 1,200 NGOs in 60 countries, making it possible to push for a landmine ban by using member organizations to create public awareness and political momentum at the national, regional, and international levels.²⁴⁶

The founders took a concrete decision not to create too rigid an organizational structure for the campaign.²⁴⁷ This proved to be a draw for NGOs, and resulted in a larger group of organizations supporting the call for a ban. The only requirement for organizations wishing to join the campaign was that they support the ICBL's joint call. Because coalition members retained the flexibility to continue their own activities, and to use the

²⁴¹ Anderson, *supra* note 201 at 105; Lawson, *Ban*, *supra* note 28 at 98.

²⁴² Lawson, *ibid.* at 102.

²⁴³ Cameron, "Democratization", *supra* note 89 at 152; Hubert, *supra* note 72 at 8.

²⁴⁴ Lawson, *Ban*, *supra* note 28 at 101-04.

²⁴⁵ Cameron, "Democratization", *supra* note 89 at 152.

²⁴⁶ Williams & Goose, *supra* note 1 at 22.

²⁴⁷ Lawson, *Ban*, *supra* note 28 at 110.

strategies and methods they chose to,²⁴⁸ it was not difficult for NGOs to commit to the ICBL.

Initially, a majority of NGOs participating in the campaign were human rights NGOs or organizations that worked in the humanitarian relief or development field, in addition to those focused on mine clearance. Over time a number of faith-based organizations also joined the campaign.²⁴⁹ While initially most participating organizations were from the global north, the ICBL was gradually able to attract coalition partners from the south, particularly after the Phnom Penh conference. Being able to include coalition members from mine affected states enhanced the ICBL's credibility and effectiveness.²⁵⁰

The ICBL had two simple and clear goals. The first was to call for "an international ban on the use, production, stockpiling, and transfer of AP mines."²⁵¹ The second goal was to increase the resources available for humanitarian mine clearance and for assistance to mine victims.²⁵² How these goals were translated into public messaging was continuously refined over the first few years of the campaign, but the core message remained short and sweet: ban landmines.

There is no question that the ICBL was pivotal in the outcome of a total landmine ban, and although the International Committee of the Red Cross did not join the ICBL for

²⁴⁸ *Ibid.* at 100.

²⁴⁹ *Ibid.* at 107; some of the organization that contributed the most resources to the campaign included World Vision, Christian Aid, Oxfam, CARE, Mennonite Central Committee, and Greenpeace.

²⁵⁰ *Ibid.* at 111. English has pointed out, however, that at the final Ottawa Conference only 20 percent of the NGOs present were from outside North America and Europe; English, *supra* note 211 at 128.

²⁵¹ Williams & Goose, *supra* note 1 at 22.

²⁵² *Ibid.*

internal mandate reasons, the ICRC collaborated extensively with the ICBL, and fully supported the Ottawa Process.²⁵³

c. Mines Action Canada (MAC)

Soon after the formation of the International Campaign to Ban Landmines a few Canadian NGOs became interested in working with the information ICBL was putting out, in particular to address Canada's position on landmines.²⁵⁴ In March 1995 the growing coalition of NGOs, which included "development, social justice, faith, health, peace, disabled people's, and disarmament organizations," formally joined forces as Mines Action Canada.²⁵⁵ From the outset MAC had very specific objectives:

legislation in Canada to ban the use, production, stockpiling, sale, transfer, or export of AP mines and the destruction of existing mines, to support humanitarian mine clearance efforts; to provide assistance to victims of land mines; to exchange information at the international level with the ICBL to promote a global ban.²⁵⁶

In support of these objectives MAC member NGOs had participated in a letter-writing campaign even before the coalition came together. The campaign was successful; indeed the government was overwhelmed by the number of letters it received on the topic and asked MAC to stop the letter-writing campaign. In addition, MAC organized a petition in late 1995-early 1996 which received more than 50,000 signatures from Canadians, which were sent in bundles of 10,000 to the House of Commons.

²⁵³ *Ibid.* at 80; Anderson, *supra* note 201 at 105; English, *supra* note 211 at 122.

²⁵⁴ Warmington & Tuttle, *supra* note 87 at 49.

²⁵⁵ The following groups joined the coalition: Physicians for Global Survival, CARE, CUSO, Oxfam, Project Ploughshares, World Vision, the United Nations Association of Canada, several churches, and the CCIC, a Canadian NGO umbrella organization; Cameron, "Democratization", *supra* note 89 at 154.

²⁵⁶ *Ibid.* at 154, citing "Objectives of Mines Action Canada," MAC, mimeo. Cameron notes that the objectives were slightly revised in November 1996, but remained substantially the same.

In part based on the work Canadian NGOs had already been doing in contributing to the process of developing defence and foreign-policy, MAC secured regular meetings with government officials to receive updates on government landmine policies and activities.²⁵⁷ Through these meetings MAC was able to supply the government with emerging details on the humanitarian and socio-economic effects of landmines as they were being documented around the world. MAC continued to press a Canadian government resistant to supporting a total ban on landmines, and consistently argued for a humanitarian view as opposed to a military utility perspective.²⁵⁸ Though tentative and rocky at first, the relationship between MAC and the Canadian Government was to become crucial to the Ottawa Process.

3. Activities of NGOs

Even before global interest started to develop in the mid 1990s, NGOs had already been contributing to the dialogue on landmines. Both in the lead up to the Ottawa Process, and during the Ottawa Process itself, non-governmental organizations made substantial contributions to the cause. Although it is not always possible to neatly categorize NGO contributions, their activities can be loosely categorized into four fields: 1) advocacy; 2) education and information-sharing; 3) field research; and 4) media and public outreach.

a. Advocacy

Non-governmental organizations have a long and proven track record in advocacy work, and their efforts in the case of a landmine ban were no exception. NGOs were involved in

²⁵⁷ Warmington & Tuttle, *supra* note 87 at 49.

²⁵⁸ *Ibid.* at 50-51.

advocacy work on a number of fronts during the landmine ban negotiations, including through consulting with governments, participating in setting strategy, lobbying governments, and taking part on government delegations to negotiating conferences.

The ICBL was very active in consulting with interested governments whenever possible. Beginning with the backroom meetings at the CCW Conference in 1992, the ICBL was involved at every opportunity to share the expertise and experience of member NGOs, as well as to act as a sounding board for governments. Core group governments, in turn, were eager to consult with the ICBL, and recognized that they had an invaluable resource at their disposal. In Canada in particular, Mines Action Canada initially struggled to have regular access to government officials, but soon developed a pattern of consultation, and continued to meet regularly over the course of the negotiations.²⁵⁹

In addition to consulting with core group states, NGOs participated in strategy-exploring and setting discussion with states. In January 1996 the ICBL began to think in terms of encouraging pro ban states “to develop a sense of their own identity as a pro-ban block and corresponding potential to work with the ICBL on advancing the ban agenda.”²⁶⁰

Direct NGO involvement with pro-ban states started with the backroom discussions. In 1996, as the CCW talks dragged on, NGOs and states came together to consider various options for moving the ban agenda forward.²⁶¹ It was in these backroom meetings that various themes were developed that became the foundation for the Ottawa Process,

²⁵⁹ Cameron, "Democratization", *supra* note 89 at 154; see generally interview of Celina Tuttle, Coordinator of Mines Action Canada at the time of the Ottawa Process (16 March 2005).

²⁶⁰ Lawson, *Ban*, *supra* note 28 at 182-83.

²⁶¹ English, *supra* note 211 at 123.

including the need to make the shift from speaking in terms of security to thinking of landmines as a humanitarian issue.²⁶²

When it came to planning of the first Ottawa Conference, NGOs were integral to the development of the strategy for that meeting, as well as to the execution of the agenda.²⁶³

Over the course of the six months prior to the Ottawa Conference, NGOs met regularly with members of the Canadian government to discuss “nearly every aspect of the conference, including how best to ensure maximum attendance by governments.”²⁶⁴

During the Conference, Canadian officials and NGOs worked together to guide the developments of the discussions, and when it came to drafting the “Chairman’s Agenda for Action” arising from that meeting, it was done in conjunction between Canadian government officials and two members of the ICBL.²⁶⁵ This experience clearly set the tone, as after the Ottawa Conference, core group governments in general, and the Canadian government in particular, continued to work closely with the ICBL, and to share strategy-setting, throughout the remainder of the Ottawa Process.

NGOs played a crucial role in moving the landmine ban forward through their persistent lobbying efforts. The ICBL was effective in providing the right information in the right context to change policymakers’ minds. In coordination with their efforts at education around the impact of landmines, and their consistent work to mobilize the public on the issue, NGOs lobbied governments with the goal of changing the perspectives and

²⁶² Dolan & Hunt, *supra* note 105 at 34.

²⁶³ Lawson, *Ban*, *supra* note 28 at 215.

²⁶⁴ Williams & Goose, *supra* note 1 at 35.

²⁶⁵ Tomlin, *supra* note 141 at 17.

positions of those in power.²⁶⁶ As noted above, MAC initiated an effective letter-writing campaign targeting government officials, which generated massive amounts of mail.

"The government" one official said, "had got the message."²⁶⁷

In addition to these more public efforts, NGOs also tried to influence governments by cultivating relationships with sympathetic officials. Axworthy writes of the NGO style of persuasion: "[a]t international meetings they did not necessarily confront, but used strong pressure in the corridors."²⁶⁸ Throughout the Ottawa Process, NGOs continued to lobby governments in conjunction with more cooperative approaches where appropriate. At the Brussels Conference, for example, the ICBL and ICRC campaigned hard to keep the media and governments focused on the goal of a complete ban.²⁶⁹

In part because of early pressure from MAC, the Canadian government recognized the value of including the NGO perspective on the government delegation to disarmament talks, and in 1996 MAC was invited to join the delegation to the CCW Review Conference.²⁷⁰ At this early stage, there were some concerns for MAC in taking up this offer. MAC did not support the CCW talks, however they recognized the value of building relationships, and of using the opportunity to bring information to the attention of those present. They also recognized the possible risk to their reputation within the ICBL if they were seen to be working too closely with the government. MAC was also a

²⁶⁶ Axworthy, *Navigating*, *supra* note 4 at 131.

²⁶⁷ Cameron, "Democratization", *supra* note 89 at 154.

²⁶⁸ Axworthy, *Navigating*, *supra* note 4 at 131.

²⁶⁹ Lawson & et al., *supra* note 157 at 176.

²⁷⁰ Valerie Warmington was the MAC representative. Cameron points out that while it was common for the Canadian government to send NGO representatives to such meetings it was the first time an NGO was included in the CCW delegation; Cameron, "Democratization", *supra* note 89 at 156.

part of the official Canadian government delegation to the October 1996 conference in Ottawa.²⁷¹ The Canadian government also tried to ensure larger NGO participation at the Ottawa Conference by encouraging states to include NGOs on their delegations. In fact, as the talks progressed, more NGOs participated on their government delegations, with approximately 15 states including NGO representatives on their delegations at the Ottawa Conference in 1996.²⁷²

b. Education and Information-Sharing

A second grouping of activities in which NGOs engaged can be labelled “education and information-sharing.” Because of their skills and expertise in the area of landmines and their effects, NGOs organized a multitude of national and regional meetings and conferences to help educate the public as well as officials and members of civil society. In addition they made significant contributions to the negotiations in general and to drafting the text of the Ottawa Convention in particular.

Non-governmental organizations contributed in significant ways to educating the public on the impact of landmine use around the world. Starting in the mid-1970s the International Committee for the Red Cross began holding conferences focusing on topics such as the prolonged hazardous conditions for non-combatants caused by such weapons, and in the early 1990s a meeting of military experts to discuss the situation of landmines. When the ICBL was formed one of its first tasks was to organize an international conference to discuss the impact of anti-personnel landmines, and the desirability of a

²⁷¹ Tomlin, *supra* note 141 at 14.

²⁷² Cameron, “Global”, *supra* note 72 at 77. Price points out that after the Ottawa Conference the number of states with NGO participants on their delegations dropped by half; Price, *supra* note 12 at 639.

total ban. At this May 1993 conference, an additional 40 NGOs joined the growing coalition to ban landmines. This NGO-organized conference marked a turning point in the expressed interest of civil society in the issue of a landmine ban, and became a model for subsequent conferences and meetings designed to engage a broad range of players. Subsequent NGO meetings took place in Ottawa, Brussels, Maputo, Tokyo, Stockholm, Sydney, New Delhi, Senegal, and Sanaa. Conferences were held in Haraare, Manila, Kempton Park, and Ashgabat.²⁷³ Crucially, the ICBL was able to use these meetings as a forum for the exchange of information between states, and at the same time to track shifts in positions, nationally and regionally. And perhaps most compelling in terms of moving the international support for the Ottawa Process forward, these meetings, whenever possible, culminated in a declaration or statement in support of the Ottawa Process.

The meetings and conferences to which the ICBL contributed – or organized – over the course of the ban talks were effective in raising awareness and attention to the issue of landmines because they took a number of approaches at the same time. They engaged academics, the public, and the media, through high profile speakers and by offering workshops to assist local NGOs in developing capacity to do advocacy work. These meetings also offered expert panels made up of members from states, as well as local and international NGOs, covering various aspects of the landmines issue including the military versus humanitarian perspectives. Williams and Goose point out that international meetings organized by the ICBL were never meant to be simply opportunities for information-sharing, but also “included campaign capacity-building

²⁷³ Williams & Goose, *supra* note 1 at 37; Lawson & et al., *supra* note 157 at 172-73.

workshops and training sessions, along with development of work plans at regional and international levels.”²⁷⁴

The perspective put forward by NGOs when sharing information about landmines highlighted the disconnect between the limited military utility of landmines and the reality of the humanitarian costs of landmines.²⁷⁵ Recognizing the weight carried by military voices that claimed the use of landmines was indispensable, the ICRC commissioned an analysis of the “Military Use and Effectiveness of Anti-personnel Mines” which resulted in the 1996 publication of *Anti-personnel Landmines – Friend or Foe?*²⁷⁶ The report, written by a retired combat engineer of the British Army and several U.S. military commanders, concluded that the use of landmines was not indispensable, nor indeed, as useful as had so often been claimed.²⁷⁷ The report stated, “[t]hat, even when used on a massive scale, they have usually had little or no effect on the outcome of hostilities. No case was found in which the use of anti-personnel mines played a major role in determining the outcome of a conflict.”²⁷⁸ In fact, it concluded that the use of landmines had “marginal tactical value under certain specific but demanding conditions...”²⁷⁹ The study’s conclusions did much to undermine the long held position that landmines are essential to military success, including pointing out the costs to the military forces using landmines.²⁸⁰ The report was endorsed by military personnel from

²⁷⁴ Williams & Goose, *ibid.* at 25.

²⁷⁵ Cameron, “Democratization”, *supra* note 89 at 153.

²⁷⁶ “Friend or Foe?”, *supra* note 3.

²⁷⁷ Price, *supra* note 12 at 632; Wexler, *supra* note 81 at 577.

²⁷⁸ “Friend or Foe?”, *supra* note 89 at Executive Summary.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.* at II para. 25; Hubert, *supra* note 72 at 15.

around the globe and the ICRC and ICBL used this to the benefit of the ban movement.²⁸¹

Because of decades of work in the field, non-governmental organizations were in a position of having much more detailed knowledge and experience about the use and effects of landmines than most governments. As a result they were in a position to provide expertise and guidance to states over the course of the ban landmines talks. This form of assistance was particularly helpful to small and medium-sized governments with fewer resources.²⁸²

One of the most crucial resources NGOs contributed over the course of the Ottawa Process was their expertise in the drafting of the Ottawa Convention.²⁸³ NGOs participated in all draft treaty working conferences, and even submitted their own draft treaty as a model.²⁸⁴ After the 1996 Ottawa Conference the Austrians took on the task of developing a draft treaty. The Austrians prepared a first draft of the treaty to which NGOs contributed.²⁸⁵ Austria then hosted a meeting of experts in February 1997 to focus on the text, to which they invited not only states and the UN, but also the ICRC and the ICBL.²⁸⁶ Over the course of the following drafts they continued to solicit input from states and the ICBL. When the draft came to the Oslo negotiations, NGOs continued to

²⁸¹ Price, *supra* note 12 at 632.

²⁸² Kenneth Roth, "New Minefields for NGOs" *The Nation* (13 April 1998) at 23.

²⁸³ Axworthy describes how there were moments of tension when there had to be compromises between the purity of the intention behind the treaty and the need to have as many states as possible sign on; Axworthy, *Navigating*, *supra* 4 at 140.

²⁸⁴ Cameron, "Global", *supra* note 72 at 78.

²⁸⁵ Celina Tuttle, "Landmine ban rooted in civil society" *Peace Magazine* 13:6 (November-December 1997) 17 at 2.

²⁸⁶ Thomas Hajnoczi, *et al.*, "The Ban Treaty" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 292 at 294.

suggest treaty language throughout the talks, as they had observer status and were present in the working group sessions.²⁸⁷ As Cameron has put it, “The ICBL ...attended all preparatory meetings, and commented on every draft written by the Austrian delegation throughout the Ottawa process. The ICBL intervened in key moments of the decision-making process and watched over the negotiations to ensure that no loopholes or reservations were carved into the treaty.”²⁸⁸

c. Field Research

One of the biggest strengths of NGOs in the effort to promote a total ban on landmines was the knowledge and expertise they contributed through their field research. Because a number of significant non-governmental organizations had already spent decades working in parts of the world where landmine use was rampant, by the time the issue came to the global agenda NGOs had amassed significant valuable first hand experience, knowledge, and data on the use and effect of landmines.

The International Committee of the Red Cross had been particularly active in landmines work since the 1970s, and in the late 1980s ICRC surgeons in places like Mozambique, Cambodia, Angola, and Afghanistan began to systematically document the effects of landmines. They recorded figures of victims, and collected photographic and video evidence of very real damage to human lives caused by what they called “the landmine

²⁸⁷ Wexler, *supra* note 81 at 590. Williams and Goose point out that NGOs could not make formal proposals of treaty language within the working parties because of their observer status, but did so liberally informally outside the meetings; Williams & Goose, *supra* note 1 at 43.

²⁸⁸ Cameron, “Global”, *supra* note 72 at 78.

scourge.”²⁸⁹ In addition to publicizing the perspective of the damage caused by landmines, the ICRC also shone a light on the military perspective of landmine use, resulting in the significant report *Friend or Foe?*, as described above. The ICRC provided to the world the much-needed statistics and photographic evidence of the impact of landmines. They produced videos that showed first hand and close up “images of amputees, especially women and children, and of hospital scenes of bodies shredded and bloodied by landmine explosions.”²⁹⁰

Other NGOs began issuing public reports documenting the harms caused by landmines in the early 1990s,²⁹¹ and conducted a global survey of the problems caused by landmines that included case studies of the most affected regions.²⁹² The survey both promoted education and supported the argument for a total ban by providing comprehensive coverage of the landmine problem.²⁹³ NGOs systematically documented the problem of landmines in several badly affected countries and by 1995 had reported on Angola, Cambodia, El Salvador, Iraqi Kurdistan, Mozambique, Nicaragua, and Somalia.²⁹⁴ A comprehensive examination of various aspects of the landmine problem was produced in 1993 as a joint effort by Human Rights Watch and Physicians for Human Rights, entitled *Landmines: A Deadly Legacy*.²⁹⁵ At least one commentator writes that the success of the landmines cause is largely due to the fact that focus remained steadily on the field-based

²⁸⁹ English, *supra* note 211 at 122.

²⁹⁰ *Ibid.* at 130.

²⁹¹ Wexler, *supra* note 81 at 569.

²⁹² *Ibid.* at 570, citing Shawn Roberts & Jody Williams, *After the Guns Fall Silent: The Enduring Legacy of Landmines* (Washington: Vietnam Veterans of America Foundation, 1995).

²⁹³ *Ibid.* at 570.

²⁹⁴ Williams, "Landmines", *supra* note 6 at par. 30.

²⁹⁵ Human Rights Watch and Physicians for Human Rights, *Landmines: A Deadly Legacy* (New York: Human Rights Watch, 1993).

aspects of the problem – the true, lived results of their use, rather than an obscure legal conception of their legitimacy.²⁹⁶ By the same token, the force of field-based NGOs participating in the ICBL cannot be underestimated.

d. Media and Public Outreach

The ICBL early on recognized the value of working with the media and made a commitment to facilitate a constant exchange of information with the media and the public at large. As Williams and Goose have written:

While the ICBL was quick to develop strong contacts in the international media, there was no overarching ICBL media strategy. The campaign certainly recognized the critical importance of favourable -- and steady -- coverage of the issue. But it was up to individual members to work with the media within their own contexts. Fortunately, many ICBL campaigners already had good contacts and significant experience with the media.²⁹⁷

As one of the clearest paths to public mobilization was through the media, this in turn meant convincing the media itself of the importance of the ban landmines message. This was done by bringing to the media's attention the chasm between the reality of landmines, and the stated international humanitarian law under which landmines fell.²⁹⁸

An effective technique used by the ICBL was to put together a letter writing campaign directed to the editors of the world's most prominent newspapers.²⁹⁹ This approach, in conjunction with stories and photographic evidence of landmine victims, had the desired effect. As Valerie Warmington and Celina Tuttle put it, "Almost overnight, the media

²⁹⁶ Hubert, *supra* note 72 at 31.

²⁹⁷ Williams & Goose, *supra* note 1 at 23.

²⁹⁸ Warmington & Tuttle, *supra* note 87 at 51; over the summer of 1995.

²⁹⁹ Davis, *supra* note 107 at para. 7.

began referring to landmines as indiscriminate killers. The Canadian public began to empathize strongly with people forced to live with mines.”³⁰⁰

Similar scenarios were taking place around the globe as NGOs and governments negotiated ever-increasing media coverage on the land mine issue. Articles discussing landmines were featured in a variety of high profile publications ranging from *Newsweek International* to *Vanity Fair*.³⁰¹ The public were increasingly exposed, particularly through the power of television, to the images of innocent civilians being maimed and killed by landmines.³⁰² The issue was certainly becoming more visible.

In addition to using the media as a conduit to the general public, MAC also made use of Canadian Members of Parliament as a conduit to the national ear. In the summer of 1995, MAC sent a series of information packages to the offices of all Canadian MPs. The result of this tactic, in combination with the general interest among the public, included one MP visiting Cambodia to see firsthand the effect of landmines,³⁰³ and several MPs repeatedly raising questions as to Canada’s position on landmines in the House of Commons.³⁰⁴

NGOs recognized early on that it would be crucial to have the public onside in the struggle for a total landmine ban. As Maxwell Cameron has written, “[r]aising public awareness of the issue of AP mines was one of the most important tasks performed by the

³⁰⁰ Warmington & Tuttle, *supra* note 87 at 52.

³⁰¹ Wexler, *supra* note 81 at 570.

³⁰² Axworthy, *Navigating*, *supra* note 4 at 132.

³⁰³ Warmington & Tuttle, *supra* note 87 at 52; Liberal MP Jane Stewart was already supportive of a landmine ban, but was encouraged by receiving a petition signed by thousands of Canadians, and supported by Canadian musician Bruce Cockburn.

³⁰⁴ *Ibid.* at 52; these MPs included Keith Martin, Svend Robinson, Bill Blakey.

ICBL, and it was a task no single state, or even group of states, could have undertaken with comparable results.”³⁰⁵ As part of its strategy to gain public support for a landmine ban, the ICBL appealed to a variety of audiences from a range of perspectives. The environmental movement was brought on-side with arguments about the effects of landmines on the environment, and the peace movement heard about landmines as a “weapon of mass destruction in slow motion.”³⁰⁶ This was an astute strategy which gained the maximum number of supporters for the movement. In addition, this strategy contributed to the effectiveness of national campaigns to ban landmines in countries across the world.³⁰⁷

Once civil society began to be involved in the ban process, the spreading of information seemed to take on a life of its own. Civil society itself contributed to the dissemination of information about the landmines issue, and helped “to define the use of AP mines as not only a problem but as a global crisis.”³⁰⁸ Indeed, it has been suggested that by involving the public to the extent that it did, the ICBL broke new ground in promoting “the participation of a social movement in the actual negotiation of an international convention.”³⁰⁹ Lloyd Axworthy has said that, “it would have been impossible for governments to mobilize opinion and pressure the way the coalition did.”³¹⁰ The

³⁰⁵ Cameron, “Global”, *supra* note 72 at 76.

³⁰⁶ Wexler, *supra* note 81 at 572, citing Kenneth Roth, “Sidelines on Human Rights: American Bows Out” *Foreign Aff.* (March – April 1998) 2.

³⁰⁷ Hubert, *supra* note 72 at 9; there were NGO-driven national campaigns in Cambodia, Sweden, Germany, Britain, the United States, New Zealand, Australia, and Italy, with Belgium, Ireland, Canada, South Africa, and Afghanistan following later.

³⁰⁸ Price, *supra* note 12 at 622.

³⁰⁹ Cameron, “Global”, *supra* note 72 at 76.

³¹⁰ Axworthy, *Navigating*, *supra* note 4 at 153.

involvement of the public through a number of civil society avenues was key to building the pressure required to shift political will in favour of finalizing a landmine ban.

It has been widely recognized that the extent of public support behind the ban landmines movement was crucial to the outcome of a successful treaty. Particularly early in 1997, when the CD process faltered, the public showed its support for a separate process towards a ban, and encouraged representatives from close to one hundred states to participate in new negotiations, and even more to ultimately sign the Ottawa Convention.³¹¹

4. Innovative Collaboration

The Ottawa Process was an example of successful collaboration. While it is widely recognized as the pinnacle of state/NGO collaboration, NGOs also worked successfully in close collaboration with one another in NGO coalitions to press for a comprehensive ban.

a. Collaboration among NGOs

As seen above, pro-ban non-governmental organizations pooled their resources and their strengths to work towards a comprehensive mine ban. Starting in the early 1990s a handful of NGOs began to work together, formally forming the International Coalition to Ban Landmines in 1992. While there was some debate as to what exactly their purpose should be as a coalition, by December 1992 all six had agreed to support a united call to

³¹¹ Atwood, *supra* note 64 at para. 20.

ban antipersonnel mines.³¹² Over the course of the next five years the ICBL grew to a total of well over one thousand NGOs. Membership in the coalition grew dramatically through a number of international conferences between 1993 and 1995. At these meetings NGOs also refined their public message and developed their approach to calling for a ban.

Participating NGOs came from various fields of civil society with different relations to the landmines issue, yet all agreed to band together in support of the ICBL's goal to ban anti-personnel mines and increase support for mine victims. Many participating NGOs were already recognized forces in their fields, and brought with them significant resources, connections, and campaigning skills.³¹³ As a result they were able to quickly begin local advocacy work, and regional outreach efforts.

In part the ICBL's success lay in the fact that its membership was made up of such varied sectors. With NGOs from humanitarian and human rights organizations, the peace movement, faith-based organizations, medical and mine-clearance groups, the ICBL membership was representative of a broad cross-section of civil society actors. In addition, participating NGOs represented the global north and south, and many were from mine affected states, which led credibility to the call for a ban.

While this diversity of membership had the potential of making collaboration challenging, the ICBL worked remarkably well. As noted above, two working principles

³¹² Lawson, *Ban*, *supra* note 28 at 99-100.

³¹³ *Ibid.* at 109.

made it strong. First, the coalition was very loosely structured, allowing member organizations to implement the work of the coalition through strategies and tactics most suited to their own contexts. Second, the ICBL insisted that all members of the coalition support the one clearly stated central message of the coalition: a comprehensive ban on AP mines.

In addition to the NGOs that came together under the banner of the ICBL, the International Committee of the Red Cross remained extremely active in landmine issues and participated fully in global call for a comprehensive ban throughout the early talks and the Ottawa Process. As described above, for internal reasons the ICRC did not formally join the ICBL, however the organizations co-operated and co-ordinated extensively with the coalition. As such, the ICRC brought with it to the global effort significant advocacy resources as well as a global presence through which to campaign.³¹⁴

b. Collaboration between NGOs and Governments

The extent of collaboration between NGOs and governments during the Ottawa Process was entirely unprecedented. Not only did the Canadian government and other core group governments work closely with NGOs in preparation for the Ottawa Conference and throughout the Ottawa Process, but NGOs were welcomed to participate in the negotiations alongside nation states. NGOs also worked in collaboration with several UN agencies towards a ban, and were explicitly included in the treaty as actors involved in

³¹⁴ *Ibid.* at 128.

the implementation of the agreement. The Ottawa Process allowed a true partnership to develop between NGOs, international organizations, and pro-ban states.³¹⁵

Partnership between NGOs and specific governments during the Ottawa Process was extraordinary. As described above, the Canadian government worked in close collaboration with NGOs – particularly Mines Action Canada – in the lead up to the Ottawa Conference in October 1996, and beyond. Other states were encouraged to include NGO representatives in their official delegations, and approximately fifteen did so.³¹⁶ As described above, NGOs also attended independently of state delegations, mostly under the umbrella of the ICBL.³¹⁷ Indeed, in a break from tradition, NGOs were invited into the room to participate in some of the sessions.³¹⁸

The negotiations in the thirteen months following the Ottawa Conference saw the ongoing participation of NGOs.³¹⁹ During the final negotiation convention in Oslo, the ICBL participated as an official observer – the same status as observer governments – and was allowed to be present at all sessions, and make oral interventions.³²⁰ As Jody Williams and Stephen Goose have written, “It is believed that this is the first occasion on which NGOs were given official status in international negotiations of a disarmament/arms control or humanitarian law treaty.”³²¹ NGOs, through the ICBL, also

³¹⁵ Anderson, *supra* note 201 at 108. Anderson explores questions surrounding the legitimacy of non-elected NGOs, and the optical usefulness to international organizations such as the UN of working with NGOs. Though compelling, these considerations are beyond the scope of this work.

³¹⁶ Cameron, “Democratization”, *supra* note 89 at 158.

³¹⁷ Cameron, “Global”, *supra* note 72 at 77.

³¹⁸ Axworthy, *Navigating*, *supra* note 4 at 135; Cameron, “Democratization”, *supra* note 89 at 158.

³¹⁹ Dolan & Hunt, *supra* note 105 at 37.

³²⁰ Williams & Goose, *supra* note 1 at 43.

³²¹ *Ibid.* at 43.

participated in the work of drafting the treaty; they submitted their own proposal for a treaty and provided feedback on drafts throughout the Ottawa Process.³²² Although not an entirely new phenomenon, the extent to which NGOs participated in these international negotiations and treaty drafting process was unprecedented,³²³ and unique in the context of disarmament negotiations.³²⁴

While the Landmine Treaty was negotiated outside the framework of the United Nations, several UN agencies were intimately involved in the movement to ban landmines, and worked in tandem with NGOs. Through their connections with UN agencies such as the Department of Humanitarian Affairs (DHA), the UN Children's Fund (UNICEF), and the High Commissioner for Refugees (UNHCR), NGOs were able to connect with local populations and policy-makers interested in the work around landmines.³²⁵ Some commentators have categorized NGOs as "policy partners" with the UN in the context of the Ottawa Process,³²⁶ as they worked together, along with core group states, to achieve a total ban on AP mines. By working in collaboration with the UN, the ICBL ensured that its weaknesses were complemented by the UN's strengths.³²⁷

Despite the criticisms occasionally levelled at core group states for being co-opted by NGOs, and at NGOs for selling out to states, the level of co-operation between the two sets of actors was a significant factor in the success of the Ottawa Process. It was through

³²² *Ibid.* at 36; Cameron, "Global", *supra* note 72 at 78.

³²³ *Ibid.* at 78.

³²⁴ Davis, *supra* note 107 at para. 5.

³²⁵ Price, *supra* note 12 at 624.

³²⁶ Thakur & Maley, *supra* note 39 at 283.

³²⁷ Hubert, *supra* note 72 at 36; for example, the UN had more resources in parts of the world where the NGO presence was weak.

pooling their resources that core groups states and the ICBL were able to put the issue of landmines on the global agenda and convince the world of the need for a comprehensive ban.

F. Conclusion

The mine ban negotiations were novel in a number of ways. Not only were they negotiated largely outside of the UN system, they also employed a radical process for state self-selection into the negotiations, and avoided taking decisions based on the traditional consensus model. The novel factor of most interest to this study, however, is the role played by non-governmental organizations in the talks. Not only did NGOs participate at an unprecedented level in these international multilateral negotiations, they did so at the invitation of states. As one commentator has put it, “[w]hat is different about the Ottawa Process is that NGOs ... were allowed into the process by the core ban states.”³²⁸ Indeed, NGOs functioned as full members of the coalition of actors seeking a comprehensive ban.

NGOs contributed to the strength of the pro-ban coalition in a number of ways. Through their sheer numbers NGOs contributed to the size of the coalition, one of Hampson & Reid’s criteria. The total number of NGOs participating under the ICBL umbrella – 1,200 – was far larger than even the total number of states registered at the UN, let alone those participating in a move to ban landmines. In addition they contributed a tremendous amount of diversity, the second criterion named by Hampson and Reid, through a number of different avenues. Because of their geographic and regional representation, as well as

³²⁸ Dolan & Hunt, *supra* note 105 at 31.

the varied fields of work they came from, NGOs contributed significantly to the diversity of the coalition. In addition they brought with them a variety of resources, skills, and expertise, and they had access to different support bases within civil society upon which to draw for further resources.

At the same time NGOs contributed to various communication functions, as identified by Drahos. They brought with them vast networks of members, supporters, and partners to whom they could turn for input and for assistance in providing education and information about the landmine problem. Because of traditional and existing relationship patterns, NGOs were capable of reaching influential individuals and groups in governmental and non-governmental sectors. This ever growing web of linkages vastly increased the scope of people reached with the message, and greatly improved the communication capabilities of the pro-ban forces.

In the case of the Ottawa Process NGOs worked in close collaboration with states to press the global community to adopt a comprehensive mine ban. By contributing the valuable factors of size and diversity, and enhanced communications facilities, NGOs had a significant impact on coalition dynamics. It was through this avenue of working in coalition with states that NGOs effectively participated in the process of creating international law.

IV. Chapter Four: Case Study – Movement for an International Criminal Court¹

A. Introduction

Building on the success of working in coalitions in the Ottawa Process, some states and NGOs saw an opportunity to replicate the pattern with the negotiations for an International Criminal Court. Indeed many of the same states and non-state actors participated. As in the Ottawa Process NGOs played a key role in pressing the international community to consider certain issues within the negotiations, and to take certain positions. Similar questions arise as to how the participation of NGOs changed the international multilateral negotiation process, and the results themselves. What were the contributions made by NGOs, and how did they work with interested states in order to promote their goals?

This chapter considers the case of the global movement to create an international system of criminal justice and how NGOs contributed to those efforts. The first section provides an overview of the tribunals and commissions created after both World War I and II, as well as the *ad hoc* tribunals for the Former Yugoslavia and for Rwanda created in the 1990s. The next section of this chapter examines the changing realities of the 1990s, by looking at the broader societal changes that took place, and the developments in the international environment that allowed ICC negotiations to progress. The subsequent section reviews the chronology of the ICC negotiations, starting with the *Ad Hoc* Committee first charged with re-examining the possibility of an ICC agreement, through

¹ Parts of this chapter draw on research and writing done for my Master's thesis; Gina Hill, *Gender in the International Criminal Court Negotiations* (LL.M. Thesis, University of Toronto, 2001) [unpublished].

the Preparatory Committee meetings, and finally the course of the negotiations at the Rome Conference itself. Finally, the chapter examines the various players in the negotiations, and the roles they took on to make the ICC a reality. These players include the United Nations, state actors and the various groupings in which they acted, non-state actors, or NGOs, and the two groupings of NGOs that had the most significant impact on the negotiations. The section then continues by exploring the activities carried out by NGOs during the various phases of the negotiations which fall under four main themes: advocacy; education and information-sharing; logistics organization; and media and public outreach. The section then presents an exploration of some of the key issues the delegates to the conference had to deal with, and the positions taken by some NGOs on key issues. The final section considers the unprecedented level of collaboration between NGOs, and between NGOs and states.

As will be seen below, NGOs were deeply involved in the negotiations at a number of different levels. In coalition with interested NGOs and with like minded states, non-state actors influenced the content of the international agenda, impacted on how the international dialogue was carried out, and ensured that certain key points were considered and ultimately integrated into the international agreement. This chapter will attempt to draw out information on three key questions: first, how did the negotiation process benefit from a coalition that included non-governmental organizations; second, how did NGOs contribute to the size and diversity of the coalition; and third, how did NGOs play a role in the communications processes that supported the success of the coalition?

B. Previous Attempts at Securing International Criminal Justice

It has been said that the concept of an international criminal court “is not a new idea, simply an old one whose time has come at last.”² As early as 1872 one of the founders of the International Committee of the Red Cross developed a comprehensive proposal for such a court, but was unable to gather enough support to make it a reality.³ After the First World War the global community began to think more seriously of a forum to deal with international matters of criminal justice. Developments after the ‘war to end all wars’ made it clear that no end had been put to tyranny, nor to human suffering caused by armed conflict. Governments, corporations, and individuals continue to pursue goals of power and wealth, and the cost in human suffering has been massive.⁴

Several tribunals and commissions have been created since World War I, though they were established for only those conflicts seen as the most severe by the public, and only for cases of international conflicts. The many domestic conflicts which were just as – if not more – brutal were largely ignored by the world’s major powers.⁵ Further, despite the claims that fair methods and just procedures were to be used in these tribunals and commissions, ostensibly created to provide some measure of justice and peace, the

² N. Stewart QC, New L.J., 12 December 1997, at 1825, quoted in Lyn L. Stevens, “Towards a Permanent International Criminal Court” (1998) 4 Eur. J. Crime, Crim. L., Crim. Justice 236 at 237.

³ *Ibid.*

⁴ Since World War II, 250 international and domestic conflicts have produced approximately 170 million casualties and immeasurable suffering; M. Cherif Bassiouni, “Historical Survey: 1919-1998” in M. Cherif Bassiouni ed. *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers, Inc., 1998) 1 at 2 [Bassiouni, “Historical”].

⁵ The exception is the International Criminal Tribunal for Rwanda established to prosecute genocide, crimes against humanity, and war crimes committed in Rwanda’s civil war, a non-international armed conflict. For further discussion of the ICTR, see section B.3, below.

actuality was one of *Realpolitik* where political goals influenced the conduct and outcome of each and every exercise.⁶

After World War I the Treaty of Versailles provided for ad hoc tribunals⁷ in order to prosecute Kaiser Wilhelm II and other persons who had violated the laws and customs of war, but none were ever created.⁸ Between 1919 and 1994 there were five ad hoc international investigation commissions, four ad hoc international criminal tribunals, and three internationally mandated or authorised national prosecutions.⁹ Because it was the winners of these conflicts who imposed “justice” on the defeated, these commissions and prosecutions perpetuated the reality of political expedience taking precedence over the creation of an international system of criminal justice.¹⁰

1. Post World War I

At the end of World War I the first international investigative commission was established at the Preliminary Peace Conference in Paris where the Allies arranged Germany’s surrender and ultimately negotiated the Treaty of Versailles in June of 1919. The Preliminary Peace Conference established an official inter-governmental Commission with the mandate to investigate and report on the responsibility of those who

⁶ Political concerns impacted on logistical, personnel, and legal problems with the result that tribunals didn’t have as positive an effect as they could have had. Bureaucratic and financial policies directed decisions and findings. Politicians banked on public interest and pressure waning with the passage of time until they no longer needed to ensure the success of the tribunals and commissions; M. Cherif Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court” (1997) 10 Harv. Hum. Rts. J. 11 at 12 [Bassiouni, “Versailles”].

⁷ *Treaty of Peace Between the Allied and Associated Powers and Germany* (Treaty of Versailles), 28 June 1919, art. 227, [Treaty of Versailles]; Bassiouni, “Historical”, *supra* note 4 at 6.

⁸ *Ibid.* at 7; Stevens, *supra* note 2 at 237.

⁹ Bassiouni, “Versailles”, *supra* note 6 at 11.

¹⁰ Bassiouni, “Historical”, *supra* note 4 at 8.

had initiated the war and those who had violated the laws and customs of war.¹¹ Two months of closed meetings and intensive investigations led to a report listing approximately 895 alleged war criminals who were to be tried by an Allied tribunal. The report included the names of Turkish officials and other individuals the Commission was to charge with “crimes against the laws of humanity” for the large-scale killing of Armenians in Turkey in 1915.¹² These charges were never laid or pursued, in part because of political concerns. Turkish officials were given impunity for war crimes because the Allies were eager not to alienate the ruling elite of Turkey which, after the Bolshevik Revolution in 1917, shared a border with the new communist regime.

Despite the ground work of the 1919 Commission it was not linked to eventual prosecutions under the Treaty of Versailles. As a result the two key provisions of the Treaty of Versailles were never implemented. The first, Article 227, provided for the prosecution of Kaiser Wilhelm II. The Kaiser sought refuge in the Netherlands, and the Netherlands discouraged the Allies from pursuing a request for the Kaiser’s surrender.¹³ The tribunal envisioned under Article 227 was thus not created. Indeed, it has been suggested that it was never intended for Article 227 to be implemented, but that including it in the Treaty was a way of placating the civilian population of Europe and certain governments who wanted to see Germany humiliated and the Kaiser punished.

¹¹ The 1919 Commission on the Responsibilities of the Authors of War and on the Enforcement of Penalties [1919 Commission].

¹² Bassiouni, “Versailles”, *supra* note 6 at 16. The United States and Japan opposed this line of charges because the Commission’s mandate was limited to investigating violations of the laws and customs of war and not the as yet uncodified laws of humanity.

¹³ The Netherlands pointed to the fact that no international criminal court had the jurisdiction to indict a head of state. Never before had a nation’s sovereign been brought before a court of justice for taking the decision to go to war; Benjamin B. Ferencz, “Von Nürnberg nach Rom: Auf dem Weg zu einem Internationalen Gerichtshof”(1998) 8 Development and Peace Foundation, Policy Paper 1 at 2.

The second provision, Article 228, providing for Allied military tribunals to prosecute Germans accused of having committed acts in violation of the laws and customs of war, and requiring German government cooperation in securing the accused individuals, was also not pursued. Politics again played into this result when, in 1921, it became clear that the stability of the Weimar Republic was shaky. Instead of creating Allied tribunals, the Allies asked Germany to prosecute a number of war criminals before Germany's own Supreme Court.¹⁴ The Leipzig Trials saw only twelve military officers prosecuted between 1921 and 1923.¹⁵ By then the Allies had lost the political will to pursue this sort of justice. The opportunity to establish a politically independent international justice system had passed.

2. Post World War II

Two international investigative commissions were established following World War II. In 1942 the Allied Powers signed an agreement establishing a Commission to investigate only war crimes committed during World War II. The 1943 United Nations War Crimes Commission (UNWCC)¹⁶ was also subject to political pressures and ultimately didn't live up to the expectations of the Allies. The UNWCC had little political influence and support partly because many of its representatives were from governments in exile after

¹⁴ 1921-1923 Prosecutions by the German Supreme Court Pursuant to Allied Requests Based on the Treaty of Versailles [Leipzig Trials]. Perhaps the Allies justified this decision by maintaining that they reserved the right to set aside a German judgment and carry out the provisions of Article 228 of the Treaty of Versailles. Because of concerns about ensuring future peace in Europe, this was never done; Bassiouni, "Versailles", *supra* note 6 at 20.

¹⁵ Many of those tried for crimes perpetrated during the First World War were acquitted or given light sentences based on the principle that they were only executing superior orders; Maria Rita Saulle, "The International Criminal Court" (1999) 5 U.C. Davis J. Int'l L. & Pol'y 119 at 120.

¹⁶ Even though this Commission's name included "United Nations" it was not related to the United Nations founded in San Francisco in 1945; Bassiouni, "Versailles", *supra* note 6 at 21.

the war. Inadequate staff and funding further hampered the UNWCC's work. After the Allied liberation of German-occupied territories the extent of the atrocities committed during the war became clear, and with British support the UNWCC was able to compile over 8000 files on alleged war criminals.¹⁷ The information collected by the UNWCC was used by various governments for national prosecutions, but was not linked to the subsequent International Military Tribunal or independent prosecutions, which used their own investigators. Once these prosecutions were under way, support for the UNWCC died.

The International Military Tribunal (IMT) at Nuremberg¹⁸ developed out of discussions between the Four Major Allied Powers as to how to deal with the prosecution and punishment of war criminals.¹⁹ Despite common goals among the Allied Powers, drafting the IMT Charter was not easy. Each nation had different national criminal procedures ranging from the adversarial common law systems of Britain and America, to the civil law system of France, and the socialist justice system of the Soviet Union. The tribunal ultimately combined elements of each legal system. In addition, the drafters defined the crimes which would fall under the mandate of the IMT. They were: 1) crimes against peace; 2) war crimes; and 3) crimes against humanity.²⁰ The Four Major Allies created

¹⁷ The 8,178 "dossiers" were comprised of 24,453 accused, 9,520 suspects, and 2,556 material witnesses; *Ibid.* at 22.

¹⁸ The 1945 International Military Tribunal to Prosecute the Major War Criminals of the European Theater [IMT].

¹⁹ Bassiouni, "Versailles", *supra* note 6 at 23; Stalin in particular wanted a special military tribunal to prosecute Hitler, his close advisors, and senior military leaders. America and France wanted a tribunal to act as forum for recording history so as to prevent similar tragedies from occurring in the future.

²⁰ *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 [London Charter].

individual prosecution teams and used their own investigators.²¹ Ultimately, the IMT indicted twenty four people, and prosecuted twenty two of those.²² All of the defendants were German, and no Allied military personnel were prosecuted for any war crimes against Germans. In addition, there was not a single German national acting as judge at the Nuremberg trials.²³ Again, the proceedings were subject to political imperatives. The U.S.S.R., for example, used the tribunal as a forum for rewriting history.²⁴

With the London Charter and Germany's unconditional surrender, the Allies each had control over specific sectors of Germany. They enacted Allied Control Council Law No. 10, permitting the Allied Powers to prosecute German nationals in their respective occupation zones.²⁵ The Americans, British, and French were effective in using CCL 10 to prosecute war criminals, while the Russians "proceeded in a summary manner with little or no regard for legal considerations."²⁶

²¹ In practice the Americans provided most of the evidence and logistical support for the other nations.

²² Three defendants were acquitted, twelve sentenced to death by hanging, three sentenced to life imprisonment, and the others to terms of imprisonment between ten and twenty years; Bassiouni, "Versailles", *supra* note 6 at 29.

²³ Saulle, *supra* note 15 at 122. Despite the political realities, the Allies did attempt to make the proceedings as fair and transparent as possible: the accused chose their own defence counsel, proceedings were conducted in four languages, and they were open to the public; Ferencz, *supra* note 13 at 3.

²⁴ Germans were accused and tried for crimes actually committed by the Soviets, such as the disappearance of approximately 15,000 Polish prisoners; Bassiouni, "Versailles", *supra* note 6 at 24.

²⁵ Allied Control Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, 20 December, 1945, Official Gazette of the Control Council for Germany, No. 3, Berlin, January 31, 1946 [CCL 10]. The prosecutions under CCL 10 may be seen to have been domestic because the Allies were exercising sovereign power in Germany, however each of the four Allies used its own system of justice, with only America employing a military system, thereby having the effect of international proceedings; *Ibid.* at 37.

²⁶ *Ibid.* at 30.

Analogous to the UNWCC, the Far Eastern Commission of 1946²⁷ was negotiated at the request of the U.S.S.R. – who wanted some control over the future of Japan – in Moscow in 1945.²⁸ In reality this Commission was a political one established to create a policy of occupation for Japan and coordinate Allied policies with regard to suspected war criminals in the Far East. When a peace treaty was signed with Japan, the FEC closed down.

In 1946, the International Military Tribunal for the Far East was established by proclamation, without a treaty.²⁹ An investigative agency was established, and as with the FEC, the members acted as representatives of their countries, leading to procedural irregularities and abuses of judicial discretion. Defendants were often selected based on political criteria and they generally received unfair trials. Sentences were also executed inconsistently, and General MacArthur used his power to grant clemency, reduce sentences, and release convicted war criminals on parole.³⁰ Again, Allied military personnel were generally not named as defendants, and none of the Allies were prosecuted for war crimes.³¹

²⁷ The 1946 Far Eastern Commission [FEC].

²⁸ Bassiouni, "Versailles", *supra* note 6 at 31.

²⁹ See Special Proclamation: Establishment of An International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589, at 3, [IMTFE]. The proclamation was issued by General Douglas MacArthur who was the Supreme Commander for the Allied Powers and had virtual control over the region. The same day General MacArthur issued the proclamation, the Charter for the IMTFE was adopted. It is unclear why IMTFE did not require a treaty agreement for its creation, however the politics of trying to keep control of the Far East from the Soviet Union may have played a part; *Ibid.* at 31-32.

³⁰ Though the FEC was a policy body, General MacArthur was the sole executor of that policy; not one of the twenty five people convicted by the IMTFE served their entire sentence; *Ibid.* at 34.

³¹ Many Japanese saw the bombing of Hiroshima and Nagasaki by the Americans to be just as much crimes against humanity and, as a result, the proceedings against Japanese war criminals were considered hypocritical and unjust; Ferencz, *supra* note 13 at 3.

In addition to the proceedings under the IMTFE, there were Allied Military Prosecutions in the Far East from 1946-1951 which were only for war crimes, and did not include crimes against humanity.³² The United States conducted trials in the Philippines, while Australia, China, France, the Netherlands, the Philippines, the United Kingdom, and the U.S.S.R. all conducted trials throughout the Pacific Theatre. Despite the multi-national prosecutions, there was no treaty or agreement defining the crimes, and each of the Allied Powers established its own military tribunals or commissions implementing its own laws and procedures.³³ Political considerations were barely concealed in these trials, especially those where General MacArthur was involved.³⁴

After the various prosecutions arising out of World War II had ended, there was a period during which no international investigative or prosecutorial bodies were created, despite many instances where there was an obvious need for such international action.³⁵ A Special Committee was appointed in 1950 to draft a convention for an international criminal court, and though a draft statute was submitted, of the major powers only France supported the establishment of such a body.³⁶ In large part, this was due to the Cold War. Geopolitical considerations once again took precedence over humanitarian concerns.³⁷

³² Bassiouni, "Versailles", *supra* note 6 at 36.

³³ *Ibid.* at 38.

³⁴ *Ibid.* at 36ff.

³⁵ Conflicts continued to cause immeasurable human suffering in the Soviet Union, the People's Republic of China, Bangladesh, Uganda, and Cambodia, to name but a few; Ferencz, *supra* note 13 at 5.

³⁶ Ved P. Nanda, "The Establishment of a Permanent International Criminal Court: Challenges Ahead" (1998) 20 Hum. Rts. Q. 413 at 414; Bassiouni, "Historical", *supra* note 4 at 13; Bassiouni, "Versailles", *supra* note 6 at 52; Ferencz, *supra* note 13 at 4.

³⁷ Politics were put aside to some extent when the United Nations adopted the Genocide Convention in 1948, *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted 9 Dec. 1948, 78 UNTS 277, [*Genocide Convention*] making it an international crime to commit acts with intent to destroy a

3. Post Cold War

After almost half a century the next investigative commission was established by the United Nations Security Council in 1992.³⁸ The Yugoslavia Commission was formed to investigate and gather evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law that took place in the territory of the former Yugoslavia. The Commission of Experts gathered 65,000 pages of documents, over 300 hours of videotape, and 3,300 pages of analysis.³⁹ The pursuit of justice in this instance was spearheaded by public opinion and outrage created in large part by media efforts to bring the atrocities of the war to the attention of the public. The goal was to promote a political settlement because of the intensity of the conflict, however, since none of the major powers wanted to intervene militarily, mediators had little to use as incentive to cease the fighting. The investigation proved to be a hindrance to political discussions for settlement because the very leaders who were involved in negotiations were also potentially subject to investigation and eventual prosecution for war crimes. The goals of politics prevailed, and the UN withheld funding from the Commission forcing it to find external resources in order to be able to conduct field investigations.⁴⁰ The Commission eventually conducted thirty five field missions including the exhumation of mass graves

national, ethnic, religious, or racial group. The General Assembly asked the International Law Commission (ILC) to look into the possibility of creating a permanent international criminal court in order to provide an international penal tribunal with jurisdiction over the crime of genocide. ILC proposals were met with opposition from many States who would not accept an international legal jurisdiction; see Stevens, *supra* note 2 at 238; Nanda, *supra* note 36 at 414.

³⁸ SC Res. 780, UN SCOR, 47th Sess., UN Doc. S/RES/780 (1992). The 1992 Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate War Crimes and other Violations on International Humanitarian Law in the Former Yugoslavia [Yugoslavia Commission].

³⁹ Bassiouni, "Versailles", *supra* note 6 at 40.

⁴⁰ As well as funding, the Commission accepted volunteers and personnel contributed by certain governments; *Ibid.* at 41.

and a large rape investigation. The information it gathered clearly indicated patterns of criminality which could not have existed without senior political and military leadership. This evidence substantiated allegations made by the press of systematic violations of humanitarian law. Because the political goal of settlement was threatened the Commission's work was terminated through bureaucratic means by the end of April, 1994.

In February of the previous year, after receiving the first Interim Report of the Commission of Experts, the Security Council provided for the establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁴¹ The ICTY came into existence on May 25, 1993. This Tribunal was novel in that it allowed for the prosecution of anyone who violated international humanitarian law in Yugoslavia since 1991, and was not restricted to offenders on only one side of the conflict.⁴² Efforts were made to keep the Tribunal independent from the UN and its Security Council through funding and other administrative measures.⁴³ It took a year until the Prosecutor was appointed; the transfer of materials was facilitated and repetitive investigations were avoided only because he was able to establish personal contact with the Chair of the by then defunct Commission of Experts.

⁴¹ SC Res. 808, UN SCOR, 48th Sess., UN Doc. S/RES/808 (1993). The 1993 International Criminal Tribunal for the Former Yugoslavia [ICTY]. ICTY (sometimes referred to as "ICTFY") was given authority to prosecute four clusters of offences: 1) grave breaches of the 1949 Geneva Conventions; 2) violations of the laws or customs of war; 3) genocide; and 4) crimes against humanity.

⁴² Bassiouni, "Versailles", *supra* note 6 at 43.

⁴³ Some of these decisions regarding administration in fact had the effect of hampering the work of the Tribunal.

Bringing indicted war criminals to trial was severely hampered by the fact that the Governments of Serbia, Croatia, and Bosnia refused to recognize the jurisdiction of the ICTY and did not cooperate in handing over nationals wanted by the ICTY.⁴⁴ This has been overcome to some extent by the use of international forces in the apprehension of indicted war criminals.

Following on the heels of the ICTY, the Security Council passed a resolution establishing a commission of experts to investigate grave violations of international humanitarian law that took place during the civil war in Rwanda.⁴⁵ In an attempt to avoid the political problems created by the Commission of Experts for Yugoslavia, the Rwanda Commission was given a limited mandate, three months to complete its mission, and no resources to investigate any specific allegations.⁴⁶ The Rwandan Commission Report was necessarily superficial and scant; nevertheless, it provided a basis for the Security Council to establish an *ad hoc* tribunal for Rwanda.

The International Criminal Tribunal for Rwanda (ICTR) was established by the Security Council late in 1994.⁴⁷ The statute of the ICTR was a direct adaptation of the ICTY Statute, and gave the Tribunal jurisdiction for events occurring between January 1, 1994

⁴⁴ Ferencz, *supra* note 13 at 6.

⁴⁵ SC Res. 935, UN SCOR, 49th Sess., UN Doc. S/R/935 (1994). The 1994 Independent Commission of Experts Established Pursuant to Security Council Resolution 935 (1994) to Investigate Grave Violations of International Humanitarian Law in the Territory of Rwanda [Rwanda Commission].

⁴⁶ Bassiouni, "Versailles", *supra* note 6 at 46; the Commission was composed of three people who spent a total of one week in the field and conducted no investigations. Because of the inability to conduct its own investigations, the Rwandan Commission Report was based on reports from other bodies, the media, and other published reports.

⁴⁷ SC Res. 955, UN SCOR, 49th Sess., UN Doc. S/RES/955 (1994). The 1994 International Criminal Tribunal for Rwanda [ICTR]. The reluctance of powerful nations to get involved in a domestic conflict caused a delay in reaction time which allowed for the massacre of over 800,000 Tutsi men, women, and children; Ferencz, *supra* note 13 at 6.

and December 31, 1994. Prosecutions are on the basis of genocide, and crimes against humanity.⁴⁸ Because of logistical and funding problems, the Tribunal became operational only in September 1996. Despite the different statutes, the ICTY and ICTR share a common Prosecutor and Appellate Chamber. This was done with the intention of maintaining a consistent legal approach while at the same time saving money and resources.⁴⁹ The tribunal was established in Arusha, Tanzania, to avoid the completely destroyed infrastructure in Rwanda. This has caused massive administrative and logistical problems.⁵⁰ The end effect has been that the efficiency and effectiveness of the ICTR has suffered.

4. NGO Contributions to Previous Attempts

While NGOs *per se* may not have had a notable impact on previous attempts at creating fora for the implementation of international criminal justice, civil society in general has made occasional contributions. For example, the Military Tribunal at Nuremberg took shape in part because of the efforts “of an ostensibly private group of statesmen, scholars and public officials under the name of the London International Assembly,” who elaborated many of the norms and concepts of the Tribunal.⁵¹

⁴⁸ Bassiouni, "Versailles", *supra* note 6 at 47; because the Rwandan conflict was not of an international nature, violations of the customs and laws of war and the Geneva Conventions of 1949 covering international conflicts are not prosecuted. In their place, violations of Common Article 3 of the Geneva Conventions of 1949 and of Additional Protocol II are prosecuted.

⁴⁹ The decision to use a single Prosecutor creates incredible strain on the Prosecutor who has to shuttle back and forth between The Hague, Netherlands, and Arusha, Tanzania, overseeing two different sets of prosecutions. The use of a common Appellate Chamber has also caused problems because the substantive law used by the two Tribunals is different, and while the ICTY judges rotate in the Appellate Chamber, the ICTR judges do not; *Ibid.* at 47-48.

⁵⁰ *Ibid.* at 49; Ferencz, *supra* note 13 at 7.

⁵¹ Bassiouni, "Versailles", *supra* note 6 at 23, fn 46.

NGOs – as a discrete segment of civil society – did make contributions to the development of the ICTY and ICTR. By the 1990s their capabilities and the contributions they could make to evolving areas of international law had been more fully developed, and as such they were accorded a certain recognition by the rest of the international legal community. The ICTY benefited from extensive research and support of NGOs, both as it was being established, and during its operation.⁵² Several NGOs provided remarks and memoranda to the United Nations, on various aspects of a tribunal for the Former Yugoslavia.⁵³ Indeed, commentators recognize that NGOs have played a key role in the development of international standards generally.⁵⁴ Until the late 1990s, however, NGO contributions were made by individual organizations, largely on an *ad hoc* basis, without the benefit of a structured institutional framework,⁵⁵ or coordinated cooperation.

5. Initial Efforts towards Establishing an ICC

The League of Nations explored the possibility of creating a permanent international criminal court with a limited jurisdiction, but was unsuccessful because of the global

⁵² Claudio Grossman, *et al.*, "International Support for International Criminal Tribunals and an International Criminal Court" (1998) 13 Am. U. Int'l L. Rev. 1413 at 1426.

⁵³ See for example, "Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-up of an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committee on the Territory of the Former Yugoslavia" (22 February 1993); Amnesty International, "Memorandum to the United Nations: The Question of Justice and Fairness in the International War Crimes Tribunal for the Former Yugoslavia" (April 1993); "Memorandum of the Lawyers Committee for Human Rights to the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia" (19 November 1993); all reprinted in Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia*, (Irvington-on-Hudson, N.Y.: Transnational, 1995).

⁵⁴ Emily Haslam, "Non-Governmental War Crimes Tribunals: A Forgotten Arena of International Criminal Justice?" in Christopher Harding & C.L. Lim eds., *Renegotiating Westphalia: Essays and Commentary on the European and Conceptual Foundations of Modern International Law* (Boston: Martinus Nijhoff, 1999) 153 at 166.

⁵⁵ Grossman, *et al.*, *supra* note 52 at 1426.

militaristic climate preceding World War II.⁵⁶ In 1946 the United Nations took up the cause in two different ways. Firstly, the UN attempted to codify international crimes.⁵⁷ The Committee on the Codification of International Law, and subsequently the International Law Commission (ILC) worked on preparing a Draft Code of Offences Against the Peace and Security of Mankind.⁵⁸ Not all international crimes were meant to be included; however the list of crimes has increased from five to twenty five.⁵⁹

Secondly, the task of formulating a draft statute for the establishment of an international criminal court was given to a special rapporteur who submitted a first draft to the ILC in March of 1950.⁶⁰ There were differing opinions as to whether the climate was right for the creation of an international criminal court. The experiences of World War II and the realities of the Cold War meant that there was little consolidated support for such an endeavour.⁶¹ Both projects went through periods of activity and periods of stagnation over the next forty years.

C. A Changing Reality

The struggle for an international criminal court had been a long one, dating back to the middle of the twentieth century. In the 1990s several elements came together at one time

⁵⁶ Bassiouni, "Historical", *supra* note 4 at 10.

⁵⁷ *Ibid.* at 11; Bassiouni, "Versailles", *supra* note 6 at 50.

⁵⁸ GA Res. 174, UN GAOR, 2d Sess., UN Doc. A/519 (1947). The first report was completed in 1950; *Report of the International Law Commission*, UN GAOR, 5th Sess., UN Doc. A/CN.4/25 (1950). In 1988 that title was changed to Draft Code of Crimes Against the Peace and Security of Mankind; *Report of the International Law Commission*, UN GAOR, 40th Sess., Supp. No. 10 at 145, UN Doc. A/43/10 (1988).

⁵⁹ For a review of the crimes included in the Code, see Bassiouni, "Versailles", *supra* note 6 at 51.

⁶⁰ *Report of the International Law Commission on Question of International Criminal Jurisdiction*, UN GAOR, 5th Sess., UN Doc. A/CN.4/15 (1950); *Ibid.*; Bassiouni, "Historical", *supra* note 4 at 12; the report stated that the two codification projects should complement one another, however they continued on separate paths.

⁶¹ For a detailed description of the positions held by various countries on this matter, see Bassiouni, "Historical", *supra* note 4 at 13.

to change the environment enough so that the reality of an ICC was imaginable. These shifts happened on two levels, a general, and a specific level. On a general level, there were changes in the state of affairs in the broader international community that impacted the international mood and willingness of states to try new forms of relating with one another. Firstly, the Cold War ended, allowing former foes to think in terms of cooperation rather than mutual destruction. Secondly, two *ad hoc* tribunals were established under the UN to deal with massive crimes similar to those contemplated by the ICC, and began to develop a track record in these areas of international law.

On a specific level, shifts took place in the mechanics of how states were negotiating with one another on the possibility of creating an international criminal court. Firstly, states in favour of such a project began to work together, forming the kernel of what was to become the group of like-minded states which turned out to be a major force propelling the negotiations forward towards making the ICC a reality. Secondly, non-governmental organizations came together to pool their experience, their resources, and their energies to make the court a reality, and to ensure that it was the strongest court possible.

1. End of Cold War

The first general factor that contributed to a changing reality with regards to the possibility of a permanent international criminal court was the end of the decades-long Cold War. As the Cold War began to thaw, changes took place in global dynamics. Two things happened that allowed the interest in an international criminal court to be taken seriously. Firstly, states felt they might be at liberty to consider the merits of an ICC

without having to worry about previously overarching ideological constraints. Major world powers started to interact with one another in ways they hadn't done in decades,⁶² and on some issues, even cooperated with one another.⁶³

Secondly, as the control exercised on states in central and eastern Europe waned, ethnic tensions began to come to the surface resulting in crimes that were exactly the sort an international criminal court would consider.⁶⁴ Humanitarian considerations became a serious element of national and international policies particularly with regard to such issues as international peace and security.⁶⁵ World events and the ever increasing interdependence of nations made it more difficult to ignore the serious violations of human rights that were affecting too many people.

2. ICTY and ICTR

The second general factor in the changing realities that allowed an international criminal court to come into being was the work of the UN in trying crimes committed in the former Yugoslavia and in Rwanda. The first occasion where the United Nations became actively involved in international criminal justice matters arose with the conflicts in the former Yugoslavia.⁶⁶ As news of the atrocities occurring in 1992 in the territory of

⁶² Rolf Einar Fife, "The International Criminal Court: Whence It Came, Where It Goes" (2000) 69 *Nordic J. Int'l L.* 63 at 76.

⁶³ Philippe Kirsch & John T. Holmes, "The Birth of the International Criminal Court: The 1998 Rome Conference" (1998) 36 *Can. Y.B. Int'l L.* 3 at 5 [Kirsch & Holmes, "Birth"].

⁶⁴ *Ibid.* at 5.

⁶⁵ Philippe Kirsch, "The International Criminal Court: Consensus and Debate on the International Adjudication of Genocide, Crimes Against Humanity, War Crimes, and Aggression" (1999) 32 *Cornell Int'l L.J.* 437 at 437 [Kirsch, "Consensus"].

⁶⁶ There were two prior conventions which made reference to international criminal jurisdiction: the 1946 *Genocide Convention*, *supra* note 37; and the 1973 *International Convention on the Suppression and Punishment of the Crime of Apartheid*, G.A. Res. 3068 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30,

former Yugoslavia became known to the rest of the world, public response grew louder and louder. It became clear that ethnic tensions had escalated to serious fighting and horrendous crimes were being committed in the name of ethnic cleansing.⁶⁷ The horror of what some were calling a genocide was a reality, and the brutal forcible rape of tens of thousands of women could not be ignored.⁶⁸ The media played a key role in ensuring that the atrocities faced by civilians every day were not glossed over or ignored by the rest of the world. It was, at least in part, because the world came face to face with these realities, and because the television screens would not allow escape from the images, that the global community was spurred to action. In 1993, the ICTY was created, resulting from a moral imperative and in reaction to the impunity the perpetrators thought they would continue to enjoy.⁶⁹

As the world was beginning to come to terms with the atrocities of the former Yugoslavia, new images began to appear on television screens. Civil war in Rwanda had escalated to a campaign of violence. The dominant majority Hutu were determined to exterminate the minority Tutsi population of Rwanda. Over three quarters of a million Tutsi men, women, and children, as well as a number of Hutu, were massacred.⁷⁰ Again, the images could not be ignored – machetes were used to hack people apart, while others

U.N. Doc. A/9030 (1973). The former referred to the jurisdiction of an eventual international criminal court, the latter referred to the establishment of an international criminal jurisdiction to prosecute apartheid, but this was never followed through; Bassiouni, "Historical", *supra* note 4 at 15.

⁶⁷ Ferencz, *supra* note 13 at 5.

⁶⁸ Amnesty International reported on the mass rape of women in the former Yugoslavia: "Rape by the armed forces in Bosnia-Herzegovina has received unprecedented publicity and the extent of sexual abuse there has caused shock and dismay. Women have been raped in their homes by soldiers from their own town or strangers passing through. Women prisoners have been raped by soldiers and guards in detention centres. Women have been raped in an organized and systematic way: they have been imprisoned in hotels and other buildings specifically so that they could be raped by soldiers." Amnesty International, *It's About Time: Human Rights are Women's Right*, (New York: Amnesty International Publications, 1995) at 18-19.

⁶⁹ Grossman, *et al.*, *supra* note 52 at 1435-6.

⁷⁰ Ferencz, *supra* note 13 at 6.

were simply beaten until they died of their injuries. Major powers were reluctant however, to get involved. The small contingent of UN Peacekeepers simply was not enough to restore order, and hundreds of thousands fled into neighbouring countries seeking asylum and trying, in vain, to escape the genocide that crossed borders. When the flow of blood slowed in the second half of 1994, the UN Security Council established the ICTR to prosecute genocide, crimes against humanity, and war crimes. The long dormant question of an international criminal court had resurfaced.

The horrendous events in Yugoslavia and Rwanda contributed to the realization that an international criminal court was needed, now more than ever, to prevent and punish such atrocities.⁷¹ Global reality was such that rather than less, there seemed to be more serious conflicts deserving of international attention. The relative success of the ICTY and ICTR constituted a psychological and political breakthrough and proved that the creation of a modern day international criminal court was both politically and juridically feasible.⁷² As Philippe Kirsch and Darryl Robinson have put it, “by the time of the Rome Conference, States were more prepared than ever to set aside traditional sovereignty concerns in favour of the more nebulous objectives of protecting individuals and promoting the rule

⁷¹ Nanda, *supra* note 36 at 415; Adriaan Bos, "From the International Law Commission to the Rome Conference (1994-1998)" in Antonio Cassese, *et al.* eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 35 at 36.

⁷² Fanny Benedetti & John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference" (1999) 5 *Global Governance* 1 at 3; William Schabas, *An Introduction to the International Criminal Court*, 2001) at 12; Michael P. Scharf, "The Politics of Establishing an International Criminal Court" (1995) 6 *Duke J. Comp. & Int'l L.* 167 at 168ff; the ICTY, as the first *Ad Hoc* Tribunal, in a short period dealt successfully with most of the major legal and practical concerns that had been raised as barriers to the creation of an international criminal court. In addition, the Security Council became unwilling to explore the possibility of further *ad hoc* tribunals for other conflicts. Causes for reluctance included so-called “tribunal fatigue”, concern expressed by Security Council members about the precedent of *ad hoc* tribunals, a perception of unfair targeting of less powerful nations, and the expense of constantly creating new tribunals.

of law.”⁷³ The international community, both civil society and many governments, were prepared to take on the challenge of establishing a court with international jurisdiction.⁷⁴

3. New Actors

Two additional factors that played a role in shifting attitudes happened on a level more specific to the ICC. The first was the coming together of like-minded states interested in seeing the court become a reality. As will be seen below, the like-minded states were influential in ensuring the negotiations move forward. Their goal was to see an international criminal court come into existence, and that it be the strongest possible court. The force of their commitment ensured that the PrepCom discussions moved forward, and that a diplomatic conference happened.⁷⁵ In addition, the like-minded states were a powerful force at the Rome Conference. The continuing growth of the like-minded states was a clear symbol of the increasing support of an ICC among the world’s nations, including those from the global south.⁷⁶ As the negotiations progressed, more and more states threw their support behind the grouping of like-minded states.

The second specific factor that contributed to the changing reality around the creation of a permanent international court was the coming together of civil society forces around the world that were in favour of such a court. As will be explored in further detail below, beginning with a few NGOs at the *Ad Hoc* Committee, the influence of non-

⁷³ Philippe Kirsch & Darryl Robinson, "Reaching Agreement at the Rome Conference" in Antonio Cassese, *et al.* eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 67 at 89.

⁷⁴ Nanda, *supra* note 36 at 415; Bassiouni, "Historical", *supra* note 4 at 19.

⁷⁵ Kirsch & Holmes, "Birth", *supra* note 63 at 36.

⁷⁶ *Ibid.* at 36-37.

governmental organizations continued to grow over the course of the ICC negotiations. These NGOs banded together in a loose coalition calling themselves the Coalition for an International Criminal Court (CICC or Coalition). As with the phenomenon of the like-minded states, the CICC was a clear reflection of the growing civil society support for an international criminal court. Despite restrictions placed on NGOs in how they could participate in the various stages of negotiations, the information and assistance they provided was instrumental in allowing delegations to understand the issues, and the implications of various proposals.⁷⁷

Over the course of little more than five years, these factors combined to create an environment in which the possibility of an international criminal court went from practically unthinkable to an actual reality.

D. Seeking the Road to Rome: Working Out a Compromise

1. The Chronology of Negotiations

The progress of the criminal court negotiations began in earnest when the General Assembly asked the International Law Commission to draft a statute for an international criminal court.⁷⁸ In 1993 the ILC produced a first draft statute for the ICC.⁷⁹ Interest in the court increased over time, and the intensity of the negotiations took on a snowballing

⁷⁷ *Ibid.* at 36.

⁷⁸ GA Res. 47/33 (1992).

⁷⁹ *Revised Report of the Working Group on the Draft Statute for an International Criminal Court*, UN GAOR, 48th Sess., UN Doc. A/CN.4/L.490 (1993); *Revised Report of the Working Group on the Draft Statute for an International Criminal Court: Addendum*, UN GAOR, 48th Sess., UN Doc. A/CN.4/L.490/Add.1 (1993).

quality as discussions progressed through the *Ad Hoc* Committee and the PrepComs, until the final negotiations took place at the Rome Conference in the summer of 1998.

a. *Ad Hoc* Committee

When the International Law Commission submitted a revised draft statute for the ICC to the Sixth Committee of the General Assembly, it included the recommendation that a diplomatic conference be convened to finalize and adopt the conference.⁸⁰ Instead, the General Assembly bowed to resistance from France, the United Kingdom, and the United States – three of the permanent members of the Security Council – and called instead for the compromise of an *Ad Hoc* Committee on the Establishment of an International Criminal Court to be established.⁸¹

Using the ILC's draft statute as a basis for discussion⁸², the *Ad Hoc* Committee met twice in 1995.⁸³ These meetings provided an opportunity for government delegations to become more informed about the issues surrounding an international criminal court as they discussed substantive and administrative aspects of the proposed court.⁸⁴ It was also here that momentum began to grow among nations that participated in these

⁸⁰ *Report of the International Law Commission*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994); William R. Pace & Jennifer Schense, "The Role of Non-Governmental Organizations" in Antonio Cassese, et al. eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 105 at 109 [Pace & Schense, "Role"].

⁸¹ UN GAOR, 84th Plen. Mtg., UN Doc. A/RES/49/53 (1994); Pace & Schense, "Role" *ibid.* at 110.

⁸² Schabas, *supra* note 72 at 13; Nanda, *supra* note 36 at 414.

⁸³ UN GAOR 6th Comm., 49 Sess., UN Doc. A/C.6/49/L.24 (1994); Bassiouni, "Historical", *supra* note 4 at 17.

⁸⁴ M. Cherif Bassiouni, "Negotiating the Treaty of Rome on the Establishment of an International Criminal Court" (1999) 32 Cornell Int'l L.J. 443 at 444 [Bassiouni, "Negotiating"]; during these meetings delegations did not discuss an actual draft, nor did they enter into negotiations as such. The issues considered included the establishment and composition of the Court; issues related to jurisdiction; types of proceedings; due process; relationship between States Parties, non-State Parties, and the ICC; and budget and administrations issues; Bos, *supra* note 71 at 38.

discussions.⁸⁵ While many supported moving directly from the *Ad Hoc* Committee meetings to a diplomatic conference to finalize the statute, there was significant resistance from some states.⁸⁶ The General Assembly followed up the *Ad Hoc* Committee by convening the PrepCom⁸⁷ to begin refining the draft for the Statute presented by the ILC, and to finalize a consolidated draft that could be brought to a diplomatic conference ready for signature and ratification by states.⁸⁸

b. (Re)Drafting the Statute – PrepComs and Intersessional Meetings

The Preparatory Committee on the Establishment of an International Criminal Court met for two three-week sessions in 1996, and again for three sessions in 1997, for a total of twelve weeks of working sessions from 1996 to 1998.⁸⁹ Fanny Benedetti, a former staff member of the NGO Coalition for an International Criminal Court, and John Washburn, then co-chair of the Washington Working Group on the International Criminal Court, have written about the ICC negotiations with an insider's view, from the PrepCom onwards.⁹⁰ In the first two sessions the PrepCom continued to deal with substantive issues as many states were not yet prepared to move into drafting the statute.⁹¹ Issues such as subject matter jurisdiction of the court, and how a matter would come before the court were politically sensitive and required significant discussion.⁹² Some initial

⁸⁵ Pace & Schense, "Role", *supra* note 80 at 112.

⁸⁶ Schabas, *supra* note 72 at 14.

⁸⁷ UN GAOR, 50th Sess., UN Doc. A/RES/50/46 (1995).

⁸⁸ Benedetti & Washburn, *supra* note 72 at 5.

⁸⁹ Bassiouni, "Historical", *supra* note 4 at 20; Benedetti & Washburn, *ibid.* at 6.

⁹⁰ Benedetti & Washburn, *ibid.*

⁹¹ Bassiouni, "Negotiating", *supra* note 84 at 444.

⁹² Benedetti & Washburn, *supra* note 72 at 5.

progress was made towards drafting the text in the first session, in March/April 1996, when some delegations submitted draft definitions of the proposed core crimes.⁹³

In the second session, in August 1996, five working groups were created to consider the areas of general principles of criminal law, rules of procedure, state cooperation with the court, composition and organization of the court, and penalties.⁹⁴ Dividing the discussions into working groups, rather than continuing in plenary, ensured that more significant progress was made in drafting a text.⁹⁵ Because there was still a fair amount of work to be done, the PrepCom recommended that it be given a further nine weeks of sessions to be completed by April 1998.⁹⁶ Nevertheless, it was clear that a turning point had been reached: it was no longer a question whether a court was desirable, but rather how the court should best be achieved.⁹⁷ As a result, the General Assembly extended the PrepCom at its 51st session, with the specific mandate to negotiate proposals towards a consolidated text for the Statute.⁹⁸ The following year the General Assembly accepted Italy's offer to host the diplomatic conference, and set the conference dates of 15 June to 17 July, 1998.⁹⁹

⁹³ *Ibid.* at 5-6; the draft definitions were for war crimes, crimes against humanity, and genocide.

⁹⁴ *Ibid.* at 7.

⁹⁵ In fact, the second session did not produce a draft, but more of a "compilation of proposals"; *Ibid.* at 11.

⁹⁶ Bassiouni, "Historical", *supra* note 4 at 18; Benedetti & Washburn, *supra* note 72 at 7.

⁹⁷ Bos, *supra* note 71 at 51.

⁹⁸ GA Res. 207, UN GAOR, 51st Sess., UN Doc. A/RES/51/207 (1997). Bassiouni, "Historical", *supra* note 4 at 18; 21.

⁹⁹ GA Res. 160, UN GAOR, 52nd Sess., UN Doc. A/RES/52/160 (1997). Benedetti & Washburn, *supra* note 72 at 6.

In its second year the PrepCom began drafting in earnest. Because the conference date had been set there was a new mood of urgency to the discussions.¹⁰⁰ In the third session, in February 1997, the PrepCom divided into two open working groups focusing on definitions of crimes, and on general principles of criminal law, and pulled together draft text on several key issues.¹⁰¹ In August 1997 the fourth session of the PrepCom took a different approach, and a lot of work was conducted in informal, closed drafting groups.¹⁰² This session dealt with the complementarity of the court, and trigger mechanisms for engaging the court. The fifth session of the PrepCom, in December of 1997, was conducted in five open working groups, where the delegates reviewed some core issues and continued with discussions on technical issues.¹⁰³

The sixth and final session was held in March/April 1998, and worked with a compiled draft statute.¹⁰⁴ More than 120 governments were represented at this session, and over 60 NGOs participated.¹⁰⁵ The goal at this session was to deal with the issues that had not been considered in detail until then, for example the court's relations with the UN, and financing of the court.¹⁰⁶ In addition, this final session had to revise several issues in the draft. Because of time pressure, much of this session was conducted in informal closed meetings.¹⁰⁷

¹⁰⁰ Bos, *supra* note 71 at 54.

¹⁰¹ Benedetti & Washburn, *supra* note 72 at 7; in particular, the definitions of genocide and crimes against humanity, and part of the general principles of criminal law.

¹⁰² *Ibid.*

¹⁰³ *Ibid.* at 7-8.

¹⁰⁴ *Ibid.* at 8.

¹⁰⁵ "Editor's Note" *The International Criminal Court Monitor* 7 (April 1998) at 1.

¹⁰⁶ Benedetti & Washburn, *supra* note 72 at 8.

¹⁰⁷ *Ibid.*

Between *Ad Hoc* Committee meetings and PrepCom sessions, informal intersessional meetings were held to further the discussions and progress being made at the formal PrepCom sessions. Both government and civil society experts were invited to attend these sessions.¹⁰⁸ As Benedetti and Washburn have put it, “intersessional discussions helped to refine ideas and concepts and to promote communication.”¹⁰⁹ What was produced at intersessional meetings was not formally part of the PrepCom, but was offered up as a proposal for furthering the discussion at the subsequent PrepCom gathering.¹¹⁰ Four such intersessional meetings were held in Siracusa, Italy, between December 1995 and November 1997.¹¹¹

Because its mandate ended on April 3, 1998, the PrepCom was working to this deadline, and at the end of 1997 it became clear that the list of proposals compiled by then would not be good enough to bring to the Rome Conference in June of 1998.¹¹² In an attempt to speed up the process another intersessional meeting was held in Zutphen, The Netherlands, in January 1998. The main purpose of this meeting was to take stock – to identify issues that were not yet resolved, issues that hadn’t yet been discussed, and issues that weren’t yet included in the draft but that needed to be.¹¹³ At this meeting the various drafts that had been developed until then were consolidated into one draft text which was used in the final PrepCom session.¹¹⁴

¹⁰⁸ Bos, *supra* note 71 at 61; Benedetti & Washburn, *supra* note 72 at 11.

¹⁰⁹ *Ibid.* at 11; it also helped that government and civil society experts attended in their personal capacities allowing them more leeway than when formally representing governments.

¹¹⁰ *Ibid.* at 12.

¹¹¹ Bassiouni, “Historical”, *supra* note 4 at 24; Benedetti & Washburn, *supra* note 72 at 6.

¹¹² Bassiouni, “Negotiating”, *supra* note 84 at 444.

¹¹³ Bos, *supra* note 71 at 60.

¹¹⁴ Benedetti & Washburn, *supra* note 72 at 6, 8; Bassiouni, “Historical”, *supra* note 4 at 24; Bos, *ibid.* at 61. Despite this additional measure to create order out of chaos, the result was still just a compilation of

One additional preparatory meeting was needed to establish how the diplomatic conference would be organized, and what strategies would be most productive for each part and each issue of the statute.¹¹⁵ This took place in Courmayeur, Italy, in May 1998.¹¹⁶ Those who participated developed a “programme for the Committee of the Whole and discussed ways and means for the Committee of the Whole to conduct its work in plenary, working groups, and in informal meetings”¹¹⁷ at the Rome Conference.

When the PrepComs concluded on April 3, 1998, many of the more crucial issues had been resolved or narrowed, including the establishment of the court, complementarity of the court, and the best combination of various legal systems for the court.¹¹⁸ In addition, the PrepComs had highlighted which issues would continue to be controversial, and had begun to consider possible solutions.¹¹⁹ The delegates had put together “a consolidated text of 173 pages, containing 116 articles, but which had some 1300 words in brackets,” with square brackets indicating disagreement.¹²⁰ With this the PrepCom had successfully

various government proposals that would need further negotiation and further technical work; Bassiouni, “Negotiating”, *supra* note 84 at 444.

¹¹⁵ Benedetti & Washburn, *supra* note 72 at 28; Bassiouni, “Negotiating”, *ibid.* at 446-47.

¹¹⁶ Bos, *supra* note 71 at 63.

¹¹⁷ *Ibid.*

¹¹⁸ Philippe Kirsch, “Introduction” in Herman A.M. von Hebel, *et al.* eds., *Reflections on the International Criminal Court* (The Hague: T.M.C. Asser Press, 1999) 1 at 1-2 [Kirsch, “Introduction”].

¹¹⁹ *Ibid.* at 2.

¹²⁰ *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, A/Conf.183/2/Add. 1 (1998). M. Cherif Bassiouni ed. *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers, Inc., 1998) at 24. Some estimate as many as 1400 square brackets indicating points of disagreement among delegates; Kirsch & Holmes, “Birth”, *supra* note 63 at 6.

fulfilled its original mandate to prepare a comprehensive draft statute for the Diplomatic Conference in Rome.¹²¹

2. Welcome to the Rome Conference

The Rome Diplomatic Conference took place over five weeks from June 15 to July 17, 1998.¹²² During the first week of the conference there were approximately 5000 delegates, many of whom came for the opening ceremonies only.¹²³ The number soon dropped to a still unwieldy 2000.¹²⁴ These were representatives of 160 countries,¹²⁵ and some 250 non-governmental organizations.¹²⁶ There were also representatives from sixteen intergovernmental organizations, five specialized agencies, and nine United Nations Programmes.¹²⁷ Immi Tallgren, who participated at the Rome Conference, describes the delegates as including, “international law advisers and diplomats, the prison wardens and judges turned into government delegates, the tortured activists, ‘Mothers of the Disappeared’ and the university teachers amongst the NGOs, and, of course, the professional human rights activists.”¹²⁸ Several participants have described the less than ideal working conditions. The Conference was held in the United Nations Food and

¹²¹ “March-April 1998 PrepCom Lays Groundwork for Rome” *The International Criminal Court Monitor* 8 (June 1998) at 3.

¹²² Rome Statute of the International Criminal Court, adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, U.N. Doc. A/CONF.183/9 (1998) [ICC Statute or Rome Statute]. All article numbers used in this chapter refer to the ICC Statute unless noted.

¹²³ My thanks to Dr. David J Leech for extensive conversations regarding the importance of the preparations carried out by all parties in anticipation of Rome.

¹²⁴ Bassiouni, “Negotiating”, *supra* note 84 at 449.

¹²⁵ See Rome Statute, *supra* note 122.

¹²⁶ *Ibid.* Annex IV. There were 137 NGOs with official credentials at the Conference, though many more than that were in attendance; Leila Nadya Sadat & S. Richard Carden, “The New International Criminal Court: An Uneasy Revolution” (2000) 88 Geo. L.J. 381 at 383.

¹²⁷ See Rome Statute, *supra* note 122, Annex III.

¹²⁸ Immi Tallgren, “We Did It? The Vertigo of Law and Everyday Life at the Diplomatic Conference on the Establishment of an International Criminal Court” (1999) 12 Leiden J. Int’l L. 683 at 684.

Agriculture Organization building, a large Mussolini-period structure which did not lend itself well to multiple meetings.¹²⁹ Only a few rooms had air conditioning, and the summer of 1998 was one of Rome's hottest and most humid.¹³⁰ The mood of the delegates "was at the same time both excited and apprehensive."¹³¹

Despite the many logistical difficulties, the participants worked hard.¹³² Because of the late completion of the draft there had remained little time for the text to be translated into all the official languages of the UN, and most delegates had less than six weeks to consider the complex draft.¹³³ As a result, many delegates had little or no knowledge of the text of the Draft Statute, and discussion frequently returned to ground already covered, and sometimes settled, by the PrepCom, making discussions move slowly. M. Cherif Bassiouni, the Chairman of the Drafting Committee of the Rome Conference, has written extensively on the negotiations. He describes how the Chairman of the Committee of the Whole, Philippe Kirsch from Canada, quickly instituted informal working groups which were then broken down into smaller informal-informal working groups,¹³⁴ all reporting directly or indirectly to the Committee of the Whole.¹³⁵ The use

¹²⁹ Meetings of various groups were scattered throughout some 100 rooms, and meeting locations frequently changed. There was often inadequate notice of room assignments and delegates frequently got lost between meetings; Bassiouni, "Negotiating", *supra* note 84 at 450; Sadat & Carden, *supra* note 126 at 383.

¹³⁰ Bassiouni, "Negotiating", *ibid.* at 450. For excellent detailed descriptions of the nitty gritty of the daily functioning of the Rome Conference, see *ibid.* at 449ff; Sadat & Carden, *ibid.* at 383ff.

¹³¹ Kirsch & Robinson, *supra* note 73 at 67. For a detailed first-hand account of the practical details of the Conference, see Tallgren, *supra* note 128.

¹³² Ten to twelve hour days were the norm for most delegates, and those who took on leading roles worked even longer hours.

¹³³ Bassiouni, "Negotiating", *supra* note 84 at 444-45.

¹³⁴ *Ibid.* at 449; Bassiouni, "Historical", *supra* note 4 at 29.

¹³⁵ Towards the end of the Conference these meetings frequently lasted most of the night. For a description of the various groups and committees and their responsibilities at the Conference, see Philippe Kirsch & John T. Holmes, "The Rome Conference on an International Criminal Court: The Negotiating Process" (1999) 93 A.J.I.L. 2 at 4ff [Kirsch & Holmes, "Conference"].

of smaller working groups allowed for faster progress to be made on the many substantive issues being discussed. In addition to these working groups, there were many informal groups based on region, language, or politics. Nevertheless, it was the ground covered in the informal working groups that allowed the Conference to proceed on schedule.

a. The Negotiating Process

The negotiations for an International Criminal Court had come a long way to get to Rome and had finally come to the point of working out the details. The best way to approach the negotiations of the complex draft had been plotted out at Courmayeur in May 1998.

Much of the process at the Rome Conference was determined by the Chairman of the Committee of the Whole, Philippe Kirsch. It was his responsibility, along with the Bureau of the Committee of the Whole,¹³⁶ to ensure that the Conference was organized and coordinated to move the negotiations forward towards the successful culmination of the conference.¹³⁷

Kirsch describes how the negotiations took place. The conference began with a plenary session which lasted for four days while delegates from almost every country stated their positions on key issues.¹³⁸ The Conference did not meet in plenary again until the last day for adoption of the Statute.¹³⁹ Discussion of issues took place in a variety of fora

¹³⁶ The Bureau of the Committee of the Whole included members from Argentina, Canada, Japan, Lesotho, and Romania; Kirsch & Holmes, "Birth", *supra* note 63 at 13, n. 25.

¹³⁷ Philippe Kirsch, "The Development of the Rome Statute" in Roy S. Lee ed. *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999) 451 at 452 [Kirsch, "Development"].

¹³⁸ Kirsch & Holmes, "Birth", *supra* note 63 at 12, n. 23.

¹³⁹ Kirsch & Robinson, *supra* note 73 at 72.

depending on the topic and the level of interest. Generally, the Committee of the Whole was responsible for the statute in its entirety.¹⁴⁰ Proper and consistent drafting, in all core languages, was the responsibility of the Drafting Committee.¹⁴¹ Once issues had been debated in the Committee of the Whole, they were divided up between Working Groups, who then reported on their progress to the Committee of the Whole.¹⁴² Continuing with the pattern that had been established at the PrepComs, items that were expected to cause the most difficulties were to be dealt with in smaller groups and through informal negotiations.¹⁴³ Many of those who had acted as Coordinators during the PrepCom continued on as Coordinators at the Rome Conference,¹⁴⁴ which was very useful to Working Groups dealing with complex issues. Once draft texts were accepted by the Committee of the Whole they were sent to the Drafting Committee for refining and technical coherence.¹⁴⁵ Only the final version of the text, approved by the Committee of the Whole, was sent to the Plenary for adoption by the Conference.¹⁴⁶

After the second week, as it became clear that progress was not being made quickly enough, Chairman Kirsch broke down these Working Groups into smaller informal working groups. As Bassiouni describes, these later further divided themselves into informal-informal working groups.¹⁴⁷ Breakfast and lunch meetings quickly became the

¹⁴⁰ Kirsch & Holmes, "Birth", *supra* note 63 at 12, n. 24.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.* Mahnouch H. Arsanjani, "The Rome Statute of the International Criminal Court" (1999) 93 A.J.I.L. 22 at 23.

¹⁴³ Benedetti & Washburn, *supra* note 72 at 28; Kirsch, "Development", *supra* note 137 at 454.

¹⁴⁴ Kirsch & Robinson, *supra* note 73 at 73.

¹⁴⁵ Kirsch & Holmes, "Birth", *supra* note 63 at 12, n. 24; Kirsch & Robinson, *ibid.*

¹⁴⁶ Kirsch & Holmes, "Birth", *ibid.*

¹⁴⁷ Bassiouni, "Historical", *supra* note 4 at 29; Bassiouni, "Negotiating", *supra* note 84 at 449; at the most there were a dozen informal-informals meeting at the same time.

norm, and soon delegates were regularly meeting late into the night.¹⁴⁸ As the number of concurrent meetings increased it became impossible for smaller delegations to attend each meeting.¹⁴⁹ In addition, these discussions took place for the most part in English, making it hard for many delegations to participate,¹⁵⁰ with the result that many meetings did not include representation from all regions.¹⁵¹

The Drafting Committee was crucial to ensuring that the text that came from various working groups was turned into a coherent Statute. As Bassiouni has described it:

...the Drafting Committee received on a daily basis pieces of a large jigsaw puzzle without knowing precisely where a given piece might fit and what its connection to another piece might entail. Furthermore, the disparity in language, approach and technique of the various groups that worked on these texts was evident in many of the referred articles.¹⁵²

As a result, the Drafting Committee had to re-draft the texts, sometimes as often as three times, all the while ensuring consistency in form and style. Even more astounding, the Drafting Committee did all this in six languages, simultaneously.¹⁵³

The themes of the Conference were consultations, consensus, and compromise.¹⁵⁴ Kirsch notes that early on it became obvious that in order to promote a strong court that enjoyed

¹⁴⁸ Benedetti & Washburn, *supra* note 72 at 28; Kirsch & Holmes, "Conference", *supra* note 135 at 3, n. 4.

¹⁴⁹ Bassiouni, "Historical", *supra* note 4 at 29. Some delegations were as small as two or three people. Delegations with ten or more people could adequately cover all the proceedings; Bassiouni, "Negotiating", *supra* note 84 at 449-50.

¹⁵⁰ Bassiouni, "Negotiating", *ibid.* at 450; Michael Plachta, "Contribution of the Rome Diplomatic Conference for the Establishment of the ICC to the Development of International Criminal Law" (1999) 5 U.C. Davis J. Int'l L. & Pol'y 181 at 187. Because of personnel constraints, logistics and cost, proceedings could not even be interpreted into the six official UN languages; Bassiouni, "Negotiating", *ibid.* at 450, n. 28.

¹⁵¹ Plachta, *supra* note 150 at 187.

¹⁵² Bassiouni, "Historical", *supra* note 4 at 30.

¹⁵³ *Ibid.*; Bassiouni, "Negotiating", *supra* note 84 at 452. There seems to be universal praise for the work, professionalism, and dedication of the Drafting Committee; see, for example, Benedetti & Washburn, *supra* note 72 at 29.

political and financial support, there had to be agreement on all the key provisions of the Rome Statute.¹⁵⁵ If the Statute's existence were a result of a vote rather than of consensus, it might create the impression that there was fundamental disagreement among the delegates.¹⁵⁶ Voting could produce majorities around certain principles, but could also permanently alienate states and groups of states whose support was essential to a successful ICC.¹⁵⁷ Kirsch recognized that alienated states may decide to vote against the final product, and that voting too early in the process could have the effect of allowing an incoherent development of the Statute as issues were decided without a view to the big picture.¹⁵⁸ As a result, consensus was sought on the broad strokes of the Statute rather than on every detail.

In order to achieve this consensus, delegates early on realized they would need to make compromises with one another in order to find a way to meld the sometimes radically different positions. Compromise was the only way to avoid a stalemate.¹⁵⁹ If compromise was essential, delegates needed a way to find the middle ground to avoid straying too far from their positions and giving up too much. Consultations became the main method for determining where that middle ground lay. Working Groups, and the corresponding

¹⁵⁴ Plachta, *supra* note 150 at 186.

¹⁵⁵ Kirsch, "Development", *supra* note 137 at 453; Kirsch & Robinson, *supra* note 73 at 76, n. 32.

¹⁵⁶ In fact, this was precisely what the United States was aiming for when it called for a last-minute show of hands. The result was 120 votes for, seven vote against (including the US and China), and 21 abstentions (including India). Despite the fact that India and China's lack of approval leaves more than half the world's population out of the reach of the Court, the overwhelming state approval of the Statute sends a clear message to the world: stop impunity for grave human rights violations; Kai Ambos, "Guest Editor's Foreword" (1998) 4 Eur. J. Crime, Crim. L., Crim. Justice 319 at 320.

¹⁵⁷ David Matas, "The Hard Realities of Soft Power: Canada and the International Criminal Court" (1998) Peace Magazine 24 at 26 [Matas, "Realities"].

¹⁵⁸ Kirsch, "Development", *supra* note 137 at 453. It was agreed that a successful vote in Plenary would require a two-thirds majority, while voting in the Committee of the Whole would require a three fifths majority; Bos, *supra* note 71 at 59.

¹⁵⁹ Plachta, *supra* note 150 at 187.

informal, and informal-informal meetings, became the venue for negotiations whenever the Committee of the Whole sessions were not providing the resolutions needed to reach compromise.¹⁶⁰ So-called “corridor discussions” were less formal, but equally essential fora for negotiation between delegates who could not easily reach a compromise.

The “spirit of compromise” hovered over the delegates throughout the Conference and prompted concessions, the withdrawal of antagonistic proposals, and the hammering out of solutions.¹⁶¹ Compromise meant that no delegates were entirely satisfied with the results, but they could take comfort in the fact that no other delegates were entirely happy either.¹⁶²

b. Bureau Papers

Negotiations under the Working Group system were producing good results; however, by the third week of the Conference, it was obvious that discussions were moving far too slowly if the Statute were to be completed in Rome. Delegates were starting to doubt whether the Conference would be successful, which in turn undermined the negotiations.¹⁶³ What is more, the negotiations that were making headway were focused

¹⁶⁰ Kirsch, “Development”, *supra* note 137 at 454; Bassiouni, “Negotiating”, *supra* note 84 at 450.

¹⁶¹ Plachta, *supra* note 150 at 190. There was one significant aberration from this philosophy of good faith compromises. The United States was stubborn in its role as the last major power and rigidly clung to its demands, especially with regard to issues of jurisdiction. While many states, especially the like-minded states, had gone to great lengths to accommodate the US, the American delegation was not beneath using political tactics to try to force other countries to agree to its proposals, or withdraw theirs. For example, threats were made against Germany and South Korea that the US would withdraw its troops from their soil if those delegations did not support the American position; at 2; Geoffrey Robertson, *Crimes Against Humanity*, (Toronto: Allen Lane, The Penguin Press, 1999) at 322; Bassiouni, “Negotiating”, *supra* note 84 at 457; Ambos, *supra* note 156 at 323.

¹⁶² When informal consultations ended and the resulting solutions were reported back to the working groups, the chair often remarked that since the parties appeared to be equally unhappy with the result, it was likely that a real compromise had been reached; see Plachta, *ibid.* at 190.

¹⁶³ Bassiouni, “Negotiating”, *supra* note 84 at 456.

on the technical legal issues and political issues where a compromise could be found relatively easily.¹⁶⁴ The more difficult issues were being left to the end.¹⁶⁵ Philippe Kirsch and John T. Holmes suggest that there were two reasons for lack of progress on the most crucial issues: 1) delegations did not want to agree on specific issues without having a clearer image of how the whole picture would look, and 2) many states had restricted their delegations to such an extent that they could not accept compromise language being proposed.¹⁶⁶ As a result, Chairman Kirsch, along with members of the Bureau of the Committee of the Whole, put together a Bureau Paper which “identified the points on which agreement had been reached and those on which it appeared possible to reach a compromise.”¹⁶⁷ The Bureau Paper also compiled what the Chairman saw to be the biggest unresolved issues,¹⁶⁸ and offered up to three possible options for many of the most pressing items.¹⁶⁹

The Bureau Paper was circulated among all the delegations and they were encouraged to discuss the critical issues listed.¹⁷⁰ The Committee of the Whole was convened for the delegates to spend the next two days discussing the Bureau Paper point by point.¹⁷¹ After these focused negotiations, Chairman Kirsch compiled a Bureau proposal which further

¹⁶⁴ Bassiouni, "Historical", *supra* note 4 at 31.

¹⁶⁵ Kirsch & Robinson, *supra* note 73 at 74.

¹⁶⁶ Kirsch & Holmes, "Birth", *supra* note 63 at 20; Kirsch & Holmes, "Conference", *supra* note 135 at 5.

¹⁶⁷ UN Doc. A/CONF.183/C.1/L.53 (6 July 1998). Bassiouni, "Historical", *supra* note 4 at 31; Kirsch & Holmes, "Birth" *ibid*.

¹⁶⁸ Bassiouni, "Negotiating", *supra* note 84 at 456.

¹⁶⁹ Benedetti & Washburn, *supra* note 72 at 29; Kirsch & Holmes, "Birth", *supra* note 63 at 20-21.

¹⁷⁰ The Bureau Paper focused on Part 2 of the Statute which dealt with major issues such as what crimes the Court would deal with and when the Court would have jurisdiction over a case; Barbara Bedont & David Matas, "Negotiating for an International Criminal Court" (October 1998) 14:5 *Peace Magazine* 21 at 23.

¹⁷¹ *Ibid.*; Benedetti & Washburn, *supra* note 72 at 30.

narrowed the options and included specific proposals.¹⁷² Many delegations reacted strongly to the Bureau proposal as they realized this was probably their last chance to see the changes they wanted to see in the Statute.¹⁷³ Little headway was made in the negotiations. Indeed, Kirsch notes that it seemed that more delegations were taking an even stronger position than before.¹⁷⁴

c. The Final Package

The Committee of the Whole had two options, as Kirsch describes it: to concede that it had not been possible to finalize the Statute at this Conference, and to recommend another conference, or to propose a final package that most delegations could accept.¹⁷⁵ Ultimately, after more formal and informal consultations, the Bureau of the Committee of the Whole produced a Final Package,¹⁷⁶ as a take-it-or-leave-it proposal,¹⁷⁷ on the last day of the Conference.¹⁷⁸ This was the only chance to conclude the Conference successfully, since the delegations hadn't been able to reach consensus through negotiations.¹⁷⁹ William R. Pace served as the Convenor of the NGO Coalition for an International Criminal Court. He and his colleague Jennifer Schense report:

The bureau's package refocused the Conference on its ultimate goal: completion of the Statute. Delegations came to realize that the time for

¹⁷² UN Doc. A/CONF.183/C.1/L.59 (July 10, 1998). at 2; Kirsch & Holmes, "Birth", *supra* note 63 at 21.

¹⁷³ Kirsch & Holmes, "Conference", *supra* note 135 at 6; Kirsch & Holmes, "Birth", *supra* note 63 at 22.

¹⁷⁴ Kirsch & Robinson, *supra* note 73 at 75.

¹⁷⁵ Kirsch & Holmes, "Birth", *supra* note 63 at 28; if the package was not accepted by the delegates, a further conference could still be recommended.

¹⁷⁶ Draft Statute, UN Doc. A/CONF.183/C.1/L.76 and Add. 1 to Add. 14 (16 July 1998).

¹⁷⁷ Lloyd Axworthy, *Navigating a New World*, (Toronto: Alfred A. Knopf, 2003) at 204.

¹⁷⁸ This package was the result of yet another long night of work; the document was released to delegates, in all six official languages, at 2:00 a.m. on July 17, 1998; Pace & Schense, "Role", *supra* note 80 at 134; Bassiouni, "Negotiating", *supra* note 84 at 458. William Schabas observes that "like a skilled blackjack player, Kirsch had carefully counted his cards, yet he had no guarantee that his proposal might meet unexpected opposition and lead, inexorably, to the collapse of the negotiations," Schabas, *supra* note 72 at 17.

¹⁷⁹ Pace & Schense, "Role", *supra* note 80 at 136.

negotiations was past and that choices had to be made. In particular, delegations that found themselves in the minority had to decide whether to join the majority or to hold out over provisions on which they did not agree with the others. Most of those States chose to join the majority or to abstain, with a few notable exceptions.¹⁸⁰

The Bureau had worked to develop a package that would garner as much support as possible.¹⁸¹ Kirsch believes that the package deal reflected the majority view of the like-minded states on most items, but also tried to address the positions of other delegations.¹⁸² In general, the response was positive. The Final Package had managed to “reflect the strong majority trends, [yet] ... accommodate minority views to the extent possible.”¹⁸³

After a day of frenetic corridor conversations and consultations with home governments, the delegates met on the evening of July 17 in a meeting of the Committee of the Whole, cramming into limited space.¹⁸⁴ Since the delegates hadn’t been able to come to any clear consensus there was still no sense of what the end result of the Conference would be.¹⁸⁵ Chairman Kirsch introduced the final package and reminded those present that it was a delicate balance that might not stand up to proposed amendments.¹⁸⁶ Two delegations, India and the United States, nevertheless tried to propose changes,¹⁸⁷ but were stifled by no action motions which effectively tabled the motions to amend.¹⁸⁸ The votes on the no

¹⁸⁰ *Ibid.*

¹⁸¹ Kirsch & Holmes, "Birth", *supra* note 63 at 30; Bedont & Matas, *supra* note 170 at 2.

¹⁸² Kirsch & Robinson, *supra* note 73 at 75.

¹⁸³ *Ibid.* at 76.

¹⁸⁴ *Ibid.*; the corridors outside, and a nearby room where the proceedings were being shown on closed-circuit TV, were packed with delegates, NGO observers, and media.

¹⁸⁵ *Ibid.*

¹⁸⁶ Kirsch & Holmes, "Birth", *supra* note 63 at 35; Kirsch & Robinson, *supra* note 73 at 77.

¹⁸⁷ India and the USA were intent on seeing their version of key issues in the text; Bassiouni, "Negotiating", *supra* note 84 at 458; Bassiouni, "Historical", *supra* note 4 at 31.

¹⁸⁸ Bassiouni, "Negotiating" *ibid.*

action motions were overwhelmingly in favour, and delegates burst into applause at the result.¹⁸⁹ The Committee of the Whole adopted the Statute without a vote.¹⁹⁰

The Committee of the Whole adjourned, and the Plenary convened at 10:00 p.m. for the final formalities which were expected to be brief and painless.¹⁹¹ However, in Plenary the United States called for an unrecorded vote.¹⁹² The results were clear: 120 delegations voted in favour of adopting the Statute and the Final Act of the Conference, and for opening the Convention for signatures the following day.¹⁹³ Seven voted against, and twenty-one abstained.¹⁹⁴ Many states then spoke to their vote extending the session well past 2:00 a.m. the next morning.¹⁹⁵ On July 18, 1998, the Convention was opened for signatures.¹⁹⁶

E. All Roads Lead to Rome: Key Players

The key players in the ICC negotiations consisted of three groupings of parties. The United Nations, states – in various and shifting alliances, and non-governmental organizations, which banded together in order to have a greater impact.

¹⁸⁹ “[T]he delegates burst into a spontaneous standing ovation, which turned into rhythmic applause that lasted close to ten minutes. Some delegates embraced one another, and others had tears in their eyes. It was one of the most extraordinary emotional scenes ever to take place at a diplomatic conference.” *Ibid.* at 459.

¹⁹⁰ Kirsch & Robinson, *supra* note 73 at 77.

¹⁹¹ Bassiouni, "Negotiating", *supra* note 84 at 459.

¹⁹² Kirsch & Robinson, *supra* note 73 at 77; Pace & Schense, "Role", *supra* note 80 at 136.

¹⁹³ Bassiouni, "Negotiating", *supra* note 84 at 459; Bassiouni, "Historical", *supra* note 4 at 32; Kirsch & Holmes, "Birth", *supra* note 63 at 35.

¹⁹⁴ Bassiouni, "Negotiating", *supra* note 84 at 459-60; Kirsch & Holmes, "Birth", *ibid.*

¹⁹⁵ Bassiouni, "Negotiating", *ibid.* at 460; Bassiouni, "Historical", *supra* note 4 at 33; the clock was figuratively stopped shortly before midnight so that the Conference officially ended within the timeframe of its mandate.

¹⁹⁶ Bassiouni, "Historical", *ibid.* at 32.

1. The United Nations

The role of the United Nations itself was crucial to the negotiation of an international criminal court. The court was conceived and promoted at the United Nations, and it is through the UN that nations were able to come together to negotiate a strategy for dealing with the most horrendous crimes. Further, the ICC incorporates and serves some of the most important purposes of the UN Charter, particularly those with relation to maintaining international peace and security.¹⁹⁷

The UN had fostered the idea of an international criminal court since the draft international criminal court statute prepared by the International Law Commission in 1993, through the six PrepCom sessions, to the Rome Conference in 1998.¹⁹⁸ Benedetti and Washburn write that many were caught off guard by the speed with which this item moved through the UN systems, and particularly by the obvious support for the project shown in the General Assembly.¹⁹⁹ The General Assembly created a PrepCom to develop an international court that was related to, yet independent of the UN.²⁰⁰ The PrepCom was supervised by the General Assembly, but maintained independence from the UN in that neither the Security Council, nor the Economic and Social Council were at all involved in the development of the ICC.²⁰¹

¹⁹⁷ Benedetti & Washburn, *supra* note 72 at 23-25. *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7, art. 1. The ICC would also have the effect of legitimizing the UN at a time when nations were beginning to question its effectiveness and its very existence. The Court would make the UN more relevant to the lives of human beings around the world.

¹⁹⁸ *Ibid.* at 3.

¹⁹⁹ *Ibid.* at 3-4.

²⁰⁰ *Ibid.* at 4.

²⁰¹ *Ibid.*

The Office of Legal Affairs was the main body of the UN Secretariat responsible for running the PrepCom and the Rome Conference,²⁰² and in particular the UN Codification Division.²⁰³ As Benedetti and Washburn have put it:

The duties of the UN Secretariat to the officers of any negotiation such as the PrepCom are diplomatic, parliamentary, legal, and bureaucratic. At the same time, the Secretariat must also advance the institutional interests of the UN in the negotiations. There was very wide agreements in the PrepCom that the Secretariat team did very well on most of these requirements.²⁰⁴

The dedication, professionalism, and efficiency of the UN Secretariat involved in the negotiations made it possible for delegates to create a draft text to bring to the Rome Conference, and to finalize a text once there. These efforts were supported by the commitment shown to this endeavour by the Secretary General, through his presence at key moments of the process, and his emphasis on the ICC negotiations in speeches.²⁰⁵ The UN wanted the negotiations to succeed, and did what was within its purview to ensure that they did.

2. State Actors – Like-Minded States and Other Groupings

Over the course of negotiations for an International Criminal Court, the positions states took regarding key elements of the negotiations began to fall in certain patterns. Based on these patterns, states formed groups in order to strengthen their negotiating positions. None of the groups were fixed, and in many cases states moved in and out of negotiating blocs depending on the issue in question. Nevertheless, three broad negotiating groups

²⁰² *Ibid.*

²⁰³ Bos, *supra* note 71 at 62.

²⁰⁴ Benedetti & Washburn, *supra* note 72 at 13.

²⁰⁵ *Ibid.* at 32.

emerged: the states that comprised the 'like-minded group' (LMG), the P-5, and the 'non-aligned movement'.²⁰⁶

The most significant was the like-minded group which began to coalesce as early as the *Ad Hoc* Committee discussions. Pace and Schense note that the grouping of nations with similar approaches to key issues was reinforced when the decision was made at the *Ad Hoc* Committee to ask delegations to comment on individual issues. States quickly found other delegates with similar positions.²⁰⁷ Members of this group tended to advocate a strong court with a powerful prosecutor and with true independence from the Security Council.²⁰⁸ The like-minded states also wanted the court to have jurisdiction over war crime suspects anywhere in the world.²⁰⁹ While they didn't necessarily agree on all aspects of the negotiations,²¹⁰ as a group their prime commitment was to ensuring that a strong court come into being,²¹¹ and their drive and determination was a significant contribution to ensuring that the statute creating the international criminal court was successfully negotiated.²¹²

²⁰⁶ Some observers have noted negotiating blocs based on geographic regions, such as the Latin American and Caribbean Group, the European Union, and the Arab Group; see Arsanjani, *supra* note 142 at 23; Benedetti & Washburn, *supra* note 72 at 31.

²⁰⁷ Pace & Schense, "Role", *supra* note 80 at 113.

²⁰⁸ Additional principles and objectives of the like-minded states were: the independence of the Prosecutor; the extension of the inherent jurisdiction of the Court to cover all core crimes; the full cooperation of States with the international criminal court; the prompt creation of an independent and effective Court; and the power of the international criminal court to finally decide on the unavailability or unwillingness of national systems to proceed with a case; Benedetti & Washburn, *supra* note 72 at 21; Kirsch & Holmes, "Conference", *supra* note 135 at 4.

²⁰⁹ Benedetti & Washburn, *supra* note 72 at 21; Robertson, *supra* note 161 at 301; Karen Austin & Nell Stewart, "Courting Justice in Rome" *Human Rights Tribune* 5:4 (4 September 1998) 6 at 6.

²¹⁰ While to some extent like-mindedness was determined as opposition to contrary states, as more nations joined the LMG, it became harder to determine what they were in opposition to; Tallgren, *supra* note 128 at 696.

²¹¹ Arsanjani, *supra* note 142 at 23; Benedetti & Washburn, *supra* note 72 at 20; Sadat & Carden, *supra* note 126 at 387.

²¹² Bassiouni, "Historical", *supra* note 4 at 25. The key role played by the like-minded group is captured by the French term for the group: *pays pilotes*; Kirsch & Holmes, "Birth", *supra* note 63 at 36.

As Kirsch points out, like-minded states tended to be middle powers that had not been directly involved in serious conflicts, and developing countries that had suffered some of the crimes being incorporated into the statute.²¹³ This group, which was well organized and experienced through its activity in promoting the ICC during the PrepCom, started out with core members from several European states, Argentina, Australia, Canada, New Zealand,²¹⁴ and South Africa.²¹⁵ Gradually others joined the movement which ultimately grew to over sixty states during the conference.²¹⁶

During the PrepCom sessions Canada played a leadership role by chairing the like-minded states involved in negotiations.²¹⁷ In this role, Canada was able to encourage like-minded states to adopt “cornerstone” positions which founded the basis for the LMG negotiations through to Rome. The cornerstone positions included an independent prosecutor, that the court not be subordinate to the Security Council, and that the court

²¹³ Kirsch & Holmes, "Conference", *supra* note 135 at 4; Kirsch & Holmes, "Birth", *ibid.* at 8. While not all developing countries became full-fledged members of the LMG, most supported a strong court and the goals of the like-minded group.

²¹⁴ As the negotiations concluded, it became clear that the like-minded group had effectively led the negotiations and brought about the successful conclusion of the Rome Conference; see Benedetti & Washburn, *supra* note 72 at 31.

²¹⁵ Bos, *supra* note 71 at 50.

²¹⁶ Because membership remained informal, and shifted over the course of the negotiations, there is no official list of LMG members; Pace & Schense, "Role", *supra* note 80 at 119, n. 35. However, it is generally agreed that like-minded states included Australia, Austria, Argentina, Belgium, Canada, Chile, Croatia, Denmark, Egypt, Finland, Germany, Greece, Guatemala, Hungary, Ireland, Italy, Lesotho, the Netherlands, New Zealand, Norway, Portugal, Samoa, Slovakia, South Africa, Sweden, Switzerland, Trinidad and Tobago (representing 12 Caricom States), Uruguay, and Venezuela; Bassiouni, "Historical", *supra* note 4 at 25; Bassiouni, "Negotiating", *supra* note 84 at 455. During the December 1997 PrepCom the United Kingdom announced that it would oppose the proposition requiring that the Security Council approve investigations and trials before the Court could proceed. This change of policy led to the U.K. joining the Like-Minded group; Benedetti & Washburn, *supra* note 72 at 21.

²¹⁷ Schabas, *supra* note 72 at 15. Once Philippe Kirsch took over as Chair of the Committee of the Whole at the Rome Conference Canada stepped down from coordinating the like-minded nations, and was replaced by Australia; Pace & Schense, "Role", *supra* note 80 at 120; Kirsch & Robinson, *supra* note 73 at 70; "Illness Sidelines Treaty Leader" *The International Criminal Court Monitor* 8 (June 1998) at 3.

have inherent jurisdiction over certain crimes²¹⁸ Even at the Rome negotiations, the like-minded group was the only coalition of states with an operational strategy.²¹⁹ As

Benedetti and Washburn describe it:

All its key meetings were carefully prepared, and its issue subgroups, meetings, and briefings for smaller delegations were well organized. The group had also designated issue coordinators early in the meeting. The Like-Minded Group planned and thought through the entire progress of the conference.²²⁰

The leadership of the like-minded group was obvious; many central positions were held by LMG members, such as “the chairs of most of the working groups, ... [and] membership in the Bureau, which was the executive body that directed the day-to-day affairs of the Conference.”²²¹ Indeed, over the course of the Rome Conference it became apparent that the like-minded group was a key factor in ensuring that the negotiations were a success.²²²

The second grouping of states included permanent members of the Security Council – the P-5. This group was led by the United States, joined by the United Kingdom, China, France, and Russia. David Matas, who was an NGO member of the Canadian government delegation to the Conference, suggests that the bond that united these states was that their role as perpetrators in previous conflicts made them concerned about the aspersions that may be cast upon them for past behaviour. France, for example, may have been thinking of colonial wars in Algeria, and the United States feared politically motivated

²¹⁸ Axworthy, *Navigating*, *supra* note 177 at 202. See also Kirsch & Robinson, *supra* note 73 at 70-71.

²¹⁹ Benedetti & Washburn, *supra* note 72 at 30.

²²⁰ *Ibid.*

²²¹ Schabas, *supra* note 72 at 16.

²²² Benedetti & Washburn, *supra* note 72 at 31.

prosecutions directed at its peacekeeping operations.²²³ Their main concerns were ensuring a strong role for the Security Council in the ICC, making sure that nuclear weapons were not among the weapons prohibited by the Statute,²²⁴ and ensuring that the crime of aggression was not included.²²⁵ Though they disagreed on some issues, they pushed in unity for a court controlled by the Security Council, which would allow them to use their permanent member veto over any unfavourable prosecutions.²²⁶ As negotiations progressed, however, some of the P-5 states shifted their positions, with the UK joining the like-minded group, and France ultimately voting for the court after winning some concessions.²²⁷

There was a loose grouping of states that strongly opposed the P-5 on the issue of the Security Council's involvement in the court, and equally strongly supported the inclusion of nuclear weapons in the list of prohibited weapons.²²⁸ Their overall preference was for a court that would have carefully restricted powers.²²⁹ These states included India, Mexico, and Egypt.

The third grouping of states, known as the 'non-aligned movement' (NAM),²³⁰ was a shifting amalgam of states including "all the usual suspects"²³¹ like Iraq, Iran, Lebanon,

²²³ Matas, "Realities", *supra* note 157 at 27

²²⁴ Kirsch & Holmes, "Conference", *supra* note 135 at 4.

²²⁵ Kirsch & Robinson, *supra* note 73 at 71.

²²⁶ Robertson, *supra* note 161 at 301.

²²⁷ Benedetti & Washburn, *supra* note 72 at 31.

²²⁸ Kirsch & Holmes, "Conference", *supra* note 135 at 4. India's support of this proposal weakened once it exploded its own test nuclear weapon shortly before the Conference; Robertson, *supra* note 161 at 301.

²²⁹ Kirsch & Holmes, "Conference", *ibid.*; Benedetti & Washburn, *supra* note 72 at 31.

²³⁰ Benedetti & Washburn, *ibid.*

²³¹ The phrase is aptly used to describe the standard group of States who generally feel no compunction about their own abuse of human rights; Robertson, *supra* note 161 at 301.

Libya, Syria, and Indonesia. These states were opposed to the very existence of an international criminal court and were conspicuous for their frequent objections, proposals, and amendments.²³² As the conference progressed, the non-aligned movement insisted that the crime of aggression be included in the Statute.²³³ As with other negotiation groupings, states moved in and out of the NAM depending on the issue under consideration, indeed, delegations normally associated with the like-minded group occasionally joined the non-aligned.²³⁴

As well as these negotiation groupings, there was a wide range of positions which could not easily be categorized by geography or politics. For example, some states such as Egypt, Algeria, Turkey, Sri Lanka, and some Caribbean states, wanted terrorism or regional drug trafficking to be included as crimes,²³⁵ while others believed these issues to fall under domestic law rather than the international jurisdiction.²³⁶

States recognized that their negotiating power was enhanced by joining with other delegations sharing similar views. The difficulty was that states had different views on different issues. As a result, loose coalitions developed with porous boundaries, allowing delegations to move in and out of negotiation groupings depending on the issue. By far the most cohesive grouping was the like-minded group, though even the membership and positions of the LMG were not rigid and definable.

²³² What was widely seen as obstructionism was later understood to result from linguistic misunderstandings caused by consistent translation inaccuracies and the lack of involvement by these countries in the initial negotiations for an ICC; Benedetti & Washburn, *supra* note 72 at 31.

²³³ Kirsch & Holmes, "Birth", *supra* note 63 at 10; Schabas, *supra* note 72 at 16.

²³⁴ Kirsch & Robinson, *supra* note 73 at 71.

²³⁵ Kirsch & Holmes, "Birth", *supra* note 63 at 10.

²³⁶ Kirsch & Holmes, "Conference", *supra* note 135 at 4.

3. Non-State Actors/NGOs

In addition to state governments, non-governmental organizations were instrumental in the creation and development of the ICC Statute. Throughout the process, starting with the *Ad Hoc* Committee, through the PrepCom, and at the Rome Conference, NGOs played a significant role in the development of the Rome Statute. Among the leading non-governmental organizations working on this issue were Amnesty International, Human Rights Watch, Lawyers Committee for Human Rights, the International Commission of Jurists, the International Institute of Higher Studies in Criminal Sciences, the Women's Caucus, and No Peace Without Justice.²³⁷ These eventually joined with others to become the NGO Coalition for an International Criminal Court. Most NGO contributions to the ICC process were made under the umbrella of this coalition.²³⁸

a. Coalition for an International Criminal Court (CICC)

Non-governmental organizations first started to work together on the issue of the International Criminal Court in 1994 at the instigation of the World Federalist Movement.²³⁹ The decision of the Sixth Committee of the General Assembly to call for an *Ad Hoc* Committee worried NGOs that movement towards a permanent court would be slowed down by eternal negotiations.²⁴⁰ Pace and Schense describe how the handful of NGOs involved agreed to establish an informal coalition of NGOs to work towards the

²³⁷ Bassiouni, "Historical", *supra* note 4 at 26.

²³⁸ Benedetti & Washburn, *supra* note 72 at 21.

²³⁹ Johan D. Van Der Vyver, "Civil Society and the International Criminal Court" (2003) 2 J. Hum. Rts. 425 at 427; Pace & Schense, "Role", *supra* note 80 at 110.

²⁴⁰ Pace & Schense, "Role", *ibid* at 109-10.

creation of an international court.²⁴¹ The CICC's objectives were stated as follows: "The main purpose of the NGO Coalition for an International Criminal Court is to advocate the creation of an effective and just International Criminal Court."²⁴² The NGOs involved wanted to be in a position to influence the negotiations, and in particular wanted to provide assistance to the group of like-minded states that supported the establishment of an ICC.²⁴³ Non-governmental organizations were encouraged by the successes of previous NGO coalitions working on issues of environment, disarmament, women's issues, and in particular, the International Campaign to Ban Landmines.²⁴⁴

As details about the group's mandate and methods of working together were finalized, Amnesty International took on the role of approaching other non-governmental organizations to encourage them to participate.²⁴⁵ The Coalition for an International Criminal Court was formalized on 25 February 1995. Several of the original NGOs became members of the self-selected steering committee of the CICC,²⁴⁶ with the World Federalist Movement serving as secretariat of the Coalition.²⁴⁷ Fergus Watt, Coordinator for the Canadian Network for an International Criminal Court, explains that the World

²⁴¹ *Ibid.* at 110.

²⁴² "About the Coalition" *The International Criminal Court Monitor* 7 (April 1998) at 8; Van Der Vyver, *supra* note 239 at 427.

²⁴³ Benedetti & Washburn, *supra* note 72 at 22.

²⁴⁴ Pace & Schense, "Role", *supra* note 80 at 111. Lloyd Axworthy, Canadian Foreign Minister at the time, spoke of the partnership between NGOs and governments that contributed to the success of the Landmines Treaty negotiations, and how similar principles could be applied to the ICC discussions; "Canadian Foreign Minister on ICC" *The International Criminal Court Monitor* 8 (June 1998) at 7.

²⁴⁵ Pace & Schense, "Role", *ibid.*

²⁴⁶ The Steering Committee consisted of: Amnesty International; European Law Students Association; Fédération Internationale des Ligues des Droits de l'Homme; Human Rights Watch; International Commission of Jurists; Lawyers Committee for Human Rights; No Peace Without Justice; Parliamentarians for Global Action; and World Federalist Movement. Coalition for an International Criminal Court, "Members of the Coalition for an International Criminal Court (CICC) State Their Support for an Effective and Credible Court and Challenge U.S. Insistence on Security Council Jurisdiction" Press Release (13 August 1997) [on file with author].

²⁴⁷ Pace & Schense, "Role", *supra* note 80 at 111.

Federalist Movement was a small NGO at the time and was the perfect administrative home for the Coalition since it wasn't so big as to be involved in inter-NGO politics and was trusted by everyone.²⁴⁸

The CICC membership was comprised of approximately thirty NGOs that were following the work of the *Ad Hoc* Committee, among them Amnesty International, Fédération International des Ligues des Droits de l'Homme, Human Rights Watch, the International Commission of Jurists, the Lawyers Committee for Human Rights, No Peace Without Justice, Parliamentarians for Global Action, and the World Federalist Movement.²⁴⁹

Pace and Schense describe how the number of NGOs affiliated with the CICC grew steadily: at the first PrepCom session there were 46 NGOs in the CICC; by the fifth session there were over 300 NGOs;²⁵⁰ and by the opening of the Rome Conference over 800 organizations were part of the Coalition.²⁵¹ As a result the participating NGOs were able to increase their efforts at the site of the negotiations, as well as regionally and nationally in significant ways.²⁵²

²⁴⁸ Interview of Fergus Watt, then Convenor for the Canadian Network for an International Criminal Court (24 November 2005); Marlies Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court" in Marlies Glasius, *et al.* eds., *Global Civil Society 2002* (Oxford: Oxford University Press, 2002) 137 at 146.

²⁴⁹ Pace & Schense, "Role", *supra* note 80 at 111; Benedetti & Washburn, *supra* note 72 at 21.

²⁵⁰ Pace & Schense, "Role", *ibid.* at 115, n. 23; Bassiouni, "Historical", *supra* note 4 at 25, n. 131.

²⁵¹ William R. Pace & Mark Thieroff, "Participation of Non-Governmental Organizations" in Roy S. Lee ed. *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999) 391 at 392.

²⁵² Pace & Schense, "Role", *supra* note 80 at 116.

b. Canadian Network for an International Criminal Court (CNICC)

In Canada, a coalition of non-governmental organizations came together to work in support of the creation of the ICC. The first call for participation went out in 1995, when the World Federalists of Canada announced that it would provide administrative support for the network to be called the Canadian Network for an International Criminal Court.²⁵³ As Watt explains, the CNICC, which worked closely with the New York based NGO umbrella group Coalition for an International Criminal Court, was not intended as a location for political activities of individual members, but was envisioned primarily as an information sharing network.²⁵⁴ The CNICC held regular briefings with government officials and NGOs, during PrepCom and in the lead up to Rome.²⁵⁵ While government-NGO briefings were the primary focus for CNICC efforts, the network also organized roundtable discussions on the ICC, regularly published “ICC Update” newsletters, lobbied key parliamentarians, participated in the work organized by the CICC in New York, and made key documents available to all those interested in the proceedings.²⁵⁶ These activities ensured an open flow of communication and sharing of strategies between the Canadian government and NGOs interested in the creation of the ICC.

²⁵³ Letter from Fergus Watt (August 1995) [on file with author].

²⁵⁴ *Ibid.*

²⁵⁵ Watt, *supra* note 248; see for example Canadian Network for an International Criminal Court, Briefing Notes, meeting with government officials and NGO representatives, (12 September 1995) [on file with author]; Canadian Network for an International Criminal Court, Briefing Notes, meeting with government officials and NGO representatives, (25 April 1997) [on file with author]; Canadian Network for an International Criminal Court, Briefing Notes, meeting with government officials and NGO representatives, (5 May 1998) [on file with author].

²⁵⁶ Memo from Canadian Network for an International Criminal Court (February 1997) [on file with author].

Non-governmental organizations with radically different background came together as members of the Coalition.²⁵⁷ These included women's organizations, peace and conflict resolution organizations, global governance and UN-oriented groups, and members of religious organizations. Despite the variety, organizations of legal professionals and human rights-focused groups constituted almost half the organizations registered at the Rome Conference.²⁵⁸ Some organizations were large, international organizations, like Amnesty International and Human Rights Watch, while others were smaller, regional or local groups, like the Aotearoa/New Zealand Foundation for Peace Studies, and the Stavropol Association of Women Lawyers.²⁵⁹

Naturally, NGOs with varying areas of interest did not always agree on the best way forward for the ICC. This was particularly challenging when delegates came to working out the specifics. Some NGOs came to the negotiations with extremely detailed and specific positions on "literally hundreds of issues."²⁶⁰ On the matter of gender issues within the Statute, for example, there were very heated debates among state delegates arguing from different religious and cultural backgrounds. In addition to state delegates not being able to agree, NGOs had different views on the matter as well. Amnesty International, for example, took a strong pro-gender stance, supporting the full integration

²⁵⁷ It is beyond the scope of this dissertation to cover the various interests promoted by all the NGOs involved in the ICC negotiations.

²⁵⁸ Glasius, *supra* note 248 at 141.

²⁵⁹ The latter two organizations were members of the Coalition, but were not accredited as participating NGOs at the Rome Conference. Participating Organizations as of August 1998 (list of NGOs), online: Coalition for an International Criminal Court < <http://www.igc.org/icc/html/coalition/htm> >; *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court*, Annex IV, "List of Non-Governmental Organizations Represented at the Conferences by an Observer" UN Doc. A/CONF.183/10 (1998).

²⁶⁰ Pace & Schense, "Role", *supra* note 80 at 125.

of a gender perspective into the statute of the ICC, including with regard to issues of forced abortion, and enforced pregnancy.²⁶¹ Other organizations, like REAL Women of Canada, lobbied strenuously against the inclusion of the term 'gender' in the Statute arguing that it may have impacts beyond the context of the ICC.²⁶²

Watt explains that in fact there were few areas where NGOs had strong disagreement. More often there would be a shared view of a larger question with differences only as to the degree.²⁶³ Despite differing opinions on some of the details, by and large NGOs working together under the CICC umbrella were able to focus on the main points required to ensure an independent and effective court – a court with automatic jurisdiction and an independent prosecutor. Indeed, there was an interesting tension at Rome, since the Coalition itself resisted taking positions on the issues.²⁶⁴ Instead it preferred “to maintain both the plurality of ideas and objectives represented by the coalition and the solidarity among its members.”²⁶⁵ In any case, despite disagreement on some specifics, the strong NGO support for an ICC demonstrated the massive popular backing for the initiative.²⁶⁶

²⁶¹ Amnesty International advocated that recognition be made of gender-specific crimes committed against women, that judges and staff of the court receive special training on issues of violence against women, that female victims and witnesses receive adequate security; Amnesty International, “The International Criminal Court: Ensuring Justice for Women” (March 1998).

²⁶² REAL Women of Canada, Position paper prepared by the David M. Kennedy Center for International Studies (? 1998) [on file with author]; “If ‘gender,’ as used in the ICC Draft Statute, in fact means something beyond ‘male’ and ‘female,’ the ICC will drastically restructure societies throughout the world.”

²⁶³ Watt, *supra* note 248.

²⁶⁴ Pace & Schense, “Role” *supra* note 80 at 125.

²⁶⁵ Benedetti & Washburn, *supra* note 72 at 23.

²⁶⁶ Robertson, *supra* note 161 at 340; the massive support of NGOs to the creation of the ICC demonstrated the interest of the global populace in the ICC and the growing strength of global civil society generally. Ultimately over 800 NGOs joined the lobby for an ICC. 11; Benedetti & Washburn, *ibid.* at 22.

Because NGOs had been such strong contributors during the preparatory stages, they were given unprecedented access to meetings at the Rome Conference.²⁶⁷ In its resolution for the Rome Conference the General Assembly included guidelines for the participation of non-governmental organizations.²⁶⁸ NGOs were entitled to attend plenary meetings and most subsidiary meetings. The general rule was that NGOs would attend as observers. If a country objected, the chair of the working group would ask the NGOs to leave. Watt points out that it helped that most chairs of working groups were from like-minded states and favourably disposed to NGOs.²⁶⁹ The fact that NGOs could participate as observers meant that their presence was felt in the room. They could receive copies of official documents, and distribute their materials to delegates. Once a session ended, NGO members could immediately approach – and be approached by – key delegates.²⁷⁰ In addition, NGOs were entitled to address the opening and closing sessions.²⁷¹ A total of 236 NGOs were accredited to participate in the Rome Conference, and they were represented by an estimated 450 individuals.²⁷²

²⁶⁷ Bassiouni, "Negotiating", *supra* note 84 at 455. Negotiations at the Vienna Conference on Human Rights in 1993, and the Beijing Conference on Women in 1995 set positive precedents for greater NGO participation; Benedetti & Washburn, *ibid.* at 22.

²⁶⁸ GA Res 160, UN GAOR, 52d Sess., UN Doc. A/RES/52/160 (1998); Bos, *supra* note 71 at 59.

²⁶⁹ Watt, *supra* note 248.

²⁷⁰ *Ibid.*

²⁷¹ GA Res 160, UN GAOR, 52d Sess., UN Doc. A/RES/52/160 (1998); only a few NGOs were given this option; Bassiouni, "Historical", *supra* note 4 at 23.

²⁷² Pace & Thieroff, *supra* note 251 at 392; some of the larger NGO delegations surpassed the delegation size of some nations, for example, Amnesty International and Human Rights Watch; Philip Nel, "Between counter-hegemony and post-hegemony: The Rome Statute and normative innovation in world politics" in Andrew F. Cooper, *et al.* eds., *Enhancing global governance: Towards a new diplomacy?* (New York: United Nations University Press, 2002) 152 at 158. Pace & Schense point out that the number of accredited NGOs may be misleading in that it does not reflect the sub-umbrella groups that formed under the CICC, such as the Women's Caucus for Gender Justice. Indeed the true numbers are closer to 500 NGOs participating at Rome, and 1000 NGOs supporting the efforts worldwide; William R. Pace & Jennifer Schense, "Coalition for the International Criminal Court at the Preparatory Commission" in Roy S. Lee ed. *The International Criminal Court* (Ardley, NY: Transnational Publishers, 2001) 705 at 707, n. 6 [Pace & Schense, "Coalition"].

Over the course of the Preparatory Commission sessions the CICC also developed a relationship with the UN Secretariat, and in particular with the Office of Legal Affairs and the bureau of the Preparatory Committee. When the presence of NGOs was challenged by a few delegations in the second PrepCom session, the Office of Legal Affairs and the bureau of the Preparatory Committee met and determined that NGOs had the right to have access to the Preparatory Committee.²⁷³ This conclusion confirmed an earlier decision and recommendation that plenary sessions would be open.²⁷⁴ In addition, informal working group meetings were also opened to NGO attendance.²⁷⁵ As a result, NGOs had official access to many of the negotiating sessions; they also had the right to share NGO materials and information with delegates.²⁷⁶ Additionally, CICC members held regular meetings with the bureau of the Preparatory Committee where they also distributed materials.²⁷⁷

c. Women's Caucus

Of particular note among NGOs working together to promote human rights in the ICC negotiations is the group that came together as the Women's Caucus for Gender Justice in the ICC. The Women's Caucus, a sub-section of the CICC group, came into being in February 1997²⁷⁸ when NGOs concerned with women's rights realized that women's issues were not being incorporated into the discussions²⁷⁹ and were not making it into the

²⁷³ Pace & Schense, "Role", *supra* note 80 at 120.

²⁷⁴ Benedetti & Washburn, *supra* note 72 at 23.

²⁷⁵ *Ibid.*

²⁷⁶ Pace & Schense, "Role", *supra* note 80 at 120.

²⁷⁷ *Ibid.*

²⁷⁸ Women's Caucus for Gender Justice in the International Criminal Court "Gender Justice and the ICC" (Recommendations and Commentary to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 1998) [on file with author].

²⁷⁹ Bedont & Matas, *supra* note 170 at 21.

Statute. The Women's Caucus pushed for gender perspectives to be integrated into all aspects of the ICC's jurisdiction, structure, and operation.²⁸⁰ One of the more controversial positions taken by the Women's Caucus was that of promoting use of the term *gender* as differentiated from *sex*.²⁸¹ They succeeded in having gender crimes and sex crimes specifically listed as war crimes and crimes against humanity,²⁸² as well as for special measures for victims of sexual violence.²⁸³ Valerie Oosterveld, an NGO delegate on the Canadian negotiating team with a particular responsibility for gender issues, reflects that the Women's Caucus worked closely with the like-minded group,²⁸⁴ and as a result was successful in having virtually all of its recommendations included in the ICC Statute,²⁸⁵ and in convincing most delegations that gender references needed to be included in the Statute.²⁸⁶

By the time of the final session of the PrepCom the Women's Caucus included approximately 300 supporters, women's organizations, legal and gender experts, representing all regions of the globe.²⁸⁷ These organizations actively lobbied their own governments at home and delegations in Rome.²⁸⁸ The Women's Caucus is well-recognized for its ability to maintain focus in principles and cohesion of members despite

²⁸⁰ "Core Principles of the Women's Caucus" *The International Criminal Court Monitor* 8 (June 1998) at 13; see generally Women's Caucus for Gender Justice in the International Criminal Court "Gender Justice and the ICC" (Recommendations and Commentary to the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 1998) [on file with author].

²⁸¹ The concept *sex* is restricted to biological differences, whereas the term *gender* takes into account differences between women and men because of their socially constructed roles; Hill, *supra* note 1 at 90.

²⁸² Van Der Vyver, *supra* note 239 at 432.

²⁸³ Bedont & Matas, *supra* note 170 at 21.

²⁸⁴ Interview of Valerie Oosterveld (26 May 2000); Hill, *supra* note 1 at 89 [Oosterveld, "Interview 2000"].

²⁸⁵ Van Der Vyver, *supra* note 239 at 431.

²⁸⁶ Cate Steains, "Gender Issues" in Roy S. Lee ed. *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999) 357 at 361.

²⁸⁷ "Women's Caucus Recommendations to PrepCom Sixth Session" *The International Criminal Court Monitor* 7 (April 1998) at 5. The Women's Caucus also had offices with permanent staff in New York.

²⁸⁸ Hill, *supra* note 1 at 89, n. 409; see www.iccwomen.org.

the pressures of the negotiations. As Pace and Schense put it, “[t]he Women’s Caucus demonstrated a remarkable capacity for keeping its diverse and talented delegation of women from around the world focused on the inclusion of the gender-related crimes in the Statute, even in the face of sustained opposition from a number of States.”²⁸⁹ As with the CICC itself, the Women’s Caucus continued its work after the Rome Conference to ensure that the gender related aspects of the ICC were properly implemented.²⁹⁰

4. Activities of NGOs

Both prior to the diplomatic conference – at and during *Ad Hoc* Committee meetings and PrepComs – and in Rome, NGOs made significant contributions to the negotiations.

While there is a fair amount of overlap between these categories, NGO activities can generally be broken down into four streams: 1) advocacy; 2) education and information-sharing; 3) logistics organization; and 4) media and public outreach.

a. Advocacy

Advocacy is one of the areas for which non-governmental organizations are most well known. NGOs have a long and established track record of arguing that governments should take a certain position on any given subject. In acting as advocates NGOs used the various avenues open to them, and the skills to which they had access, including consulting, holding strategy sessions, lobbying, and contributing NGO representatives to government delegations.

²⁸⁹ Pace & Schense, "Role", *supra* note 80 at 134.

²⁹⁰ Hill, *supra* note 1 at 89, n. 409.

During the two meetings of the *Ad Hoc* Committee in 1995, the NGOs began to forge cooperative working relations with the growing number of like-minded states. Pace and Schense describe an open and collaborative environment at the *Ad Hoc* meetings which made it easier for state delegates to share the experience of the process with NGOs that were present.²⁹¹ While the CICC was initially small – around thirty NGOs were observing the *Ad Hoc* Committee work – and in the process of developing its own processes, the NGO presence at the *Ad Hoc* Committee allowed for governments and NGOs to begin to consult with one another and to develop ways of working together that would carry through to the Rome Conference.²⁹² During PrepCom and at Rome, NGOs continued to create opportunities to hold consultations with governments.

NGOs held strategy sessions with national delegations at the *Ad Hoc* Committee meetings, and stayed in contact with delegations of like-minded states between meetings.²⁹³ As PrepCom progressed, like-minded states began to rely on NGO consultations in preparation for plenary debates, and for the development of technical issues in the Draft Statute.²⁹⁴ Pace and Schense relate how the Coalition used this reliance to encourage LMG countries to be strategic in their role in drafting the treaty, including considering the strength they would have if working as a group.²⁹⁵ Indeed, the fact that the LMG adopted a list of six principles to guide their efforts was largely a result of their interaction with NGOs.²⁹⁶

²⁹¹ Pace & Schense, "Role", *supra* note 80 at 112.

²⁹² *Ibid.* at 113.

²⁹³ *Ibid.* at 114.

²⁹⁴ *Ibid.* at 119.

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.* Benedetti and Washburn explain that though the principles were never put into writing they were discussed frequently. They were: the independence of the Court from the Security Council, the

From the beginning of the first negotiations, NGOs lobbied governments in order to promote the creation of the court.²⁹⁷ Coalition members lobbied governments in national capitals²⁹⁸ to encourage them to become involved in the process of negotiating the ICC.²⁹⁹ National departments of justice, foreign affairs, and defence were all subject to NGO approaches.³⁰⁰ In addition, NGOs used other opportunities to raise the issues with government officials, such as inter-governmental conferences such as the American Heads of State summit in Santiago de Chile in 1998.³⁰¹ NGOs also benefited from the more relaxed atmosphere of the informal meetings between PrepCom sessions, where NGO and government delegates were seen as equals and many of the usual diplomatic restrictions were lifted.³⁰²

Unsympathetic delegations felt direct pressure when they were publicly shamed by NGOs,³⁰³ while governments that supported the establishment of an ICC had both practical and philosophical support of NGOs. During the PrepCom sessions the LMG and the Coalition began to confer closely and regularly on issues such as strategies for

independence of the prosecutor, the extension of the Court's jurisdiction to cover all core crimes, the full cooperation of states with the Court, a successful diplomatic conference, that the Court have the power to decide on the ability of national judicial systems to proceed on cases; Benedetti & Washburn, *supra* note 72 at 21.

²⁹⁷ Arsanjani, *supra* note 142 at 23.

²⁹⁸ Bassiouni, "Historical", *supra* note 4 at 26. It has been argued that NGOs were largely unsuccessful in this activity during the PrepCom talks; Benedetti & Washburn, *supra* note 72 at 21.

²⁹⁹ Pace & Schense, "Role", *supra* note 80 at 117; this approach included providing summaries of the negotiations that had taken place to date so as to facilitate joining the discussions. In Canada, this lobbying most often took the form of briefing sessions between government officials and NGOs.

³⁰⁰ Glasius, *supra* note 248 at 147.

³⁰¹ *Ibid.* at 148.

³⁰² *Ibid.* at 149.

³⁰³ Arsanjani, *supra* note 142 at 23.

debates and specific technical elements, and this relationship continued as the draft statute evolved.³⁰⁴

Regular meetings between the Coalition and the like-minded states contributed to the development of principled approaches to key issues.³⁰⁵ NGO representatives at PrepCom meetings and at the Rome Conference used every opportunity before and after working party meetings, plenary sessions, and corridor encounters to press friendly governments to promote a strong court.³⁰⁶ Indeed, it has been pointed out that lobbying was so much a core activity of NGOs at the Conference, that there was no separate NGO Forum at the Rome Conference as there is at most international conferences.³⁰⁷

In the lead-up to the Rome diplomatic conference, some states came to recognize the unique contribution to be made by non-governmental organizations and invited select NGOs to participate as part of government delegations.³⁰⁸ The Canadian delegation, for example, included two NGO representatives, David Matas³⁰⁹ and Valerie Oosterveld.³¹⁰ While these members were expected to participate as full members of the government delegation, and to publicly take the positions the government was taking, they were

³⁰⁴ Pace & Schense, "Role", *supra* note 80 at 119.

³⁰⁵ Benedetti & Washburn, *supra* note 72 at 23; William R. Pace, "The Relationship Between the International Criminal Court and Non-Governmental Organizations" in Herman A.M. von Hebel, *et al.* eds., *Reflections on the International Criminal Court* (The Hague: T.M.C. Asser Press, 1999) 189 at 202.

³⁰⁶ Watt, *supra* note 248; there was always some government delegate who would be willing to promote something on behalf of the NGOs.

³⁰⁷ Glasius, *supra* note 248 at 150.

³⁰⁸ Pace & Schense, "Role", *supra* note 80 at 117-118; Some countries with NGO participants were Australia, Canada, and Switzerland. Van der Vyver mentions civil society representatives as advisors of delegation members of Canada, Australia, Bosnia and Herzegovina, Denmark, and Germany; Van Der Vyver, *supra* note 239 at 429.

³⁰⁹ Matas served on the delegation of the Canadian government on behalf of Amnesty International.

³¹⁰ Oosterveld served on the Canadian government delegation on behalf of the International Centre for Human Rights and Democratic Development (now *Rights and Democracy*).

nevertheless well-placed to share the views of their NGO on an informal basis. Matas relates that when he was not in official meetings, he spent most of his time in the NGO lounge area, thereby creating a valuable link between the Canadian delegation and NGOs.³¹¹ This was a very direct avenue for NGOs to advocate their positions, as they had the ear of both other members of their delegation, and participants on other delegations. Non-governmental organizations had great input even in the selection of which NGO representatives would serve on such delegations. The NGO representatives on the Canadian delegation to the Rome Conference were recommended by the CNICC.³¹²

b. Education & Information-Sharing

Another role NGOs have traditionally been effective in carrying out is education and information-sharing. In the context of the ICC negotiations, NGOs did this by providing subject matter expertise, by promoting national and regional education on the ICC, by facilitating caucuses' strategy meetings, and by providing coverage of all the meetings taking place at the Rome Conference.

One of the ways in which NGOs supported their advocacy work with governments was the provision of education on matters where NGOs had more expertise than many governments. The CICC published expert papers helping to educate delegates on key

³¹¹ Interview of David Matas, NGO representative on Canadian government delegation to the ICC negotiation in Rome (6 December 2005) [Matas "Interview"].

³¹² Letter from Alan H. Kessel, Director United Nations, Criminal and Treaty Law Division of the Department of Foreign Affairs and International Trade, to Fergus Watt (12 August 1998) [on file with author].

issues.³¹³ These expert papers usually took one of two forms: journal articles, or NGO reports. In both cases the intention was to inform and influence the readers.³¹⁴

One of the functions of expert papers was to provide in-depth analysis of the topics being considered. Throughout the negotiations NGOs continued to produce papers offering expert analysis of given issues under consideration, and made these available to government delegates and UN Secretariat officials.³¹⁵ These expert papers assisted delegates in gaining a deeper understanding³¹⁶ of the various facets of the issues under debate. Amnesty International, for example, produced a series of five papers from January 1997 to May 1998, with the title "Making the Right Choice."³¹⁷ These position papers were designed as easy-to-use manuals and covered the relevant international law, standards, and practice of the topics under discussion. They also identified strengths and weaknesses of the current proposals under each chapter of the Statute. Such papers were particularly valuable as discussions shifted from philosophical to technical as PrepCom meetings progressed.³¹⁸ A second function of expert papers was to provide options for the negotiation of specific items. CICC member NGOs further contributed to the creation

³¹³ Pace & Schense, "Role", *supra* note 80 at 114; these and other materials were also made available through an electronic listserv.

³¹⁴ Glasius, *supra* note 248 at 150.

³¹⁵ Arsanjani, *supra* note 142 at 23; Pace & Schense, "Role", *supra* note 80 at 117. Papers were submitted by both groups and individuals including Amnesty International, Human Rights Watch, International Commission of Jurists, Lawyers Committee for Human Rights, World Federalist Movement, Benjamin Ferencz, and William R. Pace. For a list of expert papers submitted at PrepCom and at Rome, see the CICC website at <http://www.iccnw.org/romearchive/papers.html>.

³¹⁶ Bassiouni, "Historical", *supra* note 4 at 26.

³¹⁷ [on file with author].

³¹⁸ Pace & Schense, "Role", *supra* note 80 at 116.

of an ICC by examining the ramifications of the different positions on various issues, and in proposing options to government delegations.³¹⁹

NGOs also made available the substantial legal and technical expertise they had accumulated over the years,³²⁰ in the form of briefings and legal memoranda.³²¹ Indeed, Watt points out that because NGOs were usually permitted to attend discussions as observers, they were occasionally called upon to contribute to discussions in areas where they had expertise.³²² NGO expertise was also called upon when text was being drafted.³²³

NGOs also facilitated formal sessions and informal conversations between NGO experts and delegates, which stimulated creative thinking, and allowed for the sharing of perspectives and advice.³²⁴ Pace and Schense describe, how the CICC Secretariat shared articles by NGOs and governments on various issues through the *International Criminal Court Monitor*, a regular newsletter.³²⁵ Indeed, the value of these analyses became so appreciated that they were soon expected and sought out by delegates.³²⁶

³¹⁹ Bassiouni, "Historical", *supra* note 4 at 26. See for example, Human Rights Watch, "Justice in the Balance – Recommendations for an Independent and Effective International Criminal Court" (June 1998), online Human Rights Watch <http://www.hrw.org/reports98/icc>.

³²⁰ Kirsch & Holmes, "Conference", *supra* note 135 at 5; Bassiouni, "Negotiating", *supra* note 84 at 455. During the Conference legal experts and interns were made available by the CICC to a number of government delegations, including many from developing countries.

³²¹ Arsanjani, *supra* note 142 at 23. See for example, Lawyers Committee for Human Rights, "The International Criminal Court Trigger Mechanism and the Need for an Independent Prosecutor" (July 1997), online: Coalition for an International Criminal Court <http://www.iccnw.org/romearchive/papers/4PrepCmt/LCHRTriggerMechanism.doc>.

³²² Watt, *supra* note 148.

³²³ *Ibid.*

³²⁴ Bassiouni, "Historical", *supra* note 4 at 26; Pace & Schense, "Role", *supra* note 80 at 113.

³²⁵ Pace & Schense, "Role", *ibid.* at 117.

³²⁶ *Ibid.*

Coalition NGOs participated in national and regional level work to raise the profile of the ICC discussions taking place, and to build popular support through civil society networks.³²⁷ Coalition members campaigned actively in their home countries³²⁸ through events such “as public seminars and debates, book fairs, meetings with embassy officials, ... and letters to governments.”³²⁹ These activities took place in over eighty countries, and resulted in publications in languages as diverse as Arabic, Hindi, Romanian, and Turkish.³³⁰

Conferences and similar gatherings in particular contributed to increased civil society participation. Expert meetings, public debates, seminars, symposia, and workshops were generally organized by NGOs alone or in cooperation with academic institutions, and brought in speakers and resources from a range of societal groupings interested in the ICC.³³¹ Coalition members also made efforts to include the participation of civil society groups at the negotiations. During the PrepCom CICC NGOs met with civil society representatives from their own countries and broader regions to share different viewpoints and to enhance their understanding of various positions.³³²

³²⁷ *Ibid.* at 114.

³²⁸ There was little activity of this sort in Canada beyond a Meeting of Experts hosted by ICHRDD (now Rights & Democracy) from 3-4 March 1998, entitled *Accountability for Serious International Crimes: Towards the Creation of the International Criminal Court.*

³²⁹ Pace & Schense, "Role", *supra* note 80 at 122.

³³⁰ *Ibid.*

³³¹ Glasius, *supra* note 248 at 150.

³³² Pace & Schense, "Role", *supra* note 80 at 122; this exercise also allowed civil society groups that did not feel they were being adequately represented at the negotiations to have a sense that their voices were being heard.

At the PrepComs and continuing in Rome, the CICC convened regional caucuses to assist in organizing discussions.³³³ The Coalition also convened sectoral caucuses, such as those in the areas of gender justice, victims' rights, and children's rights.³³⁴ Pace describes daily general strategy meetings for NGOs, weekly meetings with Conference chairs and coordinators, and regular meetings with governments, all organized by the CICC.³³⁵ NGOs were well-placed to act as hubs for information-sharing between governments and between governments and experts, including NGOs. Informal dialogue was further fostered by the numerous regionally-focused meetings, convened by the CICC, between governments and NGOs.³³⁶ In addition to national level efforts, CICC members met regularly with state delegates at the negotiations to exchange information and clarify positions.³³⁷

Because the negotiations were so large, with often ten or more meetings going on at once, only the largest delegations could cover all the meetings with their own members.³³⁸ To assist with this problem the CICC instituted 13 teams to cover negotiations on the specific parts of the Statute, roughly following the Parts of the Statute.³³⁹ Watt describes how team members sat in on meetings as observers, and spoke with delegates between

³³³ Nel, *supra* note 272 at 158. Regional meetings included a highly effective tri-continental alliance which incorporated groups from Africa, Asia, and Latin America; Pace & Thieroff, *supra* note 251 at 393.

³³⁴ Pace, *supra* note 305 at 202; Pace & Thieroff, *supra* note 251 at 392; Van Der Vyver, *supra* note 239 at 428.

³³⁵ Pace & Thieroff, *ibid.* at 393.

³³⁶ The CICC also convened several sessions for Francophone and Spanish-speaking countries; *Ibid.* at 394; Nel, *supra* note 272 at 158.

³³⁷ Pace & Schense, "Role", *supra* note 80 at 122.

³³⁸ Pace & Thieroff, *supra* note 251 at 394. The joke at the Rome Conference was that the NGO coalition was the largest delegation in Rome; . Very few country delegations, and no single NGO could have covered all the meetings on its own; Pace & Schense, "Role", *supra* note 80 at 127.

³³⁹ "All Roads Lead to ... Rome Treaty Conference Opens June 15" *The International Criminal Court Monitor* 8 (June 1998) at 1; Pace & Schense, "Role", *ibid.* at 126.

meetings.³⁴⁰ The teams then provided daily reports on negotiations, both written one-pagers, and verbal reports, to NGOs, as well as to governments.³⁴¹ By making information readily available in this way, the Coalition ensured that NGO members, as well as government delegates, could get a quick overview of what was going on in all aspects of the negotiations.³⁴²

c. Logistics Organization

In order to contribute effectively during the *Ad Hoc* Committee meetings, and the PrepCom meetings, the Coalition had to be well-organized in terms of both NGO participation, and the way its members dialogued with governments. This was relatively easy initially, when both the negotiations and the number of CICC members was small. The Coalition's skills in organization grew as did the numbers and general interest in the ICC negotiations, as it provided logistical support to NGOs, coordinated experts volunteering their time, and provided support to Coalition members trying to influence home governments.

By the time of the Rome Conference the CICC had been recognized as a reputable organization, and as a result the Coalition Secretariat was given the task of listing the NGOs that were seeking to participate in Rome, as well as developing and maintaining a

³⁴⁰ Watt, *supra* note 248.

³⁴¹ *Ibid.*; Pace & Thieroff, *supra* note 251 at 394; Benedetti & Washburn, *supra* note 72 at 32; Nel, *supra* note 272 at 158; Pace & Schense, "Role", *supra* note 80 at 126; Van Der Vyver, *supra* note 239 at 428.

³⁴² Watt, *supra* note 248; government missions held their own briefing sessions, but the CICC briefings were seen to be more useful by many; Pace & Schense, "Role", *ibid.* at 128.

system for accreditation of NGOs.³⁴³ The result was one less duty for the UN Secretariat, and an established position as key participant for the CICC.³⁴⁴ Pace and Schense point out that it is important to distinguish between the CICC and the Coalition Secretariat. The former was the coalition of NGOs which took positions on issues and lobbied delegates. The latter remained neutral vis-à-vis the negotiations and existed primarily to support NGOs and others in the process.³⁴⁵ The CICC also provided staff for on-site registration of NGO delegates, provided hospitality and communications services to NGOs, and hosted a reception for NGOs to improve interaction between government and NGO delegates. Watt states that hundreds of volunteers contributed to the work of the CICC Secretariat.³⁴⁶

In addition to practical logistical support, the CICC sponsored experts and students to attend the Conference and assist delegations from developing countries.³⁴⁷ The CICC translated documents and reports, and provided interpretation services for NGOs and, in some cases, for countries.³⁴⁸ Indeed, the majority of the Coalition Secretariat's work

³⁴³ *Draft Report of the Preparatory Committee*, A/AC.249/1998/L.16, 1998, summarized in Bassiouni, "Historical", *supra* note 4 at 22-23; Pace & Schense, "Role", *ibid.* at 125; Van Der Vyver, *supra* note 239 at 428; Bos, *supra* note 71 at 59.

³⁴⁴ The point has been made that because William Pace, as convener of the CICC, kept NGOs so well organized and represented NGOs so well vis-à-vis the UN, the conference organizers remained well-disposed to the NGOs participating in Rome; Van Der Vyver, *supra* note 239 at 428.

³⁴⁵ Pace & Schense, "Role", *supra* note 80 at 125.

³⁴⁶ Watt, *supra* note 248.

³⁴⁷ Pace & Thieroff, *supra* note 251 at 393ff. Between 50-80 experts from NGOs in developing countries were supported by the CICC; Pace, *supra* note 305 at 202. The NGO No Peace Without Justice sponsored many experts to sit on delegations, particularly from developing countries, through their technical assistance program; Glasius, *supra* note 248 at 151.

³⁴⁸ Pace, *ibid.* at 202.

during the Rome Conference revolved primarily around supplying support services for Coalition members, as well as to government delegations and the UN.³⁴⁹

When it was felt that a delegation was compromising on key principles, the CICC provided informal reinforcement by using its national networks to contact ministers, parliamentarians, and the media in the capital of the country in question.³⁵⁰ The CICC also offered more direct assistance to governments by sponsoring interns and legal experts who could become members of government delegations as interns.³⁵¹

d. Media and Public Outreach

NGOs took on the role of primary contact for the media by making information easily accessible, by issuing press releases, and conducting interviews. In addition, CICC members organized some demonstrations in Rome.

From early in the negotiations, the CICC was the main source of information for what was happening in the ICC negotiations. Pace and Schense discuss how in 1995 the Coalition created a “listserv” to quickly disseminate information to NGOs and governments, and a year later the CICC established a website on the ICC negotiations.³⁵² As it was able, the Coalition extended these services in key languages other than English.³⁵³ In addition, individual membership organizations, like Amnesty International

³⁴⁹ Pace & Schense, “Role”, *supra* note 80 at 125; Pace & Schense estimate that as much as 90 percent of the Coalition’s work was in providing services.

³⁵⁰ Glasius, *supra* note 248 at 150. NGOs have tried to do this at many previous conferences, but Rome was the first time it was done effectively; Pace & Thieroff, *supra* note 251 at 395.

³⁵¹ Nel, *supra* note 272 at 158; Pace, *supra* note 305 at 202; Watt, *supra* note 248.

³⁵² Pace & Schense, “Role”, *supra* note 80 at 114.

³⁵³ *Ibid.* at 129.

and some churches, disseminated information on the development of the court to and through their members.³⁵⁴

In Rome the CICC arranged for two daily publications, and an on-line bulletin.³⁵⁵ *Terra Viva*, *On-the-Record*, and the *ICC Monitor* were the only sources of print and electronic coverage of the proceedings.³⁵⁶ The daily *Terra Viva* was well-regarded and had a wide readership. As Kirsch and Holmes put it, the paper "...discussed problems of principle, reported on regional or national situations or positions, and reviewed developments at the conference itself."³⁵⁷

Prior to the Rome Conference, the CICC facilitated awareness raising efforts by NGOs and other interested parties by providing background information, synopses, and other materials to work from.³⁵⁸ This allowed NGOs to use their in-house media infrastructures to inform Canadians with whom they were in communication.

While PrepCom meetings were open to NGOs, media was barred from the sessions, and therefore had to rely on NGO reports of the negotiations.³⁵⁹ The CICC cooperated with the UN Correspondents Association to hold news conferences at the PrepComs.³⁶⁰ Once the Conference got underway, local and international media were anxious for information

³⁵⁴ Glasius, *supra* note 248 at 151.

³⁵⁵ Pace & Schense, "Role", *supra* note 80 at 129.

³⁵⁶ Nel, *supra* note 272 at 158.

³⁵⁷ Kirsch & Holmes, "Birth", *supra* note 63 at 11.

³⁵⁸ CNICC, Memo (February 1997) [on file with author]; Letter from Fergus Watt to Iris Almeida, Director of Programmes, International Centre for Human Rights and Democratic Development (11 March 1998) [on file with author].

³⁵⁹ Benedetti & Washburn, *supra* note 72 at 24.

³⁶⁰ *Ibid.*

and got very little from governments during the negotiations. As a result, they looked to the NGOs for information about what was happening during the talks.³⁶¹ The Coalition provided regular briefings for international and regional press representatives.³⁶² The CICC organized one-on-one sessions for members of the press with Coalition experts.³⁶³ In addition, NGOs provided information to national media in their home countries³⁶⁴ allowing information to be disseminated to audiences around the world. Watt describes the series of phone interviews he gave for news shows, one after another across the Canadian time zones.³⁶⁵

Some Coalition members, such as Amnesty International, organized marches by candle-light and demonstrations to promote their advocacy.³⁶⁶ At least one demonstration took place inside the facilities. On the third day of the Conference the Mothers of Plaza de Mayo protested the disappearance of political prisoners in Argentina while the Justice Minister of Argentina was speaking. They were forcibly removed and security measures were put in place to avoid future incidents.³⁶⁷ Nevertheless, public demonstrations continued outside the FAO building. As one participant reported, "One evening hundreds of candles shine invitingly in front of the FAO. Another evening activists and some representatives of the world public are lying down on the hot asphalt, holding hands in silence."³⁶⁸

³⁶¹ Watt, *supra* note 248.

³⁶² Pace & Thieroff, *supra* note 251 at 394; Pace, *supra* note 305 at 202.

³⁶³ "NGO Activities in Rome" *The International Criminal Court Monitor* 10 (November 1998) at 11.

³⁶⁴ Watt, *supra* note 248.

³⁶⁵ *Ibid.*

³⁶⁶ Pace & Schense, "Role", *supra* note 80 at 128.

³⁶⁷ Van Der Vyver, *supra* note 239 at 429.

³⁶⁸ Tallgren, *supra* note 128 at 688. These were a "human carpet" organized by Amnesty International to represent the victims of genocide, war crimes, and crimes against humanity, and a 24-hour vigil organized

It has been widely recognized that the work of the NGOs was professional and productive and that the participation of NGOs in the creation of the ICC Statute “significantly contributed to the positive outcome in Rome.”³⁶⁹ Through the tireless activities of the CICC and other NGOs, the work of non-governmental organizations sustained and strengthened the momentum of the process both in the lead up to Rome and during the Conference itself.³⁷⁰

5. Issues Facing the Conference

Once all the participants had arrived in Rome, they had to start working through a multitude of substantive issues that had to be resolved in order for the International Criminal Court to be viable. Despite the high degree of unity of purpose shared by the delegates at the Rome Conference, there were some conceptual differences which created difficulties in negotiations. One of the most basic problems was how to make very different legal systems work together.³⁷¹ Elements of the inquisitorial model used in civil law systems, and of the adversarial approach of common law systems were ultimately melded in the Statute of the ICC.³⁷² Though the basic structure of the ICC takes the shape of a common law system of justice, provisions dealing with general principles of criminal

by No Peace Without Justice to celebrate or mourn the final result of the conference; Glasius, *supra* note 248 at 152.

³⁶⁹ Bassiouni, "Historical", *supra* note 4 at 26.

³⁷⁰ Pace & Thieroff, *supra* note 251 at 393; Bassiouni, "Historical", *ibid.* at 26; Benedetti & Washburn, *supra* note 72 at 33; Pace & Schense, "Role", *supra* note 80 at 115.

³⁷¹ In addition to the problem of meshing different legal systems, the delegates had to ensure that the Rome Statute would be compatible with existing international law, including the Charter of the United Nations, the role of the Security Council, humanitarian law, and human rights law. These concerns are referred to in the provision regarding applicable law (Art. 21), and are apparent in many provisions in Part 2 relating to the definition of crimes (Art. 5-8); Kirsch, "Development", *supra* note 137 at 457-8.

³⁷² Antonio Cassese, "The Statute of the International Criminal Court: Some Preliminary Reflections" (1999) 10 Eur. J. Int'l L. 144 at 168ff; Benedetti & Washburn, *supra* note 72 at 16.

law are a hybrid of the two systems.³⁷³ There is no investigating judge or chamber, and investigations and prosecutions are left to the Prosecutor. In addition, the adversarial system is apparent in that evidence is presented through oral proceedings and exhibits by parties to the trial.³⁷⁴

As well as the basic issue of which system of justice would be most appropriate for the international criminal court, there were several other fundamental issues around which much of the negotiation took place, namely definitions of crimes, the principle of complementarity, automatic jurisdiction, state acceptance of jurisdiction, and the trigger mechanisms. Jurisdictional issues were by far the most difficult issues to find agreement on, indeed, it was a point on which the entire negotiations almost failed.³⁷⁵

The crimes addressed in the Rome Statute are those which are considered the most serious by the international community: genocide, war crimes, crimes against humanity,

³⁷³ This is especially obvious in Part 3 (General Principles of Criminal Law), Part 5 (Investigation and Prosecution), Part 6 (The Trial), and Part 8 (Appeal and Revision); Kirsch, "Development", *supra* note 137 at 456.

³⁷⁴ To complement the common law model, elements of the civil law approach have been incorporated. Some of the principal elements are as follows. Firstly, the Prosecutor is not seen as representative for one side only, but rather is responsible for investigating both incriminating and exonerating evidence (Art. 54(1)(a)). Secondly, the Prosecutor is under the scrutiny of the Pre-trial Chamber when it comes to proceeding with an investigation (Art. 15(3)). Thirdly, there is a combination of criminal and civil aspects to a crime in that the victims may take part in the proceedings, and may seek compensation or reparation (e.g. Art. 15, 68, 75). Fourthly, the Trial Chamber has a proactive role with regard to evidence and may order the production of additional evidence to that already presented during trial (Art. 64(5)(d)). And fifthly, the accused has the right to make an unsworn oral or written statement in his or her defense, during the trial (Art. 67(1)(h)). The negotiation of these provisions required a good deal of compromise on the parts of several States. Though there is an amalgam of the two systems in many provisions of the Rome Statute, there are also provisions which do not specify whether an adversarial or inquisitorial approach is to be taken; Cassese, *supra* note 372 at 169.

³⁷⁵ Kirsch, "Development", *supra* note 137 at 458.

and aggression.³⁷⁶ Although much of the ground work had been laid in preparations for previous international agreements, these crimes were carefully defined within the Rome Statute.³⁷⁷ It was important to the delegates that the international criminal court recognize recent developments in international humanitarian law, for example, the inclusion of crimes committed against particularly vulnerable groups such as women and children. Further, the Rome Statute expands the definition of war crimes by including crimes committed in internal conflicts, and incorporates into crimes against humanity crimes that are committed both during armed conflict and peace situations.³⁷⁸

The principle of complementarity was key to the successful adoption of the Rome Statute.³⁷⁹ The ICC's jurisdiction takes effect only when national judicial systems are unable or unwilling to investigate and prosecute offenders, and it is the Court, not states, that has the ultimate decision as to whether a case is admissible.³⁸⁰ There was legitimate concern among states that the ICC would have jurisdiction over and above national judicial systems and that it would act as a court of final appeal. The principle of complementarity makes the ICC redundant if national judicial systems function properly.

Closely linked to complementarity was the negotiation surrounding the acceptance of jurisdiction. Some states argued for a broad, almost universal jurisdiction for the Court,

³⁷⁶ The crime of aggression is included in order to indicate widespread acknowledgement of the importance of this crime, even though the Court cannot exercise jurisdiction over the crime of aggression until a definition and relevant preconditions are adopted by a Review Conference; *Ibid.*

³⁷⁷ Kirsch, "Consensus", *supra* note 65 at 438.

³⁷⁸ The point of most contention in the context of war crimes was crimes committed during internal armed conflict. Controversy also arose surrounding the list of weapons to be included as prohibited weapons under war crimes; Kirsch & Holmes, "Conference", *supra* note 135 at 8.

³⁷⁹ Kirsch, "Consensus", *supra* note 65 at 438.

³⁸⁰ Art. 17.

while others wanted a restrictive test to be applied on a case-by-case basis.³⁸¹ The negotiated compromise is that before a potential case can be taken on by the ICC, at least one of the following must accept the Court's jurisdiction: the state of the nationality of the accused, or the state of the territory in which the crime was committed.³⁸²

Negotiations surrounding automatic jurisdiction were not easy either. The eventual compromise reached was that states would automatically accept jurisdiction of the Court with regard to the enumerated crimes, but that there would be a provision allowing states the option of withholding automatic consent for seven years from the moment of becoming a Party to the Statute.³⁸³

The final key issue that required a good deal of negotiation is the question of trigger mechanisms.³⁸⁴ Ultimately it was agreed that proceedings may be initiated by a State Party, by the UN Security Council, or by the ICC Independent Prosecutor.³⁸⁵ There was controversy over whether the Prosecutor should be able to trigger proceedings, and so checks and balances were imposed on this function. These last two compromises were designed in order to increase support for the Statute at a point in the negotiations where it appeared that sustained opposition would undermine the effectiveness of the Court.³⁸⁶

The careful balance of provisions protecting different interests was key to having the Rome Statute adopted.

³⁸¹ Kirsch, "Consensus", *supra* note 65 86 at 438.

³⁸² When the United Nations Security Council refers a case to the ICC, acceptance is automatic by virtue of the UN Charter; Kirsch, "Consensus", *ibid.*

³⁸³ Art. 12(1), Art. 124. Kirsch, "Consensus", *ibid.*; Kirsch, "Development", *supra* note 137 at 458.

³⁸⁴ Art. 12. Kirsch, "Consensus", *ibid.* at 439; Kirsch, "Development", *ibid.* at 460; Kirsch & Holmes, "Conference", *supra* note 135 at 9.

³⁸⁵ Art. 13, Art. 14, Art. 15.

³⁸⁶ Kirsch, "Development", *supra* note 137 at 460.

a. Key Issues for NGOs

NGOs had interest in all of these issues and more. As Matas puts it, “There were hundreds of nongovernmental organizations at Rome and virtually every issue was fundamental to at least one of them.”³⁸⁷ There were a few key issues, however, that were promoted within the treaty because of NGO interest and insistence. Provisions dealing with children under the age of 15 being enlisted to participate in hostilities³⁸⁸, for example, are recognized as the result of NGO efforts.³⁸⁹ The inclusion in the Statute of reparation rights for victims in Article 75 was also due, in part, to work of NGOs.³⁹⁰ Two issues so occupied NGOs in the negotiations that they deserve further treatment. They are the provision for an independent prosecutor, and sex and gender crimes.

NGOs pressed strongly and persistently for an independent prosecutor.³⁹¹ The original draft of the Statute prepared by the International Law Commission provided for only two trigger mechanisms for an investigation: a State Party could lodge a complaint, or the UN Security Council could refer a matter to the Court. NGOs persisted in their argument that there be a third trigger under the Statute, namely that the prosecutor be able to initiate an investigation.³⁹² This issue was seen by many to be the most crucial to an effective Court, and NGOs thought of it as the “collective bottom line.”³⁹³ NGOs pointed to the track

³⁸⁷ Matas, “Realities”, *supra* note 157 at 10.

³⁸⁸ Art. 8(2)(b)(xxvi) & (e)(vii).

³⁸⁹ Arsanjani, *supra* note 142 at 34.

³⁹⁰ *Ibid.* at 39; Kirsch & Robinson, *supra* note 73; in addition to Art. 75 other provisions account for the protection and participation of victims: Arts. 15(2); 42(9); 43(6); 54(1)(b); 54(3)(f); 57(3)(c); 57(3)(e); 64(2); 64(6)(e); 68; 79; and 93(1)(j).

³⁹¹ Arsanjani, *supra*, note 142 at 27; Pace & Schense, “Role”, *supra* note 80 at 133.

³⁹² Glasius, *supra* note 248 at 153-155.

³⁹³ *Ibid.* at 153, quoting Lars Van Troost, the ICC Project Coordinator for Amnesty International.

record of existing human rights treaties where the Security Council has been reluctant to initiate proceedings, and where member states rarely have filed complaints against other member states so as not to strain relations.³⁹⁴ If this pattern had been repeated in the ICC Statute few cases would come to the Court, thereby impacting the Court's impartiality and effectiveness. In addition, NGOs pointed to the precedent set by the prosecutor for the ICTY and ICTR who had the power to initiate investigations,³⁹⁵ and worked with representatives from these tribunals to persuade delegates.³⁹⁶

Marlies Glasius has examined the negotiations between states, and the contributions made by NGOs on the matter of an independent prosecutor. She lists a number of ways that NGOs influenced the negotiations at Rome.³⁹⁷ First, NGOs offered a more radical proposal than what was on the table; they suggested that NGOs and/or victims themselves be able to file a complaint with the Court. By extending the range of options available to the delegates NGOs were able to make the proposal of an independent prosecutor more modest and acceptable. Second, NGOs persistently provided arguments against those who opposed an independent prosecutor.³⁹⁸ Third, NGOs encouraged the like-minded group to stipulate its guiding principles, and when it did, an independent prosecutor was on the list. Fourth, NGOs and the CICC did what they could to ensure that those delegates who were in favour of an independent prosecutor also saw it as a politically realizable possibility. By keeping a running tally of state positions on the

³⁹⁴ *Ibid.*; See for example, Human Rights Watch, "Nongovernmental Organization Action Alert" No. 5 (June 1998); Amnesty International, "The International Criminal Court – 16 Fundamental principles for a just, fair and effective international criminal court" (May 1998) at 3.

³⁹⁵ Amnesty International, "The International Criminal Court – 16 Fundamental principles for a just, fair and effective international criminal court" (May 1998) at 3.

³⁹⁶ Pace & Schense, "Role", *supra* note 80 at 133.

³⁹⁷ Glasius, *supra* note 248 at 154-155.

³⁹⁸ See also Pace & Schense, "Role", *supra* note 80 at 133.

issue, the Coalition was able to gauge when critical mass had been achieved in favour of an independent prosecutor. Finally, when it seemed that the independent prosecutor clause might be dropped towards the end of the Conference, major human rights organizations pooled resources to lobby delegations in teams, thereby demonstrating shared support for the initiative. Glasius points out that while it is impossible to know for certain that NGOs made the difference in the matter of an independent prosecutor, many state and civil society delegates believe that to be the case.³⁹⁹

The draft statute put forward by the ILC did not incorporate gender in any explicit way.⁴⁰⁰ NGOs, however, were very effective in pressing the myriad issues that fall under the heading of sex and gender. As seen above, the Women's Caucus for Gender Justice worked tirelessly, and succeeded in having key gender provisions included in the draft Statute by the time of the Rome Conference.⁴⁰¹ Though the strongest NGO voices were in favour of including gender provisions in the Statute, there were also NGOs lobbying against the broad approach being proposed.⁴⁰² Several right-to-life NGOs opposed the inclusion of forced pregnancy because it might imply a right to abortion,⁴⁰³ and others objected to the inclusion of the word *gender* because it might be seen to condone

³⁹⁹ Glasius, *supra* note 248 at 154.

⁴⁰⁰ *Ibid.* at 155.

⁴⁰¹ Valerie Oosterveld, "The Making of a Gender-Sensitive International Criminal Court" (1999) 1 Int'l L. Forum D.I. 38 at 39 [Oosterveld, "Making"]; Ferencz, *supra* note 13 at 8; Brook Sari Moshan, "Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity" (1999) 22 Fordham Int'l L.J. 154 at 176-78; Van Der Vyver, *supra* note 239 at 431.

⁴⁰² Several American groups such as the David M. Kennedy Centre for International Studies, and NGO Family Voice, worked closely with anti-gender delegations. REAL Women of Canada took a position in line with that of the Vatican on most issues and was very active in lobbying delegates; .

⁴⁰³ Kirsch & Holmes, "Birth", *supra* note 63 at 15; Steains, *supra* note 286 at 368;

homosexuality.⁴⁰⁴ Nevertheless, by the end of the Conference gender-sensitive provisions had been included in the definitions of crimes, in sections dealing with victims and witnesses, in provisions dealing with applicable law, and in the composition and administration of the Court.⁴⁰⁵

Glasius examines the civil society contributions to, in particular, the debates on the inclusion of gender-specific crimes in the definition of war crimes and crimes against humanity, and she points to several factors that contributed to the Women's Caucus' success.⁴⁰⁶ First, the Women's Caucus pressed for the inclusion of sexual and gender crimes as early as the December 1997 PrepCom,⁴⁰⁷ and remained highly visible for the remainder of the negotiations, including during the Rome Conference. Second, the Women's Caucus was able to make an impression on delegates in large part because of numbers – both in terms of member organizations, and in terms of active members present at the Rome Conference, representing women from around the globe. Third, the Women's Caucus was often successful in gaining as allies female members of state delegations.

⁴⁰⁴ A position paper distributed by REAL Women but prepared by the David M. Kennedy Centre for International Studies in the United States, warned that, "If 'gender' as used in the ICC Draft Statute, in fact means something beyond 'male' and 'female', the ICC will drastically restructure societies throughout the world. The possibilities include everything from hiring quotas to sexual orientation to abortion ..." [on file with author].

⁴⁰⁵ Oosterveld, "Making", *supra* note 401 at 41; Steains, *supra* note 286. Articles of the Rome Statute with specific gender components are: 6(d); 7(1)(g) & (h); 7(2)(c) & (f); 7(3); 8(2)(b)(xxii); 8(2)(e)(vi); 21(3); 15(1); 15(2); 36(8)(a)(iii); 36(8)(b); 42(9); 43(6); 44(2); 54(1)(b); 68(1) & (2); and 122(1). Articles of the Statute with non-specific, yet gender friendly components are: 15(3); 15(6); 57(3)(c); 64(2); 64(6)(c) & (e); 68(3), (4) & (5); 69(4); 75(2); and 82(4).

⁴⁰⁶ Glasius, *supra* note 248 at 155-157.

⁴⁰⁷ Glasius points out that the wording adopted for the draft "mirrors exactly the wording proposed by the Women's Caucus in its preparatory paper"; at 156.

There are two additional factors not listed by Glasius. Firstly, the close working relationship that developed between the Women's Caucus and the like-minded group,⁴⁰⁸ which allowed for many of the Caucus' positions to be advanced by state delegations. Secondly, the fact that they could point to the experience of the ICTY and ICTR in their investigations of crimes of sexual and gender violence, and the jurisprudence that resulted at these Tribunals as precedence for the gender provisions being proposed.⁴⁰⁹

The number of items debated at the Rome Conference was staggering, and NGOs had some element of interest in all of them. However, there were a few key inclusions in the Statute for which NGOs can be given a fair share of credit.

6. Innovative Collaboration

The NGO Coalition for an International Criminal Court has been recognized as a high achievement in how NGOs cooperate with one another to move forward an agenda.⁴¹⁰ In addition to working together in new and innovative ways, NGOs also interacted with government and their delegations in ways that had not been common until then.

a. Collaboration among NGOs

As seen above, NGOs pooled resources, knowledge, skills, and energies in order to ensure that a strong, effective international court be established. This was a remarkable

⁴⁰⁸ Oosterveld, "Making", *supra* note 401 at 39.

⁴⁰⁹ Steains, *supra* note 286 at 359; Kelly D. Askin & Dorean M. Koenig, "International Criminal Law and the International Criminal Court Statute: Crimes Against Women" in Kelly D. Askin & Dorean M. Koenig eds., *Women and International Human Rights Law* (Ardsley, New York: Transnational Publishers, Inc., 2000) 3 at 6.

⁴¹⁰ Pace, *supra* note 305 at 201.

development in the history of NGOs, as typically NGOs prefer to work independently.⁴¹¹ The Coalition was well-organized and efficient, and had a great impact on the negotiations leading up to Rome, and at the Rome Conference itself. Many attribute the Coalition's success to the insight and skills of William Pace, the CICC's Convenor. He contributed political know-how, a skill for fund-raising, and an ability to manage.⁴¹² It is largely because of his abilities, and the confidence he inspired in conference organizers, that NGOs were granted such broad access to the proceedings and government delegates at Rome.⁴¹³

Many of the NGOs in the Coalition were smaller NGOs – a good number from the Global South,⁴¹⁴ and some were themselves umbrella organizations for NGOs.⁴¹⁵ However, large internationally recognized NGOs were also members of the Coalition, and because of their stature, their views were often sought out by states and NGOs alike. Organizations such as Amnesty International, Human Rights Watch, the International Commission of Jurists, Lawyers Committee for Human Rights, the Women's Caucus, and the International Committee of the Red Cross made frequent and detailed contributions to the negotiations, and contributed their not insignificant resources to the Coalitions' efforts.

⁴¹¹ Van Der Vyver, *supra* note 239 at 426.

⁴¹² Benedetti & Washburn, *supra* note 72 at 9; Watt, *supra* note 248.

⁴¹³ Van Der Vyver, *supra* note 239 at 428.

⁴¹⁴ Pace & Schense, "Role", *supra* note 80 at 122.

⁴¹⁵ There were two requirements for NGOs wishing to become a member of the Coalition: "1) endorse in principle the creation of a just and effective International Criminal Court and 2) wish to be involved at some level with efforts to create an ICC." "To Join the Coalition" *The International Criminal Court Monitor* 7 (April 1998) at 8.

This constellation of NGOs within the Coalition makes it all the more remarkable that the CICC worked so well together and was able to maintain cohesion throughout the negotiations. William Pace, Convenor of the CICC, has reflected:

...[H]istorically classical divisions tear apart the solidarity: North and South divisions, ethnic and racial, competing egos and mandates of large international NGOs, the conflict between peace groups, victims groups, the conflict between the women's caucus and the right to life organizations, the conflict which arises when one group's issues are winning and another's are losing, and on and on.⁴¹⁶

Glasius has pointed out that though the lack of rigid structures within the Coalition contributed to its ability to function effectively within the reality of the negotiations, there was a lack of democracy within the Coalition itself; only self-selected steering committee members had any real say in the CICC's policies.⁴¹⁷ Nevertheless, despite the potential for differences between NGOs to overshadow commonalities, the Coalition members were so committed to the principle of a strong and independent Court that they pulled together to make it a reality.

From the outset the CICC as a whole did not advocate any particular position on the various aspects of the Statute, though the individual members of the Coalition did.⁴¹⁸

More important was that the views of Coalition members converged significantly on what would be an acceptable treaty, namely that it be independent and effective.⁴¹⁹ Some believe that it was largely because of this shared conviction that NGOs were able to

⁴¹⁶ Pace, *supra* note 305 at 209.

⁴¹⁷ Glasius, *supra* note 248 at 147.

⁴¹⁸ Coalition for an International Criminal Court, Press Release, "Members of the Coalition for an International Criminal Court (CICC) State Their Support for an Effective and Credible Court and Challenge U.S. Insistence on Security Council Jurisdiction" (13 August 1997).

⁴¹⁹ Letter from Fergus Watt, Convenor, Canadian Network for an International Criminal Court (10 January 1999) [on file with author].

maintain a high degree of organization and coordination in the lead up to Rome and at the Conference itself.⁴²⁰

There were, of course, instances where NGOs did not share the same perspective on the desired approach to any given issue. As seen above, though the majority of NGOs in the Coalition supported the integration of gender perspectives in the Statute, there was a small but strong group of NGOs who opposed this development. Just as states did not always agree with one another, so did NGOs differ in their views, and there was negotiation among NGOs – as among states – in efforts to find some common ground. The Coalition's goal was not to have consensus on each and every issue, but rather to allow NGOs to work together where it would be helpful to do so. As Pace and Schense describe it, "...the Coalition Secretariat worked to identify and expand areas of commonality among its members and encouraged them to develop joint positions and strategies where possible."⁴²¹ Indeed, the consistent neutrality of the Coalition contributed to the cohesiveness of its members who were free to agree or disagree with one another on each issue.⁴²²

b. Collaboration between NGOs and Governments

The extent of collaboration between NGOs and governments was unusually high during the ICC negotiations. While governments and non-governmental organizations are

⁴²⁰ Letter from Fergus Watt, Convenor, Canadian Network for an International Criminal Court (10 January 1999) [on file with author].

⁴²¹ Pace & Schense, "Role", *supra* note 80 at 125-26.

⁴²² *Ibid.* at 125; Kristie Barrow, "The Role of NGOs in the Establishment of the International Criminal Court" (2004) 2 Dialogue 11 at 17.

“frequently in opposition” in multilateral negotiations, this was not the case here.⁴²³

NGOs collaborated especially well with delegates from the like-minded group,⁴²⁴ particularly once both sides recognized that they could benefit from working together. NGOs could learn what was happening behind closed doors from LMG delegates, and the like-minded states could use NGOs to pressure other delegations.⁴²⁵ There was also at least one issue where some NGOs worked closely with non-LMG delegations. During the discussions on gender and forced pregnancy, pro-life NGOs collaborated with Arabic States,⁴²⁶ and benefited from the support of the Holy See.⁴²⁷

Pace and Schense point out that the development of political sophistication of the Coalition and the LMG seemed to parallel each other over the course of the PrepCom, and to some extent each could be said to have contributed to the other’s growing cohesiveness.⁴²⁸ There are many examples of the growing inter-connectedness of the NGOs and the LMG. For instance, during the PrepCom like-minded governments secured a room at the UN in which the Coalition could meet.⁴²⁹ Later, in the last PrepCom session, NGOs persuaded the LMG to develop a set of stated guiding principles that would direct their positions and discussions with other states.

The number of NGOs involved in the campaign to establish an ICC was staggering, and contributed significantly to the size of the state-NGO coalition. As Hampson and Reid

⁴²³ Bassiouni, "Negotiating", *supra* note 84 at 455.

⁴²⁴ Bassiouni, "Historical", *supra* note 4 at 26, fn 135; Kirsch, "Introduction", *supra* note 118 at 3.

⁴²⁵ Bedont & Matas, *supra* note 170 at 23.

⁴²⁶ These states included Syria, Qatar, Saudi Arabia, United Arab Emirates, and Iran; Bedont & Matas, *ibid.* at 24; Glasius, *supra* note 248 at 157.

⁴²⁷ Glasius, *ibid.*; Oosterveld, Interview 2000, *supra* note 311.

⁴²⁸ Pace & Schense, "Role", *supra* note 80 at 118.

⁴²⁹ *Ibid.* at 119.

point out, coalition strength is enhanced significantly by greater numbers of participants. As described above, many governments benefited from various contributions made by the CICC during the negotiations. The second factor identified by Hampson and Reid is diversity, and because NGOs were involved from a vast array of fields of expertise and geographic regions they contributed to the diversity of the group effort in ways states could not do.

The communication functions Drahos identifies as important to coalition success were also strengthened due to the participation of NGOs. In a number of different ways NGOs contributed to the flow of communication and the processing of information during the negotiations for an ICC and particularly at the Rome Conference. NGOs made their views heard by offering written reports and position papers, as well as speaking directly with delegates during negotiations and on breaks. While NGOs benefited from having the ear of LMG delegates, the opposite was also true. As Van Der Vyver describes, "It was not uncommon for government representatives to call on NGO lobbyists to promote a particular point of view, and for members of the CICC to urge government representatives of Like-Minded States to push for the inclusion of certain provisions in the ICC Statute."⁴³⁰ Indeed, NGOs were assured that virtually any position they wanted to advance would be taken up by at least one state delegate and brought to the negotiation.⁴³¹

⁴³⁰ Van Der Vyver, *supra* note 239 at 430.

⁴³¹ Watt recounts that some individuals involved with NGOs were friendly with people on state delegations who could be relied upon to funnel NGO concerns to the discussions; Watt, *supra* note 248.

Despite the high level of cooperation between NGOs and the LMG, Matas believes the ICC negotiations were not an example of a true partnership.⁴³² In his experience as an NGO member on the Canadian delegation, NGOs and the LMG were doing no more than working in parallel. He points out that while there was a fair amount of information-sharing, there was a lack of joint strategizing on approaches, which led to duplication of efforts. In his estimation, NGOs and the LMG did not reach their full potential of collaboration.

Nor did NGOs and LMG delegations have the same approach to the negotiations. While the Coalition and the like-minded states shared a high degree of commonality on many key issues, the compromises made by governments were not always seen as positive by NGOs. Ultimately, states had to find some common ground in order to succeed in creating the treaty, while NGOs main purpose was to push for the strongest possible Court. Matas has examined the differences in approach between NGOs and the LMG.⁴³³ He points out that many of the compromises made by the like-minded states did not sit well with NGOs who were not as willing to let the important issues go.⁴³⁴ Because of shifts in position taken by the LMG in order to achieve consensus, NGOs were concerned as to “where and when that shifting would end.”

⁴³² Matas, "Realities", *supra* note 157 at 13-14.

⁴³³ *Ibid.* at 10.

⁴³⁴ The examples Matas gives are: 1) The definition of crimes against humanity that requires multiple acts committed in furtherance of a policy. NGOs believed the trigger should be either multiple acts, or acts in furtherance of a policy, but not both. 2) The defence of superior orders for war crimes. Some NGOs believed superior orders should never constitute a defence; *Ibid.* at 10.

Regardless of perceived shortcomings in the partnership among NGOs, and between states and non-governmental organizations in the ICC negotiations, it is widely agreed that the extent of collaboration witnessed in these discussions is the most advanced seen in any multilateral treaty negotiations to that point. Indeed, it serves as the high-water mark for such collaborative efforts.

F. Conclusion

The International Criminal Court that was successfully called into being on 17 July 1998 had been the focus of periodic attention for decades. It finally became a reality when international political will and the determined effort of key players combined to clear the way. UN Secretary General Kofi Annan has summarized the experience well:

No doubt, many of us would have liked a Court vested with even more far-reaching powers, but that should not lead us to minimize the breakthrough you have achieved. The establishment of the Court is still a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law.⁴³⁵

Though the result was not entirely to everyone's satisfaction, it did nevertheless constitute a strong and independent court. State delegations – particularly those of the like-minded nations – were open to the input of NGOs. In turn, NGOs worked in cooperation with states during three years of PrepCom meetings and at the Rome Conference to ensure that a strong court was founded.

⁴³⁵ "The Gift of Hope to Future Generations" *The International Criminal Court Monitor* 9 (August 1998) at 3; the Secretary General's statement at the adoption ceremony, 18 July 1998.

V. Chapter Five: Discussion – Do NGOs Participate in the Creation of International Law?

A. Introduction

As seen in the International Law Framework chapter, non-governmental organizations do not have full legal status in international law, and are therefore not entitled to be participants in the creation of international law in the same way states are. While they may, under some circumstances, have limited rights to participate in international law, within the confines of the Westphalian system where nation states are the primary actors – and the only entities with full status – NGOs are not intended to, nor expected to, contribute to the creation of international legal standards.

An examination of the Ottawa landmines negotiations and the International Criminal Court negotiations indicates that practice has moved beyond theory. In both of these cases NGOs became key figures in coalitions that pressed for new international standards, and they made significant contributions to the process of negotiating international law. Because of their additions to the negotiations the final product in both cases is more robust and more inkeeping with strong international human rights standards than would have been the case without NGO participation. Indeed, in the case of the Landmine treaty, it is widely recognized that the treaty would not have come into being at all had it not been for the pressure and support of interested NGOs.

How is it, then, that non-governmental organizations have become participants in international law creation? NGOs have only qualified legal status in international law, and are not entitled to be creators of international law. Yet based on the two cases studied

here NGOs have become participants in that process. How do they contribute to that process, and what techniques do NGOs use to insinuate themselves into the system that governs how international law is made? What is the mechanism that allows NGOs to take part at a level almost on par with states? This chapter will attempt to answer these questions.

The first section of this chapter catalogues the areas in which non-governmental organizations made contributions to the negotiation process of each of these cases. NGOs have contributed to setting the agenda of the international community, and to the creation of conference agendas. In addition to their more familiar role of providing knowledge, expertise, and analysis during negotiations, NGOs also negotiated with and between states, and contributed to the drafting of the final treaty texts. This section then considers the techniques used by non-governmental organizations in making these contributions. NGOs employed various techniques for working together within NGO coalitions, and a range of mechanisms for cooperating with like-minded and Core Group states.

The second section reviews the broad strokes of international multilateral negotiation theory, and the specifics of coalition dynamics as they apply to the two cases studied here. It then examines the NGO-state coalitions that formed during both the Ottawa Process and the ICC Negotiations, and examines how NGOs contributed to the size and diversity, and to the communication functions of those coalitions.

The final section of this chapter examines how NGOs impact the current system, in terms of the contributions they made to the substance of the law created in the each case-study, and in terms of how they impact the process itself. How have NGOs shaped the process simply by participating in it? This section then considers whether the Westphalian vision reflects the reality of international relations with regard to law creation, based on the two cases studied here.

B. How do NGOs Contribute to the Creation of International Law?

The two cases examined in this work indicate that non-governmental organizations have been very active in promoting certain positions on the two issues in question. As international actors, non-governmental organizations are implicated in the realities of the international legal system. As organizations interested in promoting certain goals, NGOs make regular and frequent contributions to the on-going development of international legal standards. The question is, do these contributions constitute participation in the act of creating international law? The process of creating international law is a long one with many stages, starting with the initial thought or idea, carrying through discussions, negotiations, drafting, signing an agreed-upon instrument, and ultimately ratification and implementation of the law. In the cases examined here, NGOs have shown themselves to be active participants in many of these stages. The following section seeks to explore the key ways NGOs contributed to the Ottawa Process and the ICC negotiations. This section attempts to make the nature of their involvement more transparent, and to make it more easily discernible whether NGO involvement in these cases constituted participation within the process of law creation.

1. Catalogue of Contributions NGOs Have Made in Landmines and ICC

Negotiations

In both the case of the Ottawa Landmines Process and the ICC Treaty talks NGOs made significant contributions to the development of the negotiations. NGOs contributed to setting the international agenda with regard to the issues that needed to be considered, they contributed to creating the agendas for multilateral conferences at various stages of the negotiations. At the conferences themselves NGOs lobbied states, and negotiated with and between state delegates for certain positions. In addition, non-governmental organizations continued to provide their standard support to states in the form of specialized knowledge, expertise, and analysis.

a. Agenda-Setting

NGOs were instrumental in setting the international agenda for both the Landmines and the ICC negotiations. In both cases the role of NGOs was key in raising awareness of salient issues at both the political and public level.

The role of NGOs in this regard is particularly striking in the case of landmines. It has been widely recognized that the civil-society anti-mine movement that had developed over time, and specifically the International Campaign to Ban Landmines, was essential in ensuring that the issue of landmines came to the attention of the international public. The member NGOs of the ICBL were single-mindedly focused on having an international ban placed on the use, production, stockpiling and transfer of anti-personnel mines. With member organizations in 60 countries, the umbrella organization was able to ensure that

the message was getting out. Using a combination of public awareness raising and political momentum the ICBL was able to raise the profile of the landmines issue at domestic, regional, and international levels.

Starting in the 1990s non-governmental organizations strategically shifted the lens through which landmines were viewed. While anti-personnel mines had traditionally been seen as a military strategy essential to a state's right to self preservation, NGOs began to frame the question of landmines as a humanitarian one. Ban advocates made it possible for the public to conceive of mines as a source of human suffering rather than as a question of military security. With the Cold War over, they argued, states no longer needed such extreme military measures. In fact landmines were doing more harm to civilians and non-combatants than to military personnel, and as a result, the use of landmines failed the proportionality test of international humanitarian law. In addition, since landmines cause harm indiscriminately – that is, a landmine does not distinguish between military personnel and non-combatants – NGOs argued that the use of landmines also contravenes the discrimination test.¹ By framing the issue as a question of international humanitarian law as opposed to state security, NGOs successfully shifted the place of the landmines problem in the international agenda. NGOs also ensured the

¹ Maxwell A. Cameron, "Global civil society and the Ottawa process: Lessons from the movement to ban anti-personnel mines" in Andrew F. Cooper, *et al.* eds., *Enhancing global governance: Towards a new diplomacy?* (New York: United Nations University Press, 2002) 69 at 71 [Cameron, "Global"]. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, Art. 51.

landmines negotiations were on the international agenda by appealing to the media and, within Canada, to members of Parliament.²

The multi-pronged approach used by ICBL members, in combination with pressure from a number of sources, had the effect of imprinting the urgency and importance of the issue on key international political figures, who then put their energies behind bringing the issue to the world stage, facilitating discussions, and ultimately an agreement, on the question of landmines. None of this would have happened were it not for the non-governmental organizations who pushed in strategic and multi-faceted ways for the landmines question to take a prominent place on the world stage, and in people's consciences.³

The situation of NGOs and the International Criminal Court negotiations was somewhat different from the Landmines treaty. The vision of an ICC was already on the radar of the international community, and had been for some time. However, it was bogged down in the usual UN quagmire of discussions and drafts. As soon as it became apparent that there was some renewed energy in international political circles around the issue of an international criminal court, key NGOs began to participate. The original group of non-governmental organizations – which later became the Coalition for an International Criminal Court – contributed to setting the agenda by sharing with receptive states what

² Valerie Warmington & Celina Tuttle, "The Canadian Campaign" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 48 at 52.

³ See Chapter Three, section E.2, above.

they believed were the key issues starting at the *Ad Hoc* Committee meetings, through the PrepCom sessions, and at the Rome negotiations.⁴

One key contribution of NGOs to setting the agenda was insisting that certain topics be included in the negotiations. Crucial issues are included in the ICC treaty because NGOs pushed for these items to be on the agenda. As discussed in chapter four, above, Glasius describes in some detail how NGOs pressed for an independent prosecutor. Initially the Women's Caucus, and later other NGOs within the context of the CICC, pushed for a gender perspective to be taken with regard to the drafting of all aspects of the treaty. In addition, NGOs worked tirelessly to have included specific issues which were seen to be particularly gender sensitive, such as protection for victims and witnesses, and the inclusion of gender-specific crimes.⁵ In addition, NGOs ensured that civil society was aware and involved in the global conversations on the ICC, through a whole range of national and regional education initiatives.

b. Creating Conference Agendas

In both cases, non-governmental organizations made solid contributions to the development of specific conference agendas, both for meetings that were intended as education and discussion opportunities, and for those that were formal negotiation conferences.

⁴ See *e.g.* the comprehensive description of NGO involvement in Fanny Benedetti & John L. Washburn, "Drafting the International Criminal Court Treaty: Two Years to Rome and an Afterword on the Rome Diplomatic Conference" (1999) 5 *Global Governance* 1 at 4ff.

⁵ Marlies Glasius, "Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Criminal Court" in Marlies Glasius, *et al.* eds., *Global Civil Society 2002* (Oxford: Oxford University Press, 2002) 137 at 154-55 [Glasius, "Expertise"].

The role of NGOs was particularly crucial in the case of the Ottawa Process. Lloyd Axworthy, then Canadian Minister of Foreign Affairs and International Trade and a key supporter of the international push to create a landmines treaty, drew heavily on the contributions of NGOs for the creation of the conference held in Ottawa in October 1996 with the purpose of developing a strategy for achieving a comprehensive ban on AP mines. The ICBL advised on the topics that should be covered during the conference, and the issues that had to be discussed.⁶ The working relationship between NGOs and the Canadian government grew so strong that by the end of the summer the ICBL was invited to participate as full participant in the October 1996 Conference. Though the extent of participation was ultimately downgraded due to pressure from other states, the high level of contribution persisted throughout the Ottawa Process, as core group governments recognized the valuable input made by NGOs and sought out their contributions as to agenda items in subsequent negotiations.⁷

The goodwill that had been built between core governments and NGOs during the Ottawa Process was replicated in the negotiations for an International Criminal Court. While NGOs may not have been explicitly requested to contribute to the design of the conferences for the negotiation of the ICC, they were nevertheless feeding into the processes of like-minded governments as they determined what their focus issues would be. From the *Ad Hoc* meetings onwards, NGOs were providing input on what the key

⁶ Axworthy describes some of the challenges faced by government and NGOs in working closely together, including mistrust, and frustration at bureaucratic delays; Lloyd Axworthy, *Navigating a New World*, (Toronto: Alfred A. Knopf, 2003) at 138-39.

⁷ See generally Chapter Three, section D.1.b, above.

issues were, and what topics should be included in the treaty and therefore in the negotiations. It was these issues that frequently became the focal points for state negotiations within the context of the various international conferences.

c. Providing Knowledge, Expertise, and Analysis

Non-governmental organizations are widely recognized for the contributions they make by providing knowledge, expertise, and analysis in their topic areas of specialization. For a number of reasons, NGOs have the ability to become experts in their fields in ways that states simply cannot. NGOs specialize in narrow topic areas, and they dedicate all of their resources to understanding and working within those fields. In addition, non-governmental organizations regularly benefit from the input of individuals with particular expertise, and from specialists who can offer analysis not generally available to states. As such, NGOs had much to offer states interested in working with them.

In the case of the Ottawa Process, NGOs contributed very directly by offering their knowledge, expertise, and analysis to Core Group states as well as to the international community as a whole. Long before the question of landmines appeared on the international agenda, NGOs had been grappling with the impact of landmines on the lives of civilians, and had been attempting to find ways to curb their use. As a result, non-governmental organizations working in this area had already built a wealth of knowledge and experience on the issue by the time states began to think in terms of considering some form of landmine ban.⁸ In addition, because of their long-standing work in the area,

⁸ The International Committee of the Red Cross, for example, had a long and established history of work on the issue of landmines; Stuart Maslen, "The Role of the International Committee of the Red Cross" in

NGOs had access to information and to experts that they were only too willing to share with states interested in securing a ban. The report on the “Military Use and Effectiveness of Anti-personnel Mines” commissioned by the International Committee of the Red Cross, and researched and authored by former military personnel, is one example of valuable expert analysis provided by NGOs.⁹ During the talks themselves, NGOs were able to provide expert analysis of various options and suggestions being considered. In particular, they were able to assist states with analysis on how any given proposal would fit with existing international law and how it would impact those living in mine-infested regions.¹⁰ These perspectives were particularly valuable to Core Group states who wanted that strongest possible mine ban.

The Canadian government in particular benefited from the input of the ICBL and Mines Action Canada to the conversations around the key issues on the problem of landmines, and how the agenda for the international discussions would best be designed. Through regular meetings with government officials, MAC offered the Canadian government the most recent NGO information on the effects of landmines, and the opportunity to consider how these realities intersected with existing Canadian policies.¹¹ This input from NGOs was to become crucial to forming the position of the Canadian government, and to the commitment of Canada to securing a landmine ban.

Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 80 at 82ff.

⁹ International Committee of the Red Cross (ICRC), “Anti-personnel Landmines – Friend or Foe?: a study of the military use and effectiveness of anti-personnel mines” (1996) online: ICRC <<http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/C2951729922B4364C1256B6600599BF2>>.

¹⁰ See Chapter Three, section E.3.c, above.

¹¹ Warmington & Tuttle, *supra* note 2 at 50.

NGOs in the International Campaign to Ban Landmines coalition were also instrumental in influencing public opinion on the issue of landmines. By disseminating knowledge and educating the public on the real, personal impact of landmines, the role played by NGOs was crucial in shaping public opinion. ICBL approached the task of changing world opinion by considering the questions from a number of perspectives including humanitarian, environmental, and peace-centered views.¹² This had the effect of bringing on board sectors of global society which might not otherwise have been involved.

As in the case of the Ottawa Process, NGOs were instrumental in providing knowledge, expertise, and analysis around the negotiations for an international criminal court. NGOs were crucial in supplying the information needed to framing the negotiations, and to ensuring that the most pressing issues were included in the discussions. The CICC internationally, and the CNICC within Canada, provided knowledge, expertise, and analysis to governments, to the public, and to other NGOs.

During negotiations the CICC regularly published expert papers to inform delegates on various issues.¹³ These expert papers frequently provided an in-depth analysis of the issues in question allowing delegates to gain a deeper understanding of the topic at hand. Briefings and legal memoranda were another avenue used by non-governmental organizations to share the extensive legal and technical expertise they had to offer. In addition, NGOs arranged for interested delegates to have group and individual

¹² See Chapter Three, section E.3.d, above.

¹³ M. Cherif Bassiouni, "Historical Survey: 1919-1998" in M. Cherif Bassiouni ed. *The Statute of the International Criminal Court: A Documentary History* (New York: Transnational Publishers, Inc., 1998) 1 at 25-26.

conversations with experts on various topics, and organized numerous regionally-focused meetings between NGOs and governments.¹⁴

The knowledge contributions made by NGOs were particularly striking in the case of a few specific issues.¹⁵ The inclusion of sex and gender crimes in the treaty is widely recognized to be a result of persistent NGOs who provided information and expert analysis on the effect of crimes of a gendered nature. By consistent reinforcement of a gendered analysis of proposed provisions within the treaty, non-governmental organizations strengthened the message that a gender perspective simply had to be included in the treaty, and treated thoroughly throughout the ICC statute. Similarly, the inclusion of a provision for an independent prosecutor has been attributed to the contributions made by NGOs. NGOs provided expert analysis of action under existing human right treaties and reinforced the notion that in order to be effective, the ICC would have to have an independent prosecutor.

In addition to the expertise NGOs offered to states, they also provided significant education for the general public through national and regional education initiatives in the form of seminars, debates, conferences, and workshops.¹⁶ These were designed largely to increase civil society participation in the discourse on the creation of an ICC, and contributed significantly to the growth of public interest and support for the court.

¹⁴ *Ibid.* at 26.

¹⁵ See Chapter Four, section D.5.a, above.

¹⁶ Much has been written on this activity of NGOs. See, e.g. Glasius, "Expertise", *supra* note 5 at 150.

d. Negotiating with and between States

Throughout both sets of negotiations, non-governmental organizations focused much of their energy on lobbying and negotiating with states. These efforts took two distinct forms: firstly NGOs used every opportunity to apply pressure to states to advance the issues NGOs believed were important within the negotiations; and secondly NGOs acted as a conduit between states as the negotiations progressed.

As seen above, NGOs applied a significant amount of pressure on governments to raise certain topics in the international dialogue, and to take positions on issues that NGOs believed to be crucial to a successful landmine ban.¹⁷ Some governments – like Canada – were open to the input of non-governmental organizations, and readily accepted NGO contributions. In such cases the pressure applied by NGOs was more in the nature of a friendly sharing of information and advice, than of aggressive lobbying. Other states were more reluctant to accept the input of civil society voices, and were then subjected to the results of more traditional lobbying techniques from NGOs, such as public awareness raising, public denunciations, and mobilizing the public and media to take action on the issue of landmines.

Once international discussion was underway NGOs played a crucial role in facilitating dialogue between negotiating states. Already at the time of the CCW Review Conference beginning in September 1995, NGOs began work to pool the energies of governments and NGOs interested in the ban issue. It was NGOs that suggested governments work

¹⁷ For example, pressure put on the Canadian government by MAC; Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) at 154.

together as a block, and together with interested NGOs, to identify the best strategies for pushing forward the landmine ban on the international agenda.¹⁸

Particularly between the initial Ottawa conference in October 1996 and through to the Ottawa Treaty Signing Conference in December 1997, NGOs played a pivotal role in the negotiations. They were encouraged to participate alongside states, and they were invited to contribute to the negotiations and participate actively in some of the sessions. Simply by being a new element in the traditional way of conducting negotiations, NGOs helped shape the way states interacted with one another, providing an additional conduit for states to communicate their views and positions with one another, and with other stakeholders.

As in the Ottawa Process, the International Criminal Court negotiations were marked by an unusually high participation of NGOs. Non-governmental organizations played a crucial role in securing the place of certain elements of the ICC treaty on the international agenda. They accomplished this in the traditional ways – and primarily by lobbying states. As considered above, two pieces in particular stand out for the fact that they were heavily promoted by non-governmental organizations – the priority placed on gender and sexual crimes, and the role of an independent prosecutor. NGOs were tireless in their insistence that these elements must be included, and they advocated in every way they could including through direct lobbying, consultations, strategy-setting sessions, and in participating on state delegations. It was the efforts of NGOs to sway the positions of individual states that ensured these aspects were included in the statute.

¹⁸ See Chapter Three, section E.3.a, above.

NGOs were also instrumental in providing alternate communications channels for state delegates during the ICC negotiations as they were during the Ottawa Process. Non-governmental organizations provided every possible opportunity for states to communicate with one another through NGO fora, from NGO-sponsored conferences to informal discussions at the negotiating conferences. They provided information on what positions states were taking on given issues, and encouraged delegates to confer with one another.¹⁹ As official members of some state delegations, some NGOs representatives had particularly valuable positions in the sharing of information between states and NGOs.²⁰

e. Drafting of Instruments

In both the Landmines Treaty and the International Criminal Court Treaty non-governmental organizations contributed to the wording of the text of the instrument in question, both in draft forms and in the final version.

The extent of contribution made by NGOs during the Ottawa process was unprecedented, as already indicated above. In the question of drafting, as well, NGOs had considerable input to the treaty text, and this occurred in a number of ways. The most obvious and direct drafting contribution was made by the ICBL who submitted its own proposals of treaty text, and who commented on draft texts throughout the negotiations.²¹ In addition,

¹⁹ See e.g. William R. Pace & Mark Thieroff, "Participation of Non-Governmental Organizations" in Roy S. Lee ed. *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999) 391 at 392.

²⁰ Oosterveld speaks of working alongside other like-minded countries as much as possible; .

²¹ Williams and Goose describe an ICBL draft treaty that "established clear visions of what a total ban Convention would look like"; Jody Williams & Stephen Goose, "The International Campaign to Ban

many Core Group states made it a part of their practice to confer with NGOs on a multitude of matters related to the landmine negotiations. Canada, for example, worked in close collaboration with Mines Action Canada throughout the time of the Ottawa Process, and sought regular input on text options.

More than a dozen states included representatives from non-governmental organizations on their delegations, and NGOs were also invited to attend, and did attend, the proceedings independently of any affiliation with state delegations.²² With this high level of NGO integration during the negotiations, states had easy access to NGO experts and regularly sought their input. Though NGOs could not make formal proposals of treaty language within the working parties because of their observer status, they did so liberally informally outside the meetings.²³ Because of all of these ways in which NGOs were more present and more active during the negotiations, their input to the text of the Landmines treaty – both directly and through state delegations – had a significant impact on the final result.

Similarly, in the case of the negotiations for an international criminal court, NGOs made significant contributions to the drafting of the statute. Like-minded states included NGO participants on their delegations, who were in a position to provide NGO input through state channels. Like-minded states also consulted regularly with non-governmental organizations as to the text being drafted on specific items. Through formal and informal

Landmines" in Maxwell A. Cameron, *et al.* eds., *To Walk Without Fear: The Global Movement to Ban Landmines* (Toronto: Oxford University Press, 1998) 20 at 35.

²² See Chapter Three, section E.4.b, above.

²³ Williams & Goose, *supra* note 21 at 43.

meetings, NGOs shared with state delegations their expertise and perspectives on pieces of proposed text. Indeed, at the Rome conference NGOs often sat in on negotiation sessions, and were occasionally asked to contribute their expertise to the group at large, right there in the formal discussion meetings. Glasius points out that there was a blurring of roles of civil society and state officials. "The negotiations for an ICC were marked by a good deal of cross-over between academics, NGO staff and state representatives."²⁴

NGOs had the most impact, however, by acquiring the ear of state delegates. Many states gladly accepted the expertise and advice offered by non-governmental organizations, in fact, many sought out such input when it was not readily available. For example, NGO input was gladly received on the issue of the definition of gender and gender crimes within the ICC Statute.²⁵ NGOs were a constant presence from the earliest stages of the negotiations, and as such they were in a position to influence state delegations on the draft text for issues of interest.

In the cases of the Landmines Treaty and the International Criminal Court, NGOs made significant contributions to the creation of international law. In fact, NGOs influenced every stage of the negotiations. Their pressure and education strategies helped place the landmines and ICC issues on the international agenda. NGOs then contributed to setting the details of the conferences and negotiations on these issues, and they provided the knowledge and expertise states needed to make well-informed and reasoned recommendations and decisions on the myriad complex issues in each case. Through

²⁴ Marlies Glasius, *The International Criminal Court: A global civil society achievement*, (New York: Routledge, 2006) at 45 [Glasius, *civil society*].

²⁵ Glasius, "Expertise", *supra* note 5 at 155.

lobbying and other traditional NGO activities, non-governmental organizations participated in the negotiations with states, and by acting as a conduit between states. Finally, NGOs made significant contributions to the drafting of the text that was to become the final treaty in each case. For entities without full status at international law, NGOs made significant contributions to the development of international law in each of these cases.

2. Techniques NGOs Used to Make Those Contributions

In both the landmines situation and the ICC negotiations, non-governmental organizations took two key approaches that contributed to their effectiveness. The first is that they worked in coalitions with NGOs interested in the same outcomes. By working together, and pooling skills and resources, NGOs were much better able to make contributions to the creation of international law in these two cases, than any single NGO would have been able to on its own, or even a handful of NGOs working together. The second factor that allowed NGOs to have such tremendous input to the creation of both pieces of international law was that they worked closely with like-minded states. By collaborating and consulting with states in the preparatory stages, as well as during the final negotiations, NGOs were able to make significant contributions to the process.

a. Working in NGO Coalitions

Non-governmental organizations came together under umbrella organizations in order to improve their effectiveness. The International Campaign to Ban Landmines emerged as a reaction to the humanitarian suffering caused by the widespread use of anti-personnel

landmines around the world. Initially six key NGOs, including the International Committee of the Red Cross, Human Rights Watch, and Physicians for Human Rights first met in 1992, and stated as their goal an international ban on landmines. By the time of the signatory conference in Ottawa in 1997 the coalition known as the ICBL was composed of over 1,200 NGOs from over 60 countries.²⁶

Similarly, the Coalition for an International Criminal Court began in 1994 – and was formalized in February 1995 – under the guidance of the World Federalist Movement, with a handful of NGOs, including Amnesty International, and Lawyers Committee for Human Rights. Their purpose was to work towards the creation of an effective and just International Criminal Court. As with the ICBL, membership of the CICC grew over the lifespan of the negotiations to the eventual number of over 800 member organizations, of which 236 sent at least one representative to the Rome Conference.²⁷

In both instances NGOs working in coalition made use of four main techniques to improve their impact. They worked together in flexible, cooperative, decentralized structures; they made use of emerging modern forms of communication; they made use of “know-who” and personal relationships; and they agreed on and stuck with a simple message.

²⁶ Williams & Goose, *supra* note 21 at 22.

²⁷ Glasius, *civil society*, *supra* note 24 at 27.

i. Flexible, Cooperative, Decentralized Structure

The International Campaign to Ban Landmines emerged out of a group of NGOs that had been working for years on reducing the use and negative effects of landmines. While the ICBL was led by a steering committee of six NGOs, the coalition eventually grew to well over a thousand member organizations, working in a variety of fields that dealt with the impact of landmines. It was the very intentional decision to maintain a loose organizational structure for the campaign that allowed so many NGOs from such a broad cross-section of civil society interests to join the coalition. ICBL members were permitted – indeed, encouraged – to pursue their own activities, strategies, and methods in moving their work forward, provided they supported the ICBL’s joint call to ban landmines.²⁸

As a result of this decentralized approach, strategies and techniques were often *ad hoc* and left to individual organizations. For example, while the ICBL recognized the benefit of good relations with the media and ensuring that there was steady media coverage of the issue, there was no overarching media strategy. Rather, NGO members of the ICBL took on individual responsibility for ensuring steady media coverage of the landmines issues within their domains.

The Coalition for an International Criminal Court was based on the combined efforts of several NGOs whose goal was to push for the creation of a strong international criminal court. The CICC had a steering committee composed of nine NGOs, with one NGO – the

²⁸ Robert J. Lawson, *Ban Landmines! The Social Construction of the International Ban on Anti-Personnel Landmines 1991-2001* (Carleton University, 2002) [unpublished] at 100.

World Federalist Movement – acting as secretariat for the Coalition. NGOs that formed part of the Coalition were not expected to perform the same functions and use the same approaches in their own communities. Rather, flexibility was valued, and NGOs were encouraged to pursue the angles and use the methods most appropriate for their target audiences.

NGOs were not expected to agree on every issue when it came to negotiations for an ICC either. It was accepted that there were differing points of view, and that NGOs came from a variety of issue backgrounds and cultural and regional differences that would impact their positions on many issues. Participating non-governmental organizations were, however, encouraged to support the key focal points the CICC believed were required in order to sustain an independent and effective court.²⁹ Glasius points out that while the Coalition retained a loose structure, the steering committee nevertheless adopted some basic principles just before the Rome Conference.³⁰ Yet in an extraordinary display of decentralization, the Coalition itself avoided taking positions on the issues, preferring to allow member NGOs the leeway they required on individual items, in order to support cooperation on the overall goals of the CICC.³¹

ii. Modern Forms of Communication

At the time of the Ottawa Process modern electronic forms of communication were becoming more widespread, particularly in developed countries. While faxes had been

²⁹ William R. Pace & Jennifer Schense, "The Role of Non-Governmental Organizations" in Antonio Cassese, *et al.* eds., *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press, 2002) 105 at 125.

³⁰ Glasius, *civil society*, *supra* note 24 at 27.

³¹ See Chapter Four, section E.3.a, above.

used for some time, the internet and email were emerging as the medium of choice.

Williams and Goose describe the ICBL's early reliance on the fax machine and that it was not until early 1996 that email use became the primary mode of communication with NGOs.³² Though available most readily to those in the developed world, non-governmental organizations made good use of current communication technology.

Through the internet, NGOs were able to stay in touch with one-another, to coordinate strategies and actions, and share information as widely as possible.

In addition, the internet was a useful tool in educating the public on issues arising from the use of landmines. Reports, surveys, and photographic evidence of the damage caused by landmines was easily shared via the internet, whether in the form of information available on websites, or by emails sent to those who indicated an interest in receiving information about the issue. Mines Action Canada was a case in point. MAC used emails to its advantage by keeping member NGOs up-to-date on developments, and in providing information to the Canadian government on the emerging details of the humanitarian and socio-economic impact of landmines.³³

In addition to communicating with other NGOs, with governments, and with the public, the internet was also a useful tool for communicating with and coordinating with the media. Among forms of media, television was the most critical for the ban landmines movement, and a powerful tool for the ICBL. NGOs have been criticized for manipulating public support through the use of visuals that pulled at people's

³² Williams & Goose, *supra* note 21 at 24.

³³ Williams and Goose point out that the close cooperation that developed between NGOs and governments was more a result of in-person meetings than modern forms of communication; *Ibid.* at 25.

heartstrings. Nevertheless, images of landmine victims, civilians – especially women and children – with arms and legs amputated, and very real footage of the blood, pain, and suffering caused by landmines was crucial to building support for the ban.³⁴ More than print or radio, television was the perfect medium for transmitting the gruesome and very real suffering caused by landmines to the general public, and for that matter, to those directly participating in the talks.

By the time NGOs began mobilizing to press for an international criminal court, the internet, and more specifically, email were well established forms of communication, at least among northern NGOs. The CICC used the internet to its advantage. As early as 1995, the CICC encouraged NGOs, governments, and other interested parties to sign up to internet listservs, and in 1996 the CICC established a website which could be visited by anyone with access to the internet.³⁵ Through these methods, the Coalition was able to spread information, and make information available to audiences that would not normally have had access to such information. In addition, the internet allowed for news and ideas to be communicated almost immediately, drastically reducing delay in communication.

Once the negotiations for an ICC were underway, the CICC made further use of the internet by providing updates on the talks, as well as other forms of information such as position summaries, and expert opinions, by internet.³⁶ By making these resources

³⁴ Julian Davis, "The Campaign to Ban Landmines: Public Diplomacy, Middle Power Leadership and an Unconventional Negotiating Process", online: Journal of Humanitarian Assistance <<http://www.jha.ac/articles/a134.htm>> at 4. English points out that the images used for public awareness purposes often did not reflect the reality that an estimated 70% of landmine victims are men; John English, "The Ottawa Process: Paths Followed, Paths Ahead" (1998) 52 Austl. J. Int'l Aff. 121 at 130

³⁵ Pace & Schense, *supra* note 29 at 129.

³⁶ See generally Glasius, *civil society*, *supra* note 24 at 41.

available in electronic format, the Coalition allowed interested parties not physically present at the Rome negotiations to keep up-to-date – indeed, up to the minute – with the events. This in turn allowed NGOs to work in a more timely and effective manner in their home countries, by mobilizing public support where needed, and by pressing governments where appropriate.

In addition to CICC efforts, the work of individual non-governmental organizations was also improved through the availability of the internet. NGOs were able to keep in close contact with one another, as well as with the main Coalition body, and were able to mobilize their own membership much more quickly and efficiently. Amnesty International, for example, spread the word with letter writing campaigns and on-line petitions among its membership, with the purpose of encouraging world governments to support the establishment of an international criminal court.³⁷ The internet allowed the organization to reach many more people than it would have previously, and additionally, the ease of participating in an electronic medium encouraged more people to participate.

iii. Champions

Champions and personal relationships were critical factors in the success of the landmine ban movement and the Ottawa Process. While initially the individuals and organizations working towards a landmine ban were mostly unknown and working in relative obscurity, their profiles gradually became more prominent as the issue gained attention.

³⁷ It is a standard part of Amnesty International's practice to engage members in such campaigns. See www.amnesty.org.

Once they caught the attention of some key people in government positions and public roles, the issue of landmines took on an unprecedented energy and momentum.

Jodi Williams, coordinator of the International Campaign to Ban Landmines, was arguably the most visible supporter of a landmines ban. Williams was crucial in bringing together the various strands of civil society that had been working on aspects of the land mine problem up until then, and facilitated the process of finding a core strategy all the different organizations would be happy to work with.³⁸ Williams continued to work tirelessly to educate and to raise awareness on the immense humanitarian cost associated with the continued use of anti-personnel mines. Indeed, her participation was so crucial to the effort to ban landmines, that in 1997 she was awarded the Nobel Peace Prize jointly with the ICBL.³⁹

Perhaps the most famous champion of the push to ban landmines was Diana, Princess of Wales. Through her travels to mine affected Angola, and public visits with those whose lives had been touched by landmines, she drew intensive international attention to the loss and suffering brought on individuals through the use of landmines. When she spoke with the media about the issue, she framed the problem as one of humanitarian concern. Diana died in an automobile accident just one day before the negotiations for the treaty were to begin in Oslo, in September 1997. It is difficult to determine to what extent Princess Diana's attention to the landmines issue played a role in moving the agenda

³⁸ Lawson, *supra* note 28 at 94ff.

³⁹ Williams & Goose, *supra* note 21 at 46.

forward, however there is no doubt that for many the drive to end the use of landmines remains closely associated with the work of Princess Diana.

Canadian Foreign Minister Lloyd Axworthy, once he became aware of the landmines issue and the humanitarian cost, quickly became one of the strongest champions of a comprehensive ban. Axworthy had the vision that a total ban on landmines was possible, and the courage to implement a negotiation strategy that took place outside of the usual, sanctioned UN fora for multilateral negotiations.⁴⁰ In his role as Foreign Minister of Canada, Axworthy was in a position to persuade, and pressure, other governments that supporting a landmine ban was the right thing to do.

The ICBL, through Mines Action Canada, recognized early on that Axworthy would be a formidable ally in the struggle to ban landmines. Axworthy insisted that NGOs be partners in the organization of the conferences and meetings that made up the Ottawa Process, and that they contribute as full participants in the negotiations. Indeed, as described above, Axworthy bent over backwards to work closely with NGOs and to incorporate their views and their active participation to the extent possible.⁴¹ By building a relationship with Axworthy, and by working with him as a partner, NGOs made the best possible use of someone who had the vision to ban landmines, and the connections to make it happen. Axworthy was taking a diplomatic and political risk, yet he believed in both the outcome and the process enough to push forward. Indeed, many expected that

⁴⁰ Axworthy, *supra* note 6 at 136.

⁴¹ See *e.g.* Williams & Goose, *supra* note 21 at 34.

the Nobel Peace Prize would be awarded to Jodi Williams and to Lloyd Axworthy together.

The movement for an international criminal court may not have had as public a figure promoting its cause as Lady Diana, but there were two significant champions to the campaign for an ICC whose contributions ensured a successful outcome.

As Convenor of the Coalition for an International Criminal Court, William Pace played a pivotal role in ensuring NGOs had access to the negotiations in the most helpful manner possible.⁴² Pace ensured that NGOs were well-organized, and had the support they required, both prior to and during the Rome Conference. Not only did he organize and facilitate interaction between NGOs that were members of the CICC, he also acted as the point person for the Coalition vis-à-vis states and the UN System. It has been said that a great deal of the benefits and access NGOs enjoyed during the negotiations, and particularly in Rome, was due to the good reputation Pace had built over years, and his experience and knowledge in deftly coordinating between NGOs and the UN system.

Philippe Kirsch of Canada was also a key champion of the ICC, and of NGO contributions to the process. He was supportive of including NGO voices on the Canadian team, and incorporated NGO input wherever possible.⁴³ Once he became Chairman of the Committee of the Whole at the Rome Conference, Kirsch instituted small working groups to facilitate the discussions and drafting of the Treaty. He also

⁴² Johan D. Van Der Vyver, "Civil Society and the International Criminal Court" (2003) 2 J. Hum. Rts. 425 at 428.

⁴³ Benedetti & Washburn, *supra* note 4 at 32.

worked towards consensus among the delegates, and did what he could to avoid a vote which might have caused division and alienation among participants. Towards the end of the Rome Conference, Kirsch put forward a Final Package on behalf of the Bureau of the Committee of the Whole. Insisting on considering the entire package of items at this point in the negotiations, facilitated a positive vote from the delegates where considering each piece individually would likely have meant the Conference would conclude without a satisfactory outcome. Throughout the negotiations, Kirsch continued to do what he could to ensure NGOs voices were included in the deliberations. He encouraged NGO input on issues under consideration, and sought out their views when he believed they would be helpful.

iv. A Simple Message

The NGOs involved in the ban landmines campaign developed a simple message early on in their efforts: the only acceptable outcome would be a complete and total ban on landmines. As the number of organizations involved in the ICBL grew, so did concern that the core message would become diluted or lost in the mix of messages from individual NGOs. As a result, NGOs and collaborating states in the anti-landmines movement developed a clear and focused message which was consistently promoted throughout the duration of the Ottawa Process: *no exceptions, no reservations, and no loopholes*. The ICBL also used the slogan “a victim every twenty minutes”, borrowed from an ICRC statistic, which neatly encapsulated the human cost of landmines, and made tangible the number of people whose lives were being destroyed while negotiations dragged on.

The fact that the complex issues being dealt with could be boiled down to a few key phrases was one factor that contributed to NGO success in promoting the cause. These straightforward and clear messages served to unite participants under a common understanding and make people feel that they were working towards a common goal. Even those participants coming from diverse philosophical backgrounds could agree to the rallying cry being used by the coalition of NGOs. In addition, having such clear catch-phrases made reaching out to the general public easier, as there was a quick and easy way to grasp the message even without an in-depth understanding of the broader issues. This was a particularly useful tool for NGOs in the ban landmine campaign as they relied heavily on public and civil society support for their goals.

Perhaps more crucial than the encapsulation of the message in a snappy catch-phrase was the shift in perspective on landmines that was spearheaded by NGOs. While the issue of landmines had traditionally been seen as one of military armaments, and therefore a matter of state security, beginning in the 1990s NGOs began to apply a different framework to the topic of landmines, as noted above. They framed the issue as a humanitarian one, making plainly visible the hundreds of thousands of civilians whose lives were being negatively impacted by the effects of anti-personnel landmines. As Cameron put it, "These humanitarian consequences could be dramatized in simple but compelling images and symbols."⁴⁴ This shift in perspective significantly simplified the message, and made it possible to communicate the issue to the public at large as well as to those in governments.

⁴⁴ Cameron, "Global", *supra* note 1 at 83.

Once NGOs supporting a call for an international criminal court started to work together towards this goal, they began to synthesise the myriad concerns they had about the negotiations and what the court would look like once all the discussions were done. NGOs – as well as like-minded states – soon began calling for an “effective, just and independent” court.⁴⁵ This phrase neatly encapsulated the two key principles called for by supporters of an ICC, namely that the prosecutor be able to initiate proceedings independent of the UN Security Council or claims made by states, and that the Court otherwise be given the powers, freedom, and resources to properly carry out its mandate under international law.

This phrase was heard again and again at the Rome Conference. Despite the fact that they represented hundreds of different issues, the NGOs under the umbrella of the CICC rallied under the call for an “independent and effective” international criminal court. It became recognized as the collective bottom-line of NGOs. Indeed, the phrase so well encapsulated the driving force of the desires of those pushing for an ICC that states also began to use this catch phrase to sum up the concerns they shared for the outcome of the court.

b. Working with Core-Group and Like-Minded States

In both the landmines and ICC negotiations non-governmental organizations worked closely with groupings of states that shared the same or similar goals with regard to the international talks underway. While NGOs had unprecedented levels of input and

⁴⁵ Glasius, *civil society*, *supra* note 24 at 27.

influence on the outcomes of both international instruments, it is clear that they were able to do so in large part because they formed cooperative working relationships with states.

In the case of the Ottawa Process, non-governmental organizations, and especially those working under the coalition of the International Campaign to Ban Landmines, worked in close association with some key states. As seen above, the Canadian government in particular was open to – and in fact eager to – work closely with NGOs supporting a total ban.⁴⁶ The Canadian government was one of a grouping of states that supported a complete ban on anti-personnel landmines, and most of these were open to a larger role played by NGOs than was usually the case in international negotiations. These Core Group states were crucial in ensuring that NGOs could participate to the extent they did, and to guaranteeing the contributions made by NGOs were given the high level of attention they were.

During the negotiations for an international criminal court NGOs – particularly those under the umbrella of the Coalition for an International Criminal Court – worked closely with a group of states supportive of a strong ICC, known as the like-minded states.⁴⁷ These nations were keen to benefit from the knowledge and expertise brought to the issue by non-governmental organizations, and were instrumental in facilitating NGO participation and contribution to the process wherever possible.

⁴⁶ See Chapter 3, section E.4.b, above.

⁴⁷ See Chapter 4, section D.2, above.

In both sets of negotiations, NGOs made contributions in a number of ways. In addition to the concrete contributions NGOs made as listed above. NGOs sponsored or co-sponsored conferences in areas of interest, they participated as members of country delegations, they benefited from inside information shared with them by state delegations, and they exerted pressure on states domestically, particularly during national elections, and in states not inclined to sign the Treaty.

i. NGO-Sponsored Conferences

Beginning with the International Committee for the Red Cross decades before the Ottawa Process, NGOs held numerous conferences on the topic of anti-personnel mines in an attempt to raise awareness of the damage they caused to civilians. Many were organized in conjunction with states. Some involved experts considering specific aspects of landmines, while others offered an opportunity for the public and aspects of civil society engaged in the work around landmines to come together to share information. The first NGO sponsored conference hosted by the ICBL marked the start of a successful string of conferences that not only fulfilled the purpose of bringing together those with an interest in landmines issues, but also had the result of growing the numbers of NGOs that signed on as members of the ICBL.⁴⁸

NGO conferences raised awareness of the issue of landmines and increased attention to the movement for a total ban. They successfully connected people and organizations from a variety of interests, and assisted grass roots organizations in their efforts to work on the

⁴⁸ Maxwell A. Cameron, "Democratization of Foreign Policy: the Ottawa Process as a Model" (1998) 5 Can. Foreign Pol'y 147 at 152 [Cameron, "Democratization"].

issue and to lobby effectively. NGOs became efficient in ensuring that every possible connection was made between the various sectors involved in the debate around the landmine ban, and they ensured, whenever possible, that the meetings ended with a declaration or statement in support of the Ottawa Process.

Conferences were crucial to raising awareness among the public of the negotiations for an ICC. NGOs organized large, well-attended conferences and other gatherings to present information, and to allow members of civil society to discuss the issues arising in the negotiations for an international criminal court. In Canada for instance, the CNICC organized round-table discussions for civil society members who were interested in the creation of an ICC. These conferences were often co-organized with governments, and offered a good mix of NGOs, academics, state and other experts, and facilitated a wider conversation to take place between civil society and governments.⁴⁹

ii. NGOs as Members of State Delegations

Some states were quick to include representatives from the NGO community on their delegations to negotiations around landmine issues. The Canadian government recognized the need for expertise on the humanitarian aspect of landmines, and in 1996 invited Valerie Warmington of Mines Action Canada, to join the delegation to the CCW Review Conference.⁵⁰

⁴⁹ Glasius, "Expertise", *supra* note 5 at 150.

⁵⁰ Cameron, "Democratization", *supra* note 48 at 156.

In keeping with the tone set by Canada early in the process, the Core Group of states carrying forward the Ottawa Process encouraged states to include NGOs on their delegations. Ultimately, approximately fifteen states included representatives from non-governmental organizations on their delegations during the Ottawa Conference negotiations.⁵¹

During the negotiations for an International Criminal Court non-governmental organizations worked closely with some governments. A handful of like-minded states saw the value of including NGO voices on their official delegations. Typically NGO delegates were chosen with the input of non-governmental organizations in the countries in question. While they may have represented particular NGOs, they were also expected to act as full participants of the state delegation, and participate as any other delegate would. This extended both to formal and informal discussions and negotiations, as well as to what position was taken by the delegation, and what was said to those not on the delegation.⁵²

Representatives from the NGO community were able to bring their specific expertise and point of view to the negotiations, both through their contributions to discussions within the formal negotiations, and in their informal interactions with delegates from their own country and from other states. In addition, because they were able to interact freely both with state delegations and with NGO representatives to the negotiations, NGO members on state delegations acted as an effective conduit between states and the NGO coalition.

⁵¹ Cameron, "Global", *supra* note 1 at 77.

⁵² Interview of Valerie Oosterveld, NGO representative on Canadian government delegation to the ICC negotiations in Rome (21 December 2005).

They also served as a resource to other members of the state delegation, by providing specific information and expertise, as well as access to current thinking and strategizing among NGOs.

This level of interconnectedness benefited both states and NGOs. Nations with NGO delegates were often in a position to press for inclusions in the draft treaty that would improve the overall effect of a particular portion of the agreement, or indeed, items that would advance the provisions of international law as a whole. The level of insight and expertise NGO delegates offered to state delegations was a significant addition to the contributions made by state negotiating parties.

iii. Information-Sharing between States and NGOs

NGOs and states shared information through formal channels, such as in the course of meetings and the exchange of reports and other documents, but they also exchanged information in a number of less formal avenues. This ability to benefit from one another's knowledge, experience and thinking came about in large part because of the extraordinary levels of trust that developed between governments and NGOs, both at the general level, and at the individual level between state officials and NGO members. As a result, both sides were willing to share even unofficial information with one another, as for example, state delegates would share with NGOs the content of conversations in closed door sessions. One example given is that of Ambassador Selebi of South Africa

who regularly gave NGOs information on diplomatic developments in closed door sessions.⁵³

One of the perks that came with having NGO members on state delegations was the access to inside information with regard to conversations that were happening between states, both in formal sessions and informally. Of course, NGO delegates were not at liberty to share information that was not for general consumption, just as state delegates were restricted, however having access to NGO delegates meant that the Coalition and its members had an automatic and easy avenue to available information as the negotiations progressed.

In addition to the direct connection Coalition members had access to specific states through participation on state delegations, like-minded countries were generally willing to share as much as they could with NGOs they saw as allies. When NGOs were not given access to particular sessions, they approached delegates from like-minded states as soon as they emerged from the closed session to learn what had been said by whom, and which states were taking what positions. Glasius points out that good relationships between like-minded countries and CICC delegates facilitated the sharing of information from sessions closed to NGOs.⁵⁴ This easy access to information on the inner discussions between states resulted from the close working relationship, and the high degree of trust, that had built between states and NGOs over the course of working towards an international criminal court.

⁵³ Nicola Short, "A Review of the Ottawa Process to Ban Landmines", online: Columbia International Affairs <<http://www.ciaonet.org/wps/shn01>> at 4.

⁵⁴ Glasius, *civil society*, *supra* note 24 at 44.

The previous section shows that in both the Ottawa Process and the ICC negotiations NGOs made a number of contributions to the coalitions with which they were involved, through a variety of techniques. The following section explores how these contributions fit multilateral negotiation and coalition dynamics theories.

C. International Multilateral Negotiation Theory and Coalition Dynamics in the Ottawa Process and the ICC Negotiations

The previous section has itemized the numerous ways in which NGOs contributed to the process of creating international law in these two cases. This section seeks to place these contributions firmly within the context of international multilateral negotiation theory, and specifically within the framework of coalition dynamics as presented by Hampson and Reid, and Drahos.

From the beginning of the ban landmines movement non-governmental organizations made significant contributions to pressing the issue on the global consciousness. As the number of NGOs participating in the push for a ban – and those officially signed on to the International Campaign to Ban Landmines – increased, the civil society component of the coalition was more and more an integral part of the movement. The situation of the ICC Negotiations was somewhat different in that states had already been working on moving the issue forward, though this had occurred in fits and starts. Once non-governmental organizations became more involved however, progress in advancing the goal of an international criminal court became steadier and proceeded at a faster pace.

By applying the coalition dynamics of size and diversity as identified by Hampson and Reid, and communications factors as identified by Drahos, we can see how NGOs worked in close alliance with states, and how they fulfilled roles otherwise held by state actors. Indeed, we see that the participation of NGOs increased the strength of the state/NGO coalitions that formed in an effort to influence the creation of international law in certain directions.

1. Review of Size and Diversity, and Communication Functions

As described in Chapter two,⁵⁵ Hampson and Reid argue that the prime factor determining the success of the Ottawa Process and the ICC Negotiations is the size and diversity of the coalitions that grew up to support each initiative. Because of the broad cross section of state and civil society representatives in these coalitions, Hampson and Reid argue that they enjoyed a certain strength in their size and stability which could not be destabilized by the actions of any single party. In addition, the authors point out that the larger the size of the coalition, the broader the support will be for the norms, principles and institutions grounding the coalition and its efforts.

At the same time, broad representation has the added benefit of providing a wide array of strengths and resources, as well as being indicative of support from regions and communities from across the globe. Hampson and Reid outline four particular aspects of diversity that are factors in the success of coalitions: 1) the capacity to “name and shame”; 2) the capacity to bring different resources and bargaining skills to the negotiating table; 3) the capacity to take risks; and 4) the capacity to secure support from

⁵⁵ See Chapter 2, section E.1.a, above.

civil society and a wide array of non-governmental actors in order to leverage governments.

Drahoš examines coalition dynamics from a number of perspectives that revolve around communications functions.⁵⁶ Drahoš highlights four factors that are of particular interest in the context of the coalitions studied here: 1) strong communications networks, or intelligence networks, through which coalition members gather and disseminate information; 2) enrolment power, or the ability to draw in new members; 3) shared monitoring and analytical capacity; and 4) institutionalized communication processes to facilitate group dynamics, and to increase trust.

Both of these lenses are helpful in analyzing the participation of NGOs in the process of international law-creation. As seen in the previous section, NGOs contribute to the creation of international law in a variety of ways, many of which can be considered under the categories listed by Hampson and Reid, and Drahoš. The following section examines these contributions in light of the two lenses of coalition dynamics presented here.

a. Size

As seen in Chapter three, the number of states involved in the movement to ban landmines grew over the course of Ottawa Process, from the original eight that met in a back room at the CCW Review Conference in Geneva in May 1996, to a total of fifty pledging to support a comprehensive ban at the Ottawa Conference in October 1996.

Ultimately, 85 states participated in the final round of negotiations in Oslo in September

⁵⁶ See Chapter 2, section E.1.b, above.

1997. Initially there was only a handful of international NGOs pushing for a global ban on landmines, however over time the numbers only grew, until there were hundreds of non-governmental organizations participating in the movement in general. By the time of the final treaty signing conference in Ottawa in December 1996, the number of NGOs registered as part of the International Coalition to Ban Landmines had jumped to over 1,200.

In the case of the ICC negotiations, as described in Chapter four, the number of states participating was higher than in the landmines situation with eventually almost all states taking part in the discussions. As far as the coalition is concerned the number of like-minded states grew to include over sixty states, the vast majority of these collaborating with NGOs. The number of NGOs participating in the Coalition for an International Criminal Court grew from 30 during the *Ad Hoc* Committee meetings, to over 800 non-governmental organizations by the time of the Rome Conference. While “only” 236 NGOs were accredited to participate at the diplomatic conference in Rome, the over 800 NGOs were actively continuing the work of the coalition in their home countries and wider regions, spread all over the globe.

The number of non-governmental organizations participating in the International Coalition to Ban Landmines was more than double the number of states, while the Coalition for an International Criminal Court was made up of more than five times the total number of states involved in the negotiations. It is clear that NGOs made a significant contribution to the size of the NGO-state coalitions working together on each

of these issues, thereby significantly upping the number of voices reflecting global attention to the cause. In addition, the number and regional spread of NGOs involved in both negotiations greatly enhanced the reach of the coalitions' messages.

b. Diversity

In addition to contributing to the increase in size of coalitions, NGOs also contributed to the diversity of coalitions. Hampson and Reid break coalition diversity into four categories: capacity to name and shame; capacity to contribute different skills and resources; capacity to take risks; and capacity to secure support from civil society.

i. Name and Shame

States are often reluctant to publicly criticize one another on specific issues, as they must work together on a multitude of items from political, to trade, to security concerns. As a result, states tend to be circumspect and take a careful approach in how they talk about the positions and decisions taken by other states. Non-governmental organizations are generally not encumbered by such concerns. Indeed, many are well known for openly and publicly critiquing state positions on any number of issues in the international as well as domestic arena. This is one of the techniques NGOs and various civil society representatives use to great success in pressing governments to take certain positions.

In the case of the effort to create a landmines ban, NGOs used the naming and shaming technique to press governments to take a pro-ban position. NGOs openly criticized the process and the discussions taking place in the Conference on Disarmament negotiations, and had strong words to say about the amendments made to Protocol II of the *Convention*

on Certain Conventional Weapons. As the Ottawa Process began to move forward, NGOs did not hesitate to criticize specific states whose positions and policies were contrary to the intention of the ban, including the maintenance of a list called “The Good, the Bad, and the Ugly” through which the ICBL publicly shamed states whose public statements did not match up to their practices.⁵⁷

The most striking example of naming and shaming by NGOs is the comments made by Jodi Williams as coordinator of the ICBL, criticizing as inadequate the French landmine policy announced at the initial Ottawa conference in October 1996. Not only was an NGO representative unabashed in publicly criticizing a state policy, but it was done in a venue where NGOs were not usually allowed to participate, and states themselves were not in the habit of condemning one another with such vehemence. This incident set the tone for the remainder of the Ottawa Process, and NGOs, particularly within the ICBL, continued to loudly and publicly name those states that were holding out on key provisions, or otherwise causing difficulties for the pro-ban movement.

There is little documented about specific instances of NGOs ‘naming and shaming’ states during the ICC negotiations. However, NGOs were equally inclined to publicly denounce states taking positions contrary to the goals of the CICC, and were not shy about exposing and condemning behaviour of state officials with whom they were unhappy.⁵⁸ NGOs used the standard practice of naming states that held contrary views in their own

⁵⁷ Cameron, “Global”, *supra* note 1 at 76.

⁵⁸ Glasius, *civil society*, *supra* note 24 at 46.

publications, as well as in the open media. By the same token, NGOs were quick to lend support to states that did work towards the same goals, and to do so publicly.⁵⁹

ii. Different Resources and Bargaining Skills

Without question, non-governmental organizations brought resources and bargaining skills to the ICBL that were different from those offered by states. Starting with resources, NGOs generally dealt directly with affected populations, whether in mine-infested regions or in centres dealing with the results of mine detonations. As a result, NGOs were able to contribute direct, first-hand knowledge and experience about the results of landmines on people's life and health, on their daily lives and livelihoods, and on the impact of landmines on communities and societies at large. Having this first-hand access to the reality of those impacted by landmines also gave NGOs the ability to project more realistically what the most helpful solutions would be, from de-mining, and banning further production and use of mines, to the very real and immediate care needed by landmine victims. This is information few governments were in a position to contribute.

Further, NGOs had access to experts – in both practical and theoretical matters – who were able to contribute to the information and increasingly complex discourse about how best to resolve the landmine problem. Expert conferences and reports were valuable contributions to global learning about the landmines issue that would not have been easily obtained through government sources alone. NGOs were also in a position to organize and host – sometimes in conjunction with governments, but frequently on their

⁵⁹ This is most clearly shown in the close alliance between like-minded states and the CICC throughout the negotiations; Pace & Schense, *supra* note 29 at 119.

own – regional meetings and conferences that allowed a further exchange of information and ideas.

The contributions NGOs made to the bargaining power of the coalition, through their efforts at shaping public opinion and providing education to civil society in general, were significant particularly since these were not skills states could readily bring to the table. Because of their contact with those directly affected by landmines, and because of a general view of NGOs as being politically neutral, it was easier for them to shape public opinion at both the domestic and international levels. In addition, NGOs had good connections with the media and were able to disseminate information widely and rapidly.

Further, it was NGOs that initially suggested to pro-ban states that it would be helpful for them to work as a bloc to move the issue forward. NGOs were instrumental in shifting the perspective of the landmines issue from one of state security to one of a humanitarian concern. In addition, these same factors assisted NGOs when advocating for a total ban with states. The participation of NGOs in the coalition brought a number of diverse resources and bargaining skills to the pro-ban group to which states on their own may not have had access.

Many of the same considerations apply to the situation of NGOs in the ICC negotiations. The NGOs that formed part of the CICC, and the coalition itself, offered a variety of resources that were of benefit to the states participating in the coalition. In addition to consulting with governments, and assisting governments with the strategy and technical

information required for debates, NGOs also served on state delegations and were crucial in lending their resources in that way. NGOs offered subject matter expertise – through expert papers, presenting negotiation options on specific issues, and legal and technical opinions – on myriad issues that arose during the ICC negotiations.

NGOs were also essential to organizing and carrying out national and regional education initiatives to involve as many people as possible around the world in conversations about the ICC, and to enable local groups to lobby more effectively within their own countries and regions. At the negotiating venues NGOs organized caucuses and strategy meetings for interested states, and provided regular, comprehensive meeting reports on the various sessions taking place. This latter contribution was crucial to many states that did not have delegations large enough to cover all of the sessions themselves.

The CICC also proved to be a crucial avenue for the dissemination of information to all those sectors of society interested in the progress of the talks for an ICC, from the general public, to the media, to elements of civil society. The CICC shared information through a number of mechanisms including electronically, through publications – both at the negotiating fora and more widely, and through press releases and interviews. The larger NGOs used their own internal networks and in-house media infrastructures to make the information as broadly available as possible. Though the demand for information was high, governments provided very little to the media, and NGOs ably filled this vacuum with regular briefings and individual meetings for the press.

In addition, the coalition assisted with several aspects of organizing the logistics of the meeting, particularly for the NGOs accredited and attending the negotiations, but also for states who required such assistance as translation and expert volunteers in order to be able to participate effectively in the negotiations.

iii. Take Risks

Within the context of traditional international negotiations, states are not generally predisposed to taking risks when it comes to influencing other states. NGOs, on the other hand, are not bound by the strict rules of international interaction, and are therefore free to be more direct, more aggressive, and more creative in their attempts to influence states to take a certain course of action. They could lobby actively and put concerted pressure on states in ways states themselves are not generally willing to do for fear of affecting international relations.

NGOs encouraged Core Group states to be bold in a number of ways within the Ottawa Process. Firstly, the small group of NGOs that first joined together to work on promoting a comprehensive ban recognized early on that it had to work with states in order to move the issue forward at the international level. In doing so NGOs risked being co-opted, or perceived to have sold out to states, as indeed the criticism arose during the Ottawa Process.⁶⁰ It was, however, a risk the ICBL was willing to take in order to get the mine ban on the international agenda. Secondly, NGOs encouraged states to pursue a negotiation track outside the confines of the United Nations system, and to use a system that relied on states self-selecting participation based on whether they could support a

⁶⁰ Cameron, "Democratization", *supra* note 48 at 151.

pre-circulated draft text, rather than allowing negotiations to get bogged down in the a consensus approach to each individual item up for discussion. In fact it was NGOs who first suggested that pro-ban states work in a coalition to push forward the goal of a total landmine ban, rather than trying to tinker with the CCW and CD negotiations already tangled up in stalemates. This move perhaps posed more of a risk for states than for NGOs, however NGOs would also have been implicated if the venture had gone badly.

During the negotiations for an ICC, NGOs were willing to take risks and push the envelope in ways states were not. This began with NGOs pushing states to press for a diplomatic conference to follow up on the interest sparked by the ILC draft statute. Further, NGOs encouraged like-minded states to adopt formalized guiding principles to assist them during the negotiations.⁶¹ The CICC further encouraged like-minded states to step out of the boundaries of the usual and call for a diplomatic conference that did not resort to the usual consensus style decision-making, but rather one that followed the pattern started by the Ottawa Process.

The propensity of NGOs to push boundaries and takes risks was also true with regard to the substantive issues under debate. For example, in the context of the gender discussions NGOs pushed states to be bold and to codify standards in the treaty that were only just making their way into international law. In another example, NGOs helped pave the way for a strong independent prosecutor making a proposal that was even more radical than any already on the table, thereby making the proposal many found too drastic seem more

⁶¹ William R. Pace, "The Relationship Between the International Criminal Court and Non-Governmental Organizations" in Herman A.M. von Hebel, *et al.* eds., *Reflections on the International Criminal Court* (The Hague: T.M.C. Asser Press, 1999) 189 at 206.

palatable.⁶² Indeed, some states used this suggestion as a tool to press other states to accept the less extreme option of an independent prosecutor.

Another area in which NGOs were comfortable taking risks where states were not was in raising public awareness of many of the most serious issues in question during the negotiations for an ICC. NGOs held public demonstrations, often creative in nature, that caught the attention of the media and engaged the public. One such demonstration was seen as so extreme as to cause a temporary restriction of NGO access to the site.⁶³

iv. Secure Support from Civil Society and NGOs to Leverage Governments

NGOs working towards a total ban on landmines came from literally all over the world, from Europe and North America, from Africa, Asia, and South America. In virtually every country, NGOs were amassing civil society support through education and awareness campaigns among the public, and were pressing governments to take a strong position in favour of a ban.

Non-governmental organizations represented a wide array of civil society sectors, and were able to actively demonstrate public support of a total ban on landmines. They did this through a number of methods including regional meetings of NGOs and governments, expert meetings, and conferences; and through campaigning actions and public events to bring attention to various landmine issues. While there may be debate

⁶² Glasius describes the tactic of recommending that victims and/or NGOs be able to initiate proceedings even though CICC members were well aware it would be unlikely to receive significant support; Glasius, "Expertise", *supra* note 5 at 154.

⁶³ The Mothers of Plaza de Mayo demonstrations.

around the true democracy and representativeness of NGOs of civil society, there can be no question that vast swaths of civil society sectors were making themselves heard through NGO actions on the landmines issue.

In fact, the pressure of such groups was so significant that they effectively contributed to pressing governments to take certain actions.⁶⁴ Not to be ignored are the numerous approaches NGOs made to states during the Ottawa Process, on myriad individual items under negotiation, where NGO input was received and contributed to state positions on any given issue.

NGOs making up the CICC also came from dramatically different backgrounds and interests, including women's organizations, peace and conflict resolution backgrounds, global governance and UN-oriented groups, and religious organizations. Some were large globally minded organizations, some were small local groups, and many were in between.

The NGOs that formed the Coalition for an International Criminal Court worked very well together to coordinate the approaches and various forms of pressure and lobbying of states. Because of the broad makeup of the coalition, and the widespread support it had among various elements of civil society, the CICC was particularly effective at pressing state delegations at the negotiating fora, approaching states taking part in other international or regional meetings to press the case of an ICC, and in lobbying

⁶⁴ Kenneth Anderson, "The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society" (2000) 11 E.J.I.L. 91 at 107.

governments in their home capitals. The well-developed communications and cohesion of the CICC allowed the coalition to monitor state positions at the negotiations, and immediately have the appropriate reaction felt by the government at home through NGOs on the ground.

In the final tally of contributing to coalition size and diversity, non-governmental organizations brought significant additions to the skills and resources available to the coalitions of states and NGOs in both the Ottawa Process and the ICC negotiations. It is unlikely that states alone, even the relatively large number of pro-ban states that eventually came together in the coalition, could have achieved the Ottawa Treaty without the significant contributions of NGO representatives of civil society. By the same token, many crucial pieces of the ICC Statute came to the fore and were ultimately incorporated because of the pressure exerted on states by civil society through NGOs.

c. Communication Functions

In Drahos' analysis of coalitions, four specific factors come to light that improve parties' effectiveness in multilateral negotiations: intelligence networks; enrolment power; monitoring and analytical capabilities; and institutionalized communications. By examining the Ottawa Process and the ICC negotiations through this lens, we see how NGOs contributed, through these four communications functions, to the strength of collaborative ventures with states. In addition to those carried out specifically within the context of state-NGO collaboration, communications functions exercised within the NGO coalitions themselves often had a positive collateral effect on the Core Group and like-

minded states with whom NGOs were working, either because NGOs performed these functions better than states, or because states were not performing the functions at all.

i. Intelligence Networks

Over the course of both sets of negotiations NGOs created highly developed intelligence networks. These networks encompassed not only other NGOs and a variety of civil society actors, but as NGOs worked more closely with Core Group and like-minded states, included these actors as well. Well-developed intelligence networks were useful in two regards: first in gathering information, and second in disseminating information.

Both the ICBL and the CICC made extensive use of modern forms of communication, including email, listservs, and websites on the internet, to reach as many groups and individuals as possible. These forms of communication were especially useful in gathering information from around the world, both from regional and national civil society movements, and from those reporting on state actions and positions with regard to the negotiations. At the same time, NGOs used these forms of communication to best advantage in ensuring that populations and home governments around the world had access to information as quickly as it became available, which was especially important as the negotiations entered the final stages.

Intelligence networks in both negotiations also benefited from individual allies, champions and personal relationships. Collaboration between states and NGOs were significantly enhanced by relationships that developed between individuals; as

individuals began working together and learnt that they could trust one another, information flowed more freely, both ways – from NGOs to states, and from states to NGOs. In the case of the Ottawa Process, as the Canadian government took a big chance in working so closely with NGOs, personal relationships made a real difference to the level of trust between parties. In the case of the ICC negotiations, having strong personal relationships between state and NGO representatives became crucial during the final negotiations when talks became so big and complex that it was difficult for most delegations to cover all aspects of the talks. NGOs and states were able to share the different information each gathered during the conference.

Another way in which coalitions strengthened their intelligence networks was through the inclusion of NGO representatives on some government delegations to both sets of talks. Having this open avenue of communication benefited both states and NGOs as NGO delegates were encouraged to act as conduits between the two. On a more macro level, NGOs acted as intermediaries between states and civil society, feeding information from both sets of players in a targeted and useful way. In addition, states sometimes used NGOs to pressure other states on certain positions, in ways that states themselves would not have been willing to do.⁶⁵

By pooling their resources, both states and NGOs expanded the strengths and capacities available to them. For example, in working in collaboration with NGOs states had access to a wide network of experts on substantive as well as legal aspects of the treaties being

⁶⁵ Barbara Bedont & David Matas, "Negotiating for an International Criminal Court" *Peace Magazine* 14:5 (October 1998) 21 at 23.

negotiated. NGOs, by the same token, had greater access to the knowledge of and research done by states with whom they were collaborating. The scope and breadth of the intelligence networks each had access to was increased significantly by combining resources. This was particularly helpful in the ICC negotiations where NGOs realized early on that the technical aspects of the negotiations would quickly become more than most NGOs could handle on their own.⁶⁶ By working in coalition, NGOs would be better placed to cover all the aspects of the negotiations they needed to cover.

Perhaps the most structured example of intelligence networking is that of the CICC monitoring teams set up during the Rome conference for an ICC.⁶⁷ NGOs covered each of the 13 working parties and as many of the associated meetings as they could access. This information was pooled and distributed not only to all NGOs in Rome, but also to any interested state delegations. As the talks progressed, more and more states came to rely on this information. In addition, NGOs divided themselves up to cover regional caucuses, and thematic caucuses, and to make this information as widely available as possible.

ii. Enrolment Power

NGOs made significant enrolment power contributions to the coalitions in which they participated. Certainly in terms of increasing size and diversity of state-NGO coalitions, as discussed above, the biggest impact was felt through the participation of non-governmental organizations that were linked in through the NGO coalitions on each set

⁶⁶ Pace & Schense, *supra* note 29 at 111.

⁶⁷ Interview of Fergus Watt, Convenor for the Canadian Network for an International Criminal Court (24 November 2005).

of negotiations. NGO coalitions attracted new members primarily through education and information-sharing mechanisms. The more civil society actors became aware of what was at stake, the more they wanted to be involved in supporting the call for a mine ban and an international criminal court.

The power of NGOs to enrol other actors in the mine ban movement has been widely acknowledged, as it is generally recognized that the campaign to ban landmines began entirely as an NGO effort. First NGOs began to work more concertedly together, growing the numbers involved in the NGO coalition. Then they gradually brought ban-supportive states into the coalition, through tactics of awareness-raising and pressure. Many members of the Core Group of states were persuaded to join the effort by NGOs, as was the case of the Canadian government.⁶⁸ In fact, the enrolment power of the ICBL was such that ultimately a number of states committed significant resources and energy to the ban efforts,⁶⁹ and at least one participant has said that states alone would not have been able to mobilize opinion the way the ICBL did.⁷⁰

In the lead-up to the Ottawa Process, the ICBL gained the interest and participation of other NGOs through conferences. Over the course of four years, the Coalition attracted 1,200 organizations. As noted above, one of the ways the ICBL managed to enrol so

⁶⁸ Lloyd Axworthy writes of the strong, consistent, but not confrontational pressure applied by NGOs; Axworthy, *supra* note 6 at 131.

⁶⁹ Anderson, *supra* note 64 at 108.

⁷⁰ Axworthy, *supra* note 6 at 153.

many NGOs was by maintaining a very loose structure, and encouraging NGOs to decide which strategies worked best in their own contexts.⁷¹

In the case of the ICC negotiations, over 800 NGOs were members of the CICC by the time of the Rome Conference, and therefore contributing to the resources and capacity of the joint effort to create an international criminal court. Only a handful of NGOs were initially engaged in this endeavour, and after the first formal meeting of NGOs Amnesty International took on the role of writing to several dozen other non-governmental organizations to generate interest in the new coalition, and invite them to participate in an organizing meeting in early 1995. More than thirty organizations joined the coalition at that session.⁷² A significant factor in the ability to attract NGO interest was the clarity and simplicity of the stated purpose of the coalition: the CICC was specific in supporting primarily a strong independent court. This was a broad enough goal that many NGOs – regardless of their own mission – could comfortably sign on to the Coalition.⁷³

NGOs also worked to increase the number of states aligned with the coalitions. Indeed, one of the CICC's stated goals going into the Rome Conference was to increase the number of like-minded states.⁷⁴ Through a variety of activities explored in the sections above, the ICBL and CICC pressed governments to join in their efforts. The multitude of support activities NGOs carried out for state delegations, particularly in the ICC context,

⁷¹ See section B.2.a.i, above.

⁷² Pace & Schense, *supra* note 29 at 111.

⁷³ Watt, *supra* note 67.

⁷⁴ *Ibid.*

may also have contributed to a mood that inspired states to be more favourably inclined to collaborate with the NGO coalitions.

iii. Monitoring and Analytical Capacity

One of the more substantive contributions made by NGOs during the Ottawa Process and the ICC negotiations was their extensive capacity for monitoring and analysing developments, both in terms of what was happening in the context of the talks, and in terms of substantive issues that arose during those talks.

NGOs were invaluable in collecting and processing the masses of information related to the effect of landmines. Particularly as the conversation shifted away from disarmament towards humanitarian impact, states were at a disadvantage with regard to access to information. NGOs who had been working in the field for decades, were able to compile and analyse all the relevant data. In addition, because of NGO access to experts in a variety of fields, they were in a position to provide helpful analysis regarding the human rights and humanitarian aspects of the negotiations taking place within the Ottawa Process.

In the context of both negotiations, the NGO coalitions set up extensive networks of experts who were able to participate in analysis from an international law perspective as well as from a human rights advocacy position. NGOs produced countless expert papers on particular subjects which NGOs and states alike turned to in order to improve their understanding of the issues. Glasius notes that articles and reports produced by experts

“had the primary aim of informing and influencing a specialist public of NGOs, academics, and state representatives on specific sub-themes, promoting certain alternatives, or political realities.”⁷⁵ The reports and publications of a handful of bigger NGOs, such as Amnesty International and the International Commission of Jurists, were particularly appreciated by delegates, and it came to be expected that NGOs would produce expert papers on key issues as they arose.

In both the Ottawa Process and ICC negotiations NGOs were responsible for producing regular – including daily – publications, providing updates on the developments in the talks. Some of these publications were also available in electronic format, which also benefited those not present at the negotiations. They included an overview of the developments in the talks, as well as coverage of the issues, and commentaries from experts, participants, and observers.

During the Rome conference for an ICC the CICC made remarkable contributions to monitoring and analysing developments on an on-going basis. As described above, coalition NGOs split up into teams so as to cover the discussions in the 13 working parties of the conference. Because of the size of the NGO coalition they had enough people to monitor all of the sessions taking place, a task which few delegations, state or NGO, could have done on their own. Pace and Schense describe that the teams covering each working party consisted of at least one team leader with expertise in the area and contact with government delegations, and deputies who were responsible for ensuring

⁷⁵ Glasius, "Expertise", *supra* note 5 at 150.

good communication among team members and for developing the team reports.⁷⁶ These teams reported back to NGOs and interested states, and provided analysis of the events on a daily basis, in both oral and written reports.

In addition to the value of this monitoring function performed by NGOs in Rome, they also kept detailed logs recording the formal positions of delegations on every issue of importance, and “compiled these positions into percentages in favour of and in opposition to any given option.”⁷⁷ Through these compilations delegates were able to get an overview of the various options on the table, and the levels of support for each. Having this information also enabled delegates and NGOs to strategize effectively about lobbying states.⁷⁸ The numbers collected by the teams were eventually used to put together ‘virtual votes’ which helped the Committee of the Whole put together a final package designed to garner as much support as possible.

Many commentators have pointed to the value of the monitoring and expert analysis provided by NGOs.⁷⁹ Their contributions assisted delegations – especially smaller delegations – in understanding the various levels involved in the debates, and as a result improved the quality of the negotiations. Not only did monitoring and analysis by NGOs directly assist participants in the negotiations, NGOs also made much of their coverage available to broader civil society, thereby increasing the public’s awareness and understanding of the issues under debate.

⁷⁶ Pace & Schense, *supra* note 29 at 127.

⁷⁷ *Ibid.* at 134.

⁷⁸ Van Der Vyver, *supra* note 42 at 430.

⁷⁹ See for example, Philippe Kirsch & John T. Holmes, “The Birth of the International Criminal Court: The 1998 Rome Conference” (1998) 36 Can. Y.B. Int’l L. 3 at 36.

iv. Institutionalized Communications

NGO coalitions in both the Ottawa Process and the ICC negotiations were good at maintaining open flows of communication, both among themselves, and with Core Group and like-minded states with whom they collaborated.

At the most basic level, the NGO coalitions made sure all members were informed as to the issues and discussions taking place. The ICBL and the CICC were deliberate about ensuring that all members were kept in the loop with regard to developments, and contributed to decision-making and information gathering wherever possible. Both coalitions organized a number of international conferences and meetings in the lead up to the formal diplomatic negotiations, that allowed civil society and state participants to share information, views, and thinking on the issues, in both formal and informal settings.⁸⁰

Within the context of the ICC negotiations, the CICC organized NGOs into regional and thematic caucuses as a way of keeping flows of information organized. The 13 working party monitoring teams described above had the same effect. The CICC also contributed to formalized communications by issuing regular reports, organizing news teams for daily coverage of the Rome conference, holding regular briefing sessions for NGOs and state delegates, holding daily strategy sessions to keep Coalition members up-to-date, and

⁸⁰ Nel points out that these conferences also provided the opportunity for informal negotiations between states; Philip Nel, "Between counter-hegemony and post-hegemony: The Rome Statute and normative innovation in world politics" in Andrew F. Cooper, *et al.* eds., *Enhancing global governance: Towards a new diplomacy?* (New York: United Nations University Press, 2002) 152 at 158.

holding regular meetings with governments, especially like-minded states.⁸¹ The CICC also facilitated communications for NGOs and some states by providing co-ordination and organizational services, as well as translation and interpretation. All of these functions contributed to the communications network that facilitated the work of NGOs and like-minded states, both individually, and as a coalition.⁸²

Perhaps most importantly, both coalitions went to great lengths to establish open channels of communications with friendly states, and to ensure as free-flowing communications as possible. This happened in the form of official meetings between NGOs and government officials, at conferences and other meeting fora, and through informal conversations. These conduits for information sharing benefited both states and NGOs.

NGOs took part in coordinated lobbying efforts both at the conference sites and in home countries. This was particularly evident at the Rome ICC conference where NGOs approached state delegates at the conference while at the same time their colleagues lobbied government officials and the media in their home capitals.⁸³ NGOs were also crucial to keeping the global media informed of developments in the negotiations. Regular press briefings and news releases facilitated access to information not only for specific NGOs involved in the coalitions, but for all of civil society, thereby increasing the sense of open channels of communication.

⁸¹ Pace, "Relationship", *supra* note 61 at 202.

⁸² Pace and Schense observe that because of the efforts of the CICC, some smaller states from the Global South who would not have been able to participate in any meaningful way on their own, felt that they were at least being heard by the Coalition; Pace & Schense, *supra* note 29 at 122.

⁸³ Glasius, "Expertise", *supra* note 5 at 150.

D. How are NGOs Impacting the Current System?

Despite the limitations NGOs face within the Westphalian system, in these two cases they have pushed at the boundaries of current practice. As a result, the traditional practice based on the supremacy of the state has begun to show gradual changes. By pressing for consistent participation in international law creation, and by contributing to the size and diversity, and the communication functions of the coalitions in which they participate, non-governmental organizations have had an impact on the creation of international law in two ways. First, they have influenced the content of the two international treaties examined in this dissertation. And second, they have begun to influence the state pattern of behaviour with regard to accepting NGO participation within international multilateral negotiations.

1. NGO Impact – Content of the Law

Both the treaties considered above demonstrate that NGO participation in the law-creation process can result in international legal standards that would not have developed without their input. While states remained the chief factors in both negotiations, it is clear that in these two cases certain aspects of the final treaties were a direct result of NGO influence.

In the case of the Ottawa Treaty to Ban Landmines, many have argued that the fact that the agreement exists at all is due to the efforts and persistence of civil society and NGOs that pushed for the agreement. Had NGOs and the ICBL not pressed so consistently and

effectively for attention to the global problem of landmines, states would likely have continued on the paths of negotiations taking place within the context of the CCW and CD talks, neither of which were making good progress. It is also highly improbable that either of these courses of negotiations would have led to a comprehensive landmine ban. This result is due in large part to the work of NGOs in bringing attention to the matter, and in changing the framework of the discourse from one of security and disarmament to one of a humanitarian issue. The participation of NGOs in coalition with Core Group states was instrumental to the existence of the Ottawa Treaty to Ban Landmines.

The International Criminal Court treaty, though itself not directly attributable to NGOs, owes several key provisions to their efforts, including the independent prosecutor and the strong, consistent attention given to sex and gender issues. Non-governmental organizations lobbied persistently for a strong independent prosecutor. Indeed, many NGOs saw this question as the collective bottom line. As explored in the previous chapter, NGOs ensured, through a number of tactics, that the duties and powers given to the prosecutor were adequately independent and robust to allow the role to function as best it could. Many have acknowledged that the casting of the prosecutor as independent of any existing bodies can be directly attributed to NGOs.

In addition, the inclusion of sex and gender issues within the definitions of the Statute, and the fact that there are built-in strategies to adequately assist and support victims and witnesses of sexual and gender crime, is also attributed by many to the efforts of NGOs. Through their individual efforts, and most particularly their collaboration with like-

minded states, NGOs ensured that sex and gender concerns were incorporated into the Statute.

In both of these cases, then, the participation of NGOs in the process of law creation, in coalition with states, has led to contributions to international law that would most likely not have occurred without their involvement.

2. NGO Impact – Creation of the Law

As discussed in Chapter two, the only entities truly and unquestionably entitled to create international law are states.⁸⁴ It is apparent from the cases studied in this dissertation, however, that non-state actors – in particular non-governmental organizations – are increasingly impacting the creation of international law. They are doing so in two key ways. Firstly by influencing state decision-making and state behaviour, and secondly by inserting themselves into, and participating in, the law-creation system through working in coalition with states.

The first of these methods is a traditional and accustomed role for NGOs; non-governmental organizations have been lobbying and pressing states to take a certain course of action since they first began operating. The second method, that of participating in the creation of international law, is arguably a newer endeavour for NGOs. While it is helpful to look at these functions separately, in order to see the individual parts of the puzzle, there is also significant overlap between the two. When NGOs work in coalitions with states they may very well develop close, collaborative working relationships with

⁸⁴ Some inter-governmental organizations have law-making powers, but these are granted to them by states.

government representatives. Such close relationships by no means, however, stop NGOs from continuing to press the governments with which they are collaborating, and others, to take certain positions.

a. Influencing State Behaviour and State Decision-Making

In both the Ottawa Process and the ICC negotiations NGOs were influential in getting the topics themselves on the international agenda. They then went on to contribute to setting the agenda for how the discussion among states and other elements of civil society would play out – both in terms of the general flow of international conferences and discussions, and in terms of the agendas of specific conferences themselves. Once negotiations between states began, non-governmental organizations continued to provide information, exert pressure, and otherwise do what they could to influence states to take certain positions, and in turn, to lobby other states regarding their positions. Non-state actors influenced state behaviour and decision-making in a number of ways. They informed and educated, they made extensive analytical and field based expertise available to states, they mobilized public support which in turn influenced governments, and they carried out traditional lobbying activities.

NGOs most obviously influenced state behaviour and decisions when they collaborated with states. This happened in two ways: NGOs partnered with states in one-on-one relationships, and NGOs participated in coalitions made up of states and non-state actors. In both of these scenarios, as seen above, governments were greatly influenced by the

contributions made by NGOs in both substantive and procedural matters relating to the negotiations.

In both negotiations NGOs successfully influenced state decision-making and state behaviour. It was through NGO persistence that the topic of landmines was raised in the international diplomatic consciousness. Similarly the ICC negotiations, though already underway in a preliminary way, were greatly supported by the pressure NGOs placed on states to make the discussions a priority. Once the topics were on the international agenda, NGOs contributed to the development and planning of the international discourse on each of these issues. Because their contributions were recognized, non-governmental organizations were invited to be present at the negotiation venues, whether as sources of information for state delegations, or as participants in the negotiation sessions themselves.

b. Being a Part of the Process

Perhaps most interestingly, non-governmental organizations are gradually changing the traditional patterns of international law-making simply by consistently inserting themselves into the process. Despite the fact that non-state actors do not currently have an explicitly recognized right to participate in the creation of international law, in the two cases examined here they nevertheless continued to make their presence felt, and persisted in seeking ways to participate in the process. Likewise, states increasingly looked to NGO participation to support their own contributions to the negotiation process

in a variety of ways. Sometimes these interactions looked almost oppositional, and sometimes it took the shape of working in state-NGO coalitions.

There are two distinct yet complementary factors at work that had the effect of making NGOs a part of the process. The first is that NGOs constantly asserted themselves on the international scene, insisting that they had significant contributions to make, to the process as well as to the substance of the development of international law. The second factor is that states, some more than others, sought out the input and participation of NGOs to inform and guide government decisions on the topics in question.

As seen in the two case studies, and the analysis in this chapter, NGOs insisted that their voices be heard, and that their constituencies be represented in the negotiation processes for each of the treaties. Non-governmental organizations persisted in seeking different avenues for participation, and for their input to reach the attention of states and government delegations. From street actions to NGO conferences, from lobbying governments to participating as members of their official negotiating teams and working in close collaboration with states in coalitions, NGOs continued to push the boundaries of acceptable participation by non-state actors in what is ostensibly a process open only to states.

At the same time states, to varying degrees, recognized the benefits to be gained from opening themselves up to the contributions, collaborations, and criticisms offered by NGOs with expertise in the topics in question. Some states included NGO representatives

on their official delegations to negotiation conferences benefiting from very direct NGO contributions that way – and further, had access to a more direct link to NGO and civil society communities through this practice. Many states participated in coalitions composed of states and NGOs sharing the same goal, a process which brought with it challenges, but also significant benefits, as already described. And most states turned to non-governmental organizations for information, expert opinions, and analyses of various issues and options during the negotiations.

Sometimes tacitly, and sometimes explicitly, states accepted NGOs participation in negotiations in ways normally reserved for states. In both the Ottawa Process and the ICC negotiations, non-governmental organizations participated to an unprecedented extent in the creation of international legal instruments. So where does this leave us with regard to the traditional understanding of the roles of states and non-state actors in the international legal system? That will be explored in the following section.

3. Coalition Dynamics and the Westphalian Paradigm

As described in Chapter two, according to the Westphalian paradigm upon which the international legal system is based, states are the central units, and the only actors with full legal status. As such, only states are entitled to create international law. While other actors have qualified legal status, derived from states, their right of participation within the international legal system is limited, and they are generally not authorized to create international law.

It is clear from the two cases examined in Chapters Three and Four that NGOs have become involved in the law creation process. In both the landmines negotiations and the negotiations for an international criminal court, non-governmental organizations were central to the development of the international instruments that ultimately resulted. Indeed, we see here that NGOs not only *contributed* to the creation of international law, they *participated* in its creation. This distinction might appear subtle; however it is crucial in the debate surrounding the extent of NGO involvement in the process of creating international law. Contributions may be made through any number of channels, for example by providing information in a general public way which states may choose to use, or by lobbying states from an arm's length position. Participation, however, connotes a more direct and hands-on approach to the pursuit, actually sharing in the activity in question. The cases studied here indicate that non-governmental organizations did exactly that – they took part in, or participated in, the process of creating international law.

The question then, is how did NGOs participate in the process of law creation when, as non-states they are technically barred from doing so? What is the process used by the international community to create international law, and how did NGOs become a part of that process? The answers lie in multilateral negotiations theory and coalition dynamics.

Viewed from the approach of international multilateral negotiation theory, the Ottawa Process and the ICC negotiations involved a multitude of actors negotiating on various levels, and in overlapping groupings, involving a complex variety of themes and issues. International multilateral negotiations theory applies very clearly to state actors as they

engage in the process of discussion and consultation that will hopefully lead to an international agreement that most, if not all, can agree to. In the case of the Ottawa Process and the ICC negotiations, however, an additional set of actors became involved in the negotiation process: non-governmental organizations.

How, then, did NGOs insert themselves into negotiations which, within the Westphalian paradigm, should have involved only states? In both instances, NGOs began working in collaboration with certain states that were favourably disposed to the causes NGOs were pressing. Gradually, through persistent efforts, and consistent results, NGOs began working in more formal alliances with states, in temporary, issue-specific coalitions.

In applying the theories of coalition dynamics presented by Hampson and Reid, and Drahos, we can begin to see how NGOs fulfilled certain roles within coalitions that made them valuable contributors to the group effort. Indeed, NGOs were frequently able to perform functions that states could not perform as well, or at all. Hampson and Reid's theory of coalition dynamics focuses on the size and diversity partners bring to coalitions, thereby making the coalitions stronger. We have seen how non-governmental organizations contributed not only to the size of the coalitions in question, but also participated in several key diversity functions: naming and shaming, contributing different resources and bargaining skills, taking risks, and securing support from civil society to leverage governments.

In his analysis, Drahos raises various aspects of communication that make a coalition's work more successful. In examining the negotiations for the landmine ban and an ICC, we see that NGOs participated in all of these communication functions within the coalitions with which they were involved: they established intelligence networks, they contributed enrolment power, they provided monitoring and analytical capacity, and they ensured institutionalized communications systems. In contributing these various coalition-member roles, NGOs became valuable and valued members of state-NGO coalitions.

As members of these coalitions, NGOs fulfilled many functions otherwise carried out by states, and as such were implicitly involved in the negotiation process. From within the framework of these coalitions NGOs were able to participate in the creation of international law in many of the same ways states did. In the two cases considered here, non-governmental organizations participated in international multilateral negotiations leading to the creation of international law by becoming part of coalitions with states. NGOs took part in activities considered to be – at least in the Westphalian paradigm – reserved for states.

Given the direct participation of NGOs in the international multilateral negotiations leading to the landmines ban and the ICC, does the Westphalian paradigm accurately reflect the reality of how international law was created in these two cases?

International negotiation theory can be useful in understanding how various actors, and sets of actors, participate in the process of negotiating international law. In this dissertation the coalitions dynamics frameworks of both Hampson and Reid, and Drahos, have been applied to explain how NGOs have participated in the process of international law-creation.

While Drahos makes no comment directly related to the participation of NGOs (as opposed to states) in coalitions, Hampson and Reid suggest that NGOs bring value to coalitions through their contribution to the size of the coalition, and the diversity they bring. As seen in the previous discussion, non-governmental organizations participate in a number of ways that do indeed contribute to the overall size and diversity of the coalitions in which they work. However, Hampson and Reid's theory of coalition size and diversity does not adequately reflect the extent of the contributions made by NGOs. In fact, the contributions to size and diversity on the part of NGOs are both over and above what would normally be contributed by states within a coalition. Hampson and Reid's analysis understates the nature of the contribution made by NGOs.

Further, Hampson and Reid's theory of coalition size and diversity does not consider the shift in category of those contributing to coalitions. As seen in the examples of the Ottawa Process and the ICC negotiations, NGOs contributed to the coalitions in ways that simply would not have been possible by states. While NGOs did contribute to coalitions involving states, they contributed skills and resources that states could not, but that were nevertheless instrumental in the success of the coalitions.

What neither of these frameworks recognizes is that NGOs participated in coalitions as non-state actors. Other coalition members were all states. Within the paradigm of the traditional legal system, NGOs are not supposed to be playing within this inner circle of the game, and yet, here they were, playing with states, and making contributions that states could not themselves make. It would seem, then, that NGOs constitute a new, additional force or player in the game of international law creation, as they bring to the table resources, skills, and constituencies to which states do not typically have access. The shortcoming of these two coalition dynamics frameworks is that they fail to recognize NGOs as actors – as coalition members – distinct from state actors.

Treaty law develops when states enter into agreements, conventions, or statutes with one another. Clearly non-state actors can also enter into agreements with one another and with states to create agreements. The *Vienna Convention*, which codifies CIL as it applies to the creation of treaties, recognizes that agreements might be entered into by subjects of international law other than states. However such agreements do not fall within the scope of the *Vienna Convention*.⁸⁵ The *Convention* makes no further comment on the treaty-making ability of non-state entities, and by default, the Convention applies only to treaties between states.

While the Westphalian system continues to maintain that states are the primary actors, and the only actors within international law who are entitled to make law, in the two case studies considered here, NGOs – as non-state actors – have had a significant impact on

⁸⁵ United Nations, Doc. A/CONF. 39/27 (May 23, 1969).

both the content of the international law being created, and on the process by which such law is created. The reality is that NGOs participated in law-creation as non-state actors, and therefore stretched the boundaries of the traditional Westphalian legal system. The two case-studies above demonstrate that the traditional understanding of who contributes to the process and the content of international law can no longer accurately be said to be limited to states. In both cases, non-state actors – namely non-governmental organizations – participated in the creation of international law.

Chapter Six : Conclusion

Review of the Research

This study has been undertaken in an attempt to gain some insights as to whether non-governmental organizations participate in the creation of international law, and if so how. The research problem is based in the observation that on at least two occasions NGOs seemed to be more intimately involved in the process of creating international law than accounted for in the traditional explanation of the international legal system. These cases lead to questions as to whether NGOs were involved in any way beyond the role usually reserved for non-state actors. More specifically, these observations gave rise to the question of whether NGOs actually *participate* in the process of creating international law.

In Chapter Two I examined the framework of the current international legal system, highlighting existing practices and principles of international law that firmly situate nation states as the primary units of international law with full legal personality. Other entities have only qualified legal status, and it is evident that non-governmental organizations do not currently constitute a category of entities with full legal personality. I also examined the two ways international law is generally created: through customary international law, which develops over time as states persist in patterns of behaviour upon which other states gradually begin to rely; and through development of formal treaties, where states negotiate among themselves to conclude international agreements on specific issues. The *Vienna Convention*, which governs the process for creating international treaty law, applies only to states. Though the *Vienna Convention* recognizes

that “international organizations” are sometimes involved in the process of negotiating international treaties with states, the *Vienna Convention* specifies that international organizations are inter-governmental organizations, thereby excluding the possibility of non-governmental organizations participating in negotiations.

Chapter Two went on to examine the growing phenomenon of non-governmental organizations, their characteristics, scope, and fields of activity, as well as some factor under debate. NGOs are especially active in the fields of human rights, and the environment, and their key identifying factor is a significant degree of independence from government control, though many have close relationships to governments through their area of work and/or their sources of funding. The Chapter gave an overview of NGO activity in the domain of international law dating back to the early 1800s, and explored the formal though limited role they have had within the United Nations since its inception.

Chapter Two ended with an exploration of the basics of international multilateral negotiation theory, which analyses discussion among multiple parties with multiple and shifting agendas. The Chapter looked at two particular understandings of coalition dynamics. The first, proposed by Hampson and Reid, suggests that the success of coalitions depends on their size and diversity. The second is an analysis by Drahos of several factors that contribute to coalition bargaining power – all of which fall loosely under the category of communication functions.

In summary, in Chapter Two I set the framework for the following chapters by laying out the currently accepted standards and patterns in the international legal system that relate to the creation of international law. States are the central units of the legal system, and non-governmental organizations do not currently benefit from recognized legal personality. International law is created by states, and states are the only entities entitled to create international law. Non-governmental organizations, though active in the realm of international society, are non-state actors, and are therefore not entitled to create law. Nevertheless NGOs have been involved in the processes of creating international law, and the question is, what has enabled them to do so? A theory that may help understand how NGOs have been involved in the negotiations leading to the creation of international law is that of international multilateral negotiation theory, and in particular, theories of coalition dynamics within multilateral negotiations.

The third chapter allowed a deeper examination of a case of international multilateral negotiations resulting in the creation of a new international legal instrument in which NGOs were intimately involved. The Ottawa Process was to a large extent initiated and carried by NGOs. Non-governmental organizations brought global attention to the issue of mines and the disastrous impact their use was having on society. In addition to raising public awareness about the issue, NGOs were effective in harnessing the inclination of certain states to work towards a total ban.

In order to promote the idea of a ban, NGOs carried out a multitude of functions which fell into four main categories: advocacy work; education and information-sharing; field

research, and media and public outreach. NGOs formed a coalition, the International Campaign to Ban Landmines, which allowed them to collaborate with one another in the promotion of a mine ban, and facilitated the interaction and cooperation of organizations in ways which minimized duplication of effort. In addition, NGOs worked closely with core group states, to ever-increasing degrees, as the negotiations progressed. Remarkably, NGOs were initially seen by some to be full partners in the effort by certain states, and their level of involvement in the actual negotiations was only downgraded when other states voiced their objections. Nevertheless, NGOs maintained a high profile in the official conferences and the multitude of meetings that took place in the course of the Ottawa Process.

Chapter Four offered a deeper examination of a second case of NGO involvement in the process of international multilateral negotiations. The drive to create an international criminal court had a long history, but had been dormant for some time. When certain states began considering the possibility again, NGOs took an interest and began working towards supporting that effort. As in the case of the mine ban negotiations, NGOs were effective in drawing public and state attention to a number of key issues under debate, and they pressed for robust positions to be taken on a number of issues within the treaty.

NGOs came together as the Coalition for an International Criminal Court, under which they could press for common goals, but also could diverge where necessary. Much as with the Ottawa Process, NGO activities on the ICC negotiations fell into four broad categories: advocacy work; education and information-sharing; logistics and

organization; and media and public outreach. While NGOs were active in the drive to create an ICC from the initial conversations onwards, they were particularly visible at the various conferences leading up to Rome, and at the diplomatic conference in Rome itself. Many like-minded states worked closely with NGOs, and some significant portions of the ICC treaty are in place because of NGO efforts.

In the fifth chapter I discussed the two cases within the context of the international legal system framework, and examined the cases through the lens of coalition dynamics. The chapter began by identifying the various activities of NGOs in the landmines negotiations, and the ICC negotiations. I sorted the activities into categories according to the type of contributions they made to the process of creating international law. It became apparent that NGOs made significant contributions in both these cases, and further, that they used a variety of techniques in order to do so.

When working in coalitions with one another, NGOs collaborated in flexible and decentralized ways so as to allow as much freedom as possible to individual organizations while maintaining the integrity of the coalitions. NGOs made the best possible use of modern and emerging forms of communication in order to facilitate their work together. They also benefited from high profile champions of the causes in question, and ensured that they pitched their message in as simple and graspable a manner as possible. When NGOs worked in collaboration with core-group and like-minded states they contributed extensively to a variety of conferences and meetings, held at various levels, in order to raise awareness and educate on the subject. They also made

themselves and their expertise available to states in a number of ways, up to and including serving on official state negotiating delegations. Lastly, NGOs benefited from good working relationships with states which allowed them access to information within the ongoing discussions to which they may not otherwise have been privy.

Chapter Five also provided an in-depth look at how NGOs contributed to several key aspects of coalition dynamics. NGOs had significant input to the factors identified by Hampson and Reid as determinant of coalition success, namely coalition size, and diversity. In both the ban mines case and the ICC negotiations, NGO support dramatically increased the size of the coalitions pushing for these legal instruments. In addition, NGOs contributed considerably to the diversity of the state-NGO coalitions. Not only did they come from a wide range of regions, backgrounds, and interests, they also participated in the four specific diversity factors identified by Hampson and Reid: the capacity to “name and shame”; the capacity to contribute different resources and bargaining skills; the capacity to take risks; and the capacity to secure support from civil society and to leverage governments. NGOs also contributed to the four communications functions required for strong coalitions as identified by Drahos: intelligence networks; enrolment power; monitoring and analytical capacity; and institutionalized communications. Non-governmental organizations supplemented and complemented contributions states made to the communications functions of the coalitions made up of states and NGOs.

In Chapter Five I also discussed how NGOs, through their collaboration with states, are impacting the existing international legal system. Not only have NGOs influenced the content of the international law being created, as shown in the two cases explored in this research, but they have also impacted on the manner in which international law is created. Most notably, NGOs, simply by working in coalition with states, are taking on roles which would otherwise be filled by states. By fulfilling functions within coalitions such as those identified by Hampson and Reid, and Drahos, non-governmental organizations are in effect *participating* just as other members of the coalition do. In other words, NGOs fulfil the same functions expected of states. It is through their membership in coalitions with states that NGOs participate in the process of law creation.

Conclusions and Some Questions

The research and discussion in this study point to two interesting conclusions. The first is the recognition that non-governmental organizations do participate in the process of creating international law. Despite the fact that NGOs are not states, and have not been granted full legal personality by states, they participate in a process normally closed to all entities but states. Granted, non-governmental organizations rely on the willingness of states to allow NGOs to take part; at the very least, they depend on state acquiescence. In the two cases examined in this study, states fell on all points of the spectrum with regard to willingness to allow NGOs to participate. Some states, such as those in the core group and like-minded group, were actually eager to welcome NGO input and participation in a multitude of aspects of the negotiations. Indeed NGOs took part in everything from strategizing and agenda-setting with states, to conference planning, to negotiating with

and between states, and drafting aspects of the legal instruments themselves. At the other end of the spectrum, some states resisted the greater involvement of NGOs and, in the case of the Ottawa Process, their objections curtailed the extent of NGO involvement in the negotiations by excluding direct participation of NGOs. However, by taking part in the negotiations alongside NGOs, these reluctant states were at the very least acquiescing to NGO participation in the process. In these two cases, between the good number of states that actively sought out NGO participation in the process, and those that acquiesced to NGO participation, there is growing evidence that states are open to NGO involvement in the creation of international law.

Certainly in the context of the coalitions that were created between states and NGOs in both the Ottawa Process and the ICC negotiations, NGOs filled many significant functions which would otherwise be left to states to fulfil, or be left unfulfilled. NGOs contributed to both the size and diversity of coalitions to which they belonged, bringing increased legitimacy through their numbers and the broad range of civil society elements they represented. NGOs contributed aspects of diversity that states would have had difficulty fulfilling, such as naming and shaming states that took certain views; contributing particular resources and bargaining skills; the ability to take risks in ways states could not; and access to civil society and the ability to leverage civil society support to pressure governments. Further, NGOs fulfilled certain communication functions that contributed to the success of the coalitions. They significantly broadened the intelligence networks of the coalitions; they contributed enrolment power by lending their support to the causes, and thereby influencing others – both states and NGOs – to

join the effort; they participated in the on-going functions of monitoring and analyzing developments; and they contributed to institutionalizing communications within and without the coalitions.

All of these functions and roles played by NGOs contributed to the strength and ultimate success of the coalitions, much in the same way similar functions carried out by states contributed to the strength and success of the coalitions. We have seen, in the two cases examined here, that non-governmental organizations behaved as, and were treated as, full members of the coalitions. States had the same expectations of NGOs as they had of other states, such as the expectation that they support the goals of the coalition, and work in a collaborative manner with other members of the coalition. Despite the fact that NGOs are not states, nor do they have full legal personality and the concomitant right to create international law, these two cases demonstrate that through their participation as full members of coalitions, NGOs directly participated in the creation of international legal instruments.

The second conclusion this research draws is that at least in these two cases, the Westphalian paradigm of state-centred processes for law-creation, is not an accurate representation of how international law is created. In classical international law states are the primary subjects, and the only entities with full legal personality. Under this commonly accepted paradigm states are the only entities entitled to create international law. Both customary international law and treaty law originate with states, leaving non-state entities very little option in influencing the outcome of law creation.

As seen in the two cases studied here, however, NGOs have participated in the creation of international law in ways traditionally reserved only for states. Firstly, they have *behaved* much as states behave in the context of multilateral negotiations for the creation of international law. They marshalled their resources and took part in coalitions contributing to dynamics and functions just as states do, and through the route of working in coalitions, NGOs shared in the activity of creating international law. Through this avenue, non-governmental organizations were intrinsically part of the process of creating international law.

Secondly, through their activities NGOs *shaped* international law as it was being created. For example, by participating in setting the agenda, by negotiating with and between states, and by drafting the text of the legal instruments, non-governmental organizations actively contributed to the final result of the negotiation process. They have helped determine the final form of international law by taking part in the process of its creation. So not only have non-governmental organizations behaved as states do, they have impacted the outcome of negotiations as states do.

The notion that only states are entitled to create international law, though widely accepted as a cornerstone of the traditional international legal system, comes into question when faced with the two cases examined here. The experience of NGO participation and impact on the process of law creation in the Ottawa Process and the ICC negotiations, clearly

falls outside this generally held understanding. The question then becomes, were these two cases anomalies, or the beginning of a pattern?

A comprehensive study of other instances of international law creation where NGOs were involved would be helpful in beginning to answer this question. There are many examples of non-governmental input contributing to the shaping of newly emerging international law, and NGOs continue to do what they can to inform and influence developing legal standards, for example, the recent negotiations leading to the Declaration on the Rights of Indigenous Peoples, and pressing for an internationally legally binding Arms Trade Treaty. How have NGOs participated in these and other instances – including those where collaborative efforts may not have been so successful – and how does their participation there compare with the two cases examined in this research?

More specifically, building a deeper understanding of the role of NGOs in coalition dynamics within international multilateral negotiations would also benefit from an examination of other instances of law creation where NGOs were involved. Are there other factors contributing to the success or failure of NGOs to participate that are not apparent in the two cases here? Are there lessons to be drawn from other instances that would assist NGOs and states seeking to work together in coalitions?

Of course, the bigger question remains. If it is true that non-state entities are participating in the process of international law creation in ways normally reserved for states, what

does that mean for the current legal system firmly rooted in the Westphalian paradigm? Would this denote nothing more than a slight shift, or expansion, of what certain subjects of international law are entitled to do within the system? Is the class of actors with law-creating entitlement expanding? Or does this signal a bigger move away from the traditional view of an international legal system centred around only one actor – the state?

Ultimately, this dissertation has explored one question in this bigger range of inquiry: Is there a place for non-governmental organizations within the system for creating international law? The answer, based on the two cases considered here, is clearly yes. Within the context of multilateral negotiations, NGOs have on at least two occasions, been able to insert themselves into coalitions, and have in that way *participated* in the process of creating international law.

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