

The Growing Influence of Non-Governmental Organizations: Chances and Risks

DÉLBER ANDRADE LAGE*

LEONARDO NEMER CALDEIRA BRANT**

Resumo

A participação de Organizações Não-Governamentais na esfera política é objeto de ampla discussão no meio acadêmico. As teorias usadas para explicar seu escopo e suas limitações são variadas. Em anos recentes, um movimento especial chama a atenção dos estudiosos: houve um crescimento adicional no número destas organizações e a lista de seus tipos e funções igualmente foi aumentada. Na primeira parte do texto, a emergência da sociedade civil como um sujeito no processo de governança é discutida. Uma visão geral das principais oportunidades e riscos resultantes da inserção das ONGs no sistema de governança global é fornecida. A partir disto, inferências importantes sobre os problemas a serem enfrentados em um futuro próximo podem ser traçadas. O objetivo da última parte deste trabalho é aplicar os instrumentos teóricos, previamente acertados, a duas das principais instituições americanas: o MERCOSUL e o Sistema de Proteção dos Direitos Humanos.

Abstract

Participation by Non-Governmental Organizations in the political sphere has been the object of broad discussion in the academic milieu. The theories used to explain their scope and limitations are varied. In recent years, a special movement has called the attention of these scholars: there has been additional growth in the number of these organizations, and the list of their types and functions has lengthened as well. In the first part of the text, civil society's emerging as a subject in the governance process is discussed. An overview of the main chances and risks resulting from NGOs being introduced into the global governance system is provided. From it, important inferences about the problems to be faced in the near future can be woven. The aim of the last part of this paper is to apply theoretical tools, previously set out, to two of the main American institutions: MERCOSUR and the Interamerican Human Rights Protection System.

* Member of The International Law Center - CEDIN

** Professor of Intenational Law, Federal University of Minas Gerais, Brazil; Former Legal Officer of the International Court of Justice; President of The International Law Center - CEDIN

Non-Governmental Organizations' performance is pointed to as a major indicator of Civil Society's growing participation in formulating policies, whether they are of a national or an international nature. Ways of tackling new governance mechanisms vary. The focus has been on enabling the Sovereign State's role in determining guidelines for the International Agenda's most relevant issues¹ to be modified. As such, NGOs' influence must be understood from the way they relate with the State and it must be analyzed on the basis of two complementary dimensions: legitimacy and normativity. The need to legitimise the public decision-making process creates a favourable context for performers, who at the outset were only an object of such deliberations, to perform. From the moment they are juridical recognized, and start interfering positively in formulating and implementing policies, there is a new alteration in their relationship pattern with the social medium they act in.

NGOs participation growth has been pointed to as a factor modifying the pattern for exerting political power. In this way, their performance is put forward as an intervening variable in the theoretical models asserting that the classical Westphalian viewpoint, in which States appear as the legitimate performers in this process, is outmoded². This would mean altering how political authority is exerted³. In this regard, States would lose power, and, at the same time, non-state-owned performers would be empowered⁴. Thus, governance structures in which the State has a strategic, but not necessarily dominant, role would be formed⁵. The new challenges set by complex interdependence⁶ and resulting emergence of transnational flows, involve the need to rearrange the political decision-making framework. Studying it, therefore, means considering the way it operates *through* (and not *in*) Civil Society. This must be considered a government subject, and not just its mere object⁷.

In this regard, the NGO's start performing a supporting role in formulating and implementing state policies. They often acquire the status of observer in the main government and interstate agencies. In these situations, they must inspect decision-making procedures and the choice of policies, as well as monitor the accountable investment of funds and the progress and outcome of their implementation. Action by a third party, apparently with different interests from those who occupy public offices would, in these cases, confer greater transparency and legitimacy on these initiatives⁸.

Likewise NGOs can play a technical role. In such cases, they offer relevant information to define policies, either at the time they are formulated, or when they

1 See, for example, ROSENAU, James. *Toward an Ontology for Global Governance*. In.: Approaches to Global Governance Theory, HEWSON and TIMOTHY (eds) 1999; ROSENAU, James, *Governance in a New Global Order*, 2002; HELD, David, and McGREW, Anthony (eds.) *Governing Globalization*, London: Polity Press, 2002.

2 COLLINGWOOD, Vivien; LOGISTER, Louis. *State of the Art: Addressing the INGO 'Legitimacy Deficit'*, 2005, p.176.

3 HELD, David, and McGREW, Anthony (eds.) *Governing Globalization*, London: Polity Press, 2002.

4 KECK e SIKKING, *Activists Beyond Borders. Advocacy Networks in International Politics*, 1998; e ROSENAU, James, *Toward an Ontology for Global Governance*, 1999.

5 SENDING, Ole Jacob. NEUMANN, Iver B. *Governance to Governmentality: Analyzing NGOs, States, and Power*, 2006, p.651.

6 KEOHANE and NYE; NYE, Joseph S., and DONAHUE, John D. (eds.), *Governance in a Globalizing World*, Washington: Brookings Institution Press, 2000.

7 SENDING, Ole Jacob. NEUMANN, Iver B. *Governance to Governmentality: Analyzing NGOs, States, and Power*, 2006, p.669.

8 See, BUCHANAN and KEOHANE, *The Legitimacy of Global Governance Institutions*, 2006, p. 432.

are implemented (to be sure the actions are effective). On the other hand they can perform directly, after being granted state permission, by actually carrying the policies out. This happens in situations in which the State, for either political⁹ or technical¹⁰ reasons, is not able to do it satisfactorily. In cases of humanitarian aid, by not being linked to any State, these organizations can avoid hindrances of a political nature and obtain the consent of those involved for them to perform in certain regions¹¹. Likewise they can provide aid to needy portions of the population, for them to have effective access to the juridical instruments conferred on them¹².

Besides performing through mechanisms conferred on them by the States, NGOs can perform as lobbyists, influencing political decisions that theoretically are privy to the state. As a result, in many circumstances, these organizations serve as an instrument for empowering social groups that, for some reason, are supposed to be excluded from the political process. In these cases, they would be helping to strengthen participative democracy¹³.

In special situations, Non-governmental organisations can be real agents for change. This is because they can make a crucial contribution in publicising issues mistreated in the inter-state sphere, divulge and put scientific discoveries on the agenda¹⁴, and also help set meanings and build consensus around certain issues¹⁵. NGOs are also privileged to enable negotiation and effect solutions in cases where traditional mechanisms for solving conflicts have proved unsuccessful¹⁶. Lastly, in some cases, they manage to raise a dramatic amount of funds that must be destined to a specific type of policies. In this way, they go on to formulate, finance and implement projects regardless of the state seal. These actions can thus complement state political shortfalls and overcome bureaucratic procedure delays¹⁷.

In fact the NGO's actions are normally of five different orders: (i) acclamation of values widely accepted in international society, such as Human Rights; (ii) because of support for their activities, whether because of the number of members or donations of funds; (iii) based on their technical excellence and knowledge of how to solve certain situations; (iv) the span of their actions, for example, many humanitarian NGOs fill spaces in which States would not manage to intervene; and (v) subjectively, because of notions such as trust, integrity and reputation¹⁸.

⁹See, for example, KU, Charlotte. DIEHL, Paul F. *Filling In the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System*, 2006, p.168.

¹⁰COLLINGWOOD, p.177. The case of the ban on antipersonnel landmine, is for instance, a successful example of transnational network advocacy (see SENDING, Ole Jacob. NEUMANN, Iver B. *Governance to Governmentality: Analyzing NGOs, States, and Power*, 2006, pp. 664-668).

¹¹LISCHER, Sarah Kenyon. *Military Intervention and the Humanitarian "Force Multiplier"*, 2007.

¹²See, for example, the case of *Amicus Curiae*, and its participation in international courts and tribunals.

¹³See BUCHANAN and KEOHANE, *The Legitimacy of Global Governance Institutions*, 2006

¹⁴OPPENHEIMER, Michael. *Science and Environmental Policy: The Role of Nongovernmental Organizations.*, 2006, p. 884.

¹⁵See BROWN, L. David, TIMMER, Vanessa; *Civil Society Actors as Catalysts for Transnational Social Learning*, 2006, pp. 3-6.

¹⁶See BROWN, L. David, TIMMER, Vanessa; *Civil Society Actors as Catalysts for Transnational Social Learning*, 2006, pp. 9-10; YANA-COPULOS, Helen. *The strategies that bind: NGO coalitions and their influence*, 2005, pp.98-107.

¹⁷BURCHELL, Jon; COOK, Joanne. *Assessing the impact of stakeholder dialogue: changing relationships between NGOs and companies*, 2006.

¹⁸SLIM, Hugo. *By what authority? The Legitimacy and accountability of non-governmental organizations*, paper presented at the International Council on Human Rights Policy, International Meeting on Global Trends and Human Rights – Before and After September 11, Geneva, 10-12 January, 2002.

But the growing influence of NGO's involves risks. A number of relevant criticisms of these approaches were put forward by studies concerned with a practical perspective, in which the effectiveness of performance by agents from the third sector was discussed¹⁹. The lack of control mechanisms and accountability, as well as the degree of openness to participation by groups from civil society within the NGOs themselves, are pointed to as relevant elements characterizing a legitimacy crisis²⁰.

In a different direction, some authors contest even the idea that NGO's can modified the normative pattern for exerting political power. In a normative basis there is no communication between the third sector and the state-run sphere. Its appearance would be an extra-systemic factor arising along with other elements (internalization of international standards, soft law, etc.) in response to the inability of the traditional legal system to respond in the face of the challenges set by International Society's current dynamics²¹.

The risks

In fact, when observing how NGOs act, three structural dimensions involve risks. The first one concerns the definition of the principle that oriented their scope of activities. Actually, the main reason for NGOs to exist is to do with the belief that they act for collective objectives, which may occasionally be excluded from ordinary public policy formulation procedures. At times they are pointed to as being instruments to support the State, inasmuch as that they are supposed to act in a supplementary capacity, in situations in which the State proved to be inefficient²². In this respect, the definition of the principle that oriented their scope of activities is shown to be essential for them to be legitimate. In practice, however, this can become a problem, for a number of reasons.

The first of them refers to the question of representativeness²³. For example, cases can appear, in which certain strata of society are "contemplated" by several organizations, while others, equally needy, find themselves neglected. This danger is further exponentiated by the fact that the majority of NGOs are from developed countries. In the end, where the resources are applied could be determined by people from those countries, and not those who will be benefited by their actions²⁴. Additionally, there could be a clash of interests between the organizations and the State or the population who are the object of their policies²⁵.

19 See EDWARDS, M, and HULME, D. (eds), *Non-Governmental Organizations – performance and accountability: beyond the magic bullet*. London: Earthscan, 1995.

20 CLARK, I. *Legitimacy in a Global Order*. Review of International Studies, 29, 2003, pp. 75-96; KAGAN, R. *America's Crisis of Legitimacy*, Foreign Affairs, March/April, pp.65-87.

21 See, for example, KU, Charlotte. DIEHL, Paul F. *Filling In the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System*,

22 See KU, Charlotte. DIEHL, Paul F. *Filling In the Gaps: Extrasystemic Mechanisms for Addressing Imbalances Between the International Legal Operating System and the Normative System*, 2006, pp. 167-171; MILLS, Alex; JOYCE, Daniel. *Non-governmental Organisations and International Norm Transmission on the Fault Lines of the International Order*, pp.15-18.

23 COLLINGWOOD, Vivien; LOGISTER, Louis. *State of the Art: Addressing the INGO 'Legitimacy Deficit'*, 2005, p. 188.

24 WOODWARD, B.K.; *Global Civil Society and International Law in Global Governance: Some Contemporary Issues*, 2006, p. 265; BEBINGTON, Anthony. *NGOs and uneven development: geographies of development intervention*; RUBAGOTTI, Gianluca. *Non-Governmental Organisations and the Reporting Obligation under the International Covenant on Civil and Political Rights*, 2005, p.74.

25 COLLINGWOOD, Vivien; LOGISTER, Louis. *State of the Art: Addressing the INGO 'Legitimacy Deficit'*, 2005, p. 179.

On the other hand, the effectiveness of the NGOs' actions may not produce the results expected for a series of different reasons, including accidental causes or 'force majeure', that are unpredictable at the time the policies are formulated. What is clear, however, is that in some cases this failing is caused by structural problems, normally linked to lack of planning of the NGOs' joint actions with the States and with other organizations that have the same scope of action²⁶. If, governments opt to leave formulating and implementing policies for a particular point in the agenda in their charge, they run the risk of suffering from programs carried out being dispersed. In this respect, long term actions would be jeopardized, and needs would only be remedied at some points or in regions contemplated by these actions. In an equally problematic situation, lack of planning can mean that two NGOs with similar purposes allocate their resources and efforts to the same area and to the same target public. Apart from the possibility of their clashing, this is a clear demonstration that the resources could have been much better allocated, so they could reach a larger portion of society²⁷.

It can be emphasized, therefore, that the effectiveness problem is closely related to the legitimacy of the NGOs' actions. Conceptualizing legitimacy is a notably complex matter²⁸. On the one hand, an institution's legitimacy is to be understood as a *right* that it has to create and apply standards; while, on the other hand, the former has to be understood as the *generalized belief* that it has this right²⁹. So a discussion about this must look at "*a combination of procedural constraints on the exercise of power (such as accountability, transparency, democratic decision making, and so forth) and some sort of correspondence between the power-holder's values and those held by the community in which they operate*³⁰". As such, its concept refers to legal and ethical aspects. In order to enable the relationship between the State and NGOs to be assessed based on the idea of legitimacy, it, therefore, needs to be demonstrated not just whether these institutions are (juridical) legitimate, but if they are perceived as such³¹. It is likewise important to identify where the legitimacy comes from (norm sources), as well as the notion of how these institutions are to operate³².

Finally, perhaps the most problematic situation is regarding the possibility that their resources and structure are appropriate for groups whose aim is just to reach private interests, therefore distorting their aim and purpose. Situations can be mentioned in which States create "ghost" organizations to make easy investment of particular financial resources, or, furthermore to manage to go through into spheres of other States which they would not reach by usual routes³³. Additionally, there is

26 See WALSH, Eoghan; LENIHAN, Helena. *Accountability and effectiveness of NGOs: adapting business tools successfully*, 2006.

27 COLLINGWOOD, Vivien; LOGISTER, Louis. *State of the Art: Addressing the INGO 'Legitimacy Deficit'*, 2005, p.183; SENDING, Ole Jacob. NEUMANN, Iver B. *Governance to Governmentality: Analyzing NGOs, States, and Power*, 2006, pp. 667-668.

28 For an overview of the literature on legitimacy within the State, see BEETHAM, D. *The Legitimation of Power*. London: Macmillan, 1991; and FRANCK, Thomas, *The Power of Legitimacy Among Nations*, New York: Oxford University Press, 1990. For the discussion of the standards of legitimacy for Global Governance Institutions, see BODANSKY, Daniel, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?*, American Journal of International Law, 93, n.3, July 1999, pp. 596-624.

29 BUCHANAN and KEOHANE, *The Legitimacy of Global Governance Institutions*, 2006 p.405.

30 COLLINGWOOD, Vivien; LOGISTER, Louis. *State of the Art: Addressing the INGO 'Legitimacy Deficit'*, 2005, p. 178.

31 BUCHANAN and KEOHANE, *The Legitimacy of Global Governance Institutions*, 2006, p.407.

32 COLLINGWOOD, Vivien; LOGISTER, Louis. *State of the Art: Addressing the INGO 'Legitimacy Deficit'*, 2005, p. 178.

33 MAYHEW, Susannah H.; *Hegemony, Politics and Ideology: the Role of Legislation in NGO Government Relations in Asia in Journal of Development Studies*, 2005, p.728.

the danger that private interests exert control over the NGOs' action³⁴. Regulating these situations, however, poses the difficulty of hitting the thin line separating accountability mechanisms from unnecessary bureaucracy.

The chances

The State as the sole deciding authority for matters concerning "national" or 'international' interest has been queried for at least three decades. Since 1972, some authors demonstrated the emerging transnational flows and interactions, which created a setting of complex interdependence in which the notion of government sovereignty has to be replaced by the concept of autonomy, measured by its dimensions of sensitivity and vulnerability³⁵. The current scene, however, is even more diversified, inasmuch as densification of networks among States, Private Enterprises and Third Sector Movements is set by a market in which the exchange of goods and services gains global features³⁶.

In this context, the statement by the United Nations Secretary General at the 1999 General Assembly is symptomatic, according to which "*States must serve their people. If they fail to do so and allow serious Human Rights abuses, they are open to justified intervention by the international community, in the shape of UN itself*"³⁷. Civil society's perception of the need to control government actions, along with its demand to play an effective part in the political decision-making process, is remarkable. This movement is revealed in Agenda 21, where it is stated that governments must take "*any legislative measures necessary to enable non-governmental organizations to establish consultative groups and to ensure the right of non-governmental organizations to protect the public interest through legal action*"³⁸.

So there is significant pressure for communication channels to be created between the State and Civil Society, which will translate (i) into a suitable environment for NGOs to perform in; and (ii) into making classical patterns of international normative production a problem, inasmuch as legality (based on consent).

Pressures for transparency and accountability in government decisions are likewise accompanied by alteration in the dynamics of normative creation in the international sphere. States were called on to establish norms on matters of common interest, vital to the International Community and the welfare of their individuals³⁹. From this moment on, the basis for validity of international juridical norms takes on a material aspect, with its focus on promoting essential values, using quite different reasoning from the classical formalism of voluntarist conceptions. In this respect, a horizontal regulatory

34 WILLETTS, p.319; MAYHEW, Susannah H.; *Hegemony, Politics and Ideology: the Role of Legislation in NGO Government Relations in Asia* in *Journal of Development Studies*, 2005, pp. 748-749.

35 KEOHANE, R.; and NYE, J. *Power and Interdependence: world politics in transition*, New York: Longman, 1989.

36 ESTEVES, Paulo L. *Global Governance: Order and Justice in International Society*, p.71; and TUSSIE, *New Procedures and Old Mechanisms: global governance and civil society*, p.41. In.: ESTEVES, Paulo L. *International Institutions, Security, Trade and Integration*. Belo Horizonte: Publisher PUC Minas, 2003.

37 Financial Times. *People First*. Sept. 22nd, 1999, p.13.

38 Agenda 21, paragraphs. 27.10 and 27.13.

39 WOODWARD, B.K.; *Global Civil Society and International Law in Global Governance: Some Contemporary Issues*, 2006, p.268.

pattern which marked a coordination relationship in the interstate sphere⁴⁰, was replaced by a setting acclaiming a certain hierarchy in normative production, represented by the prevalence of the community's interests such as (environmental protection), and by valuing the individual⁴¹, mainly as regards human rights and humanitarian law. As such, tension between the sovereign government and the tendency towards common interest in international relations appears⁴².

The classical notion of an international legal system, based on formal legality as a mere consequence of government consent, has proved to be outmoded⁴³. The identification of *jus cogens* norms and the emergence of soft law provide clear signs that the essential role of consent in legal determination is partial outdated⁴⁴. In view of this setting, International Law's mere legality has proved to be a deficient element to confer legitimacy on its institutions⁴⁵.

This scenario throws out critical challenges for contemporary International Law, such as identifying what appropriate procedures for normative production ought to be, as well as determining when, why and to what degree sub-state performers can affect the States' behaviour⁴⁶.

It can, therefore, be seen that the abovementioned modification in relationship patterns in international society involved changing the concept concerning use of governance mechanisms among its social agents⁴⁷. The demands created by this context can be called "first generation demands" and they mainly referred to the possibility of defining the policy agenda to be discussed and voted; following the decision-making process, so as to ensure they are transparent; rendering technical services – on both creation and implementation; and checking that adopted policies are carried out. What picks them out is their tendency to participate as process observers, which translates the desire for legitimacy.

These first generation demands were satisfactorily acclaimed by the international legal system. However, development of these patterns made civil society organizations grow dramatically, their typology and functions varying enormously. This new set of performers was responsible for a new pattern of demands, which will be called second generation. In fact, NGO's demands more autonomy in formulating and implementing

40 In this regard, states Waltz: "Parties in domestic political systems maintain relationships of superiority and subordination. Some have the privilege of command, others must only obey. Domestic systems are centralised and ranked. Parties in the international political system maintain coordination relationships. Formally, all are equal. No one has the privilege of command, no one must obey. International systems are decentralized and anarchical". WALTZ, Kenneth N. *Theory of International Politics*, 1979, p.88.

41 In this regard see TRINDADE, Antônio Augusto Cançado, *Human Rights: personality and international juridical capacity of the individual*, 2004.

42 In this regard see PELLET, Alain, *New Trends in International Law: "Macrojuridical Aspects"*, 2004, p.6. As the author points out, consolidation of the individual as a subject of IL still lacks institutional advances that enable him to be better able to perform in the international sphere.

43 PELLET, Alain. *The normative dilemma: Will and consent in International law-making*, 1992, pp.42-43, where he states: "This is indeed pure hypocrisy. It is not enough to wish; it is also necessary to want to wish. And it is very clear that, in international society, while States are equal, some are 'more equal' than others. (...) Obviously, the desire of a small, weak State is 'less free' than larger, more powerful ones. (...) If the States are sovereign, why do they sign treaties that in reality they do not wish for? The answer is because they need to. Not only in view of the need for money, technical assistance, has urgent food aided, etc., but also because they feel the absolute need to 'take part'. And this is true not only of treaties, but in a general way, for International Law, whatever its shape".

44 SHELTON, Dinah. *International Law and "Relative Normativity"*, 2003, pp. 145-150.

45 BUCHANAN and KEOHANE, *The Legitimacy of Global Governance Institutions*, 2006, p. 413, stress that this situation would be aggravated by the action of non-democratic States, or those that systematically violate their citizens' human rights.

46 WOODWARD, B.K.: *Global Civil Society and International Law in Global Governance: Some Contemporary Issues*, 2006, p.249.

47 SENDING, Ole Jacob. NEUMANN, Iver B. *Governance to Governmentality: Analyzing NGOs, States, and Power*, 2006, pp.653-658.

their own projects, often regardless of any link with the authorities. This reality were not completely assimilated by international society and produce demands for the international normative system to be readapted.

Because it is a movement that manifested itself in recent years, there has been no final response from the normative system about this. There are, however, several efforts to discuss and define guidelines to deal with the issue. In this regard the work of the “*Panel of Eminent Persons on United Nations – Civil Society Relations*”, chaired by Fernando Henrique Cardoso (a former-president of Brazil), stands out, and gave rise to the report “*We the peoples: Civil Society, the United Nations and Global Governance*”⁴⁸, of June 11th, 2004. Its aims were to:

- *Review existing guidelines, decisions and practices regarding civil society organizations’ access to and participation in United Nations deliberations and processes;*
- *Identify best practices in the United Nations system and in other International Organizations with a view to identifying new and better ways of interacting with non-governmental organizations and other civil society organizations;*
- *Observe the ways in which the participation of civil society actors from developing countries can be facilitated;*
- *Review how the secretariat is organized to facilitate, manage, share experiences and evaluate the relationships of the United Nations with civil society.*

It can be seen that the purpose of this panel is the outcome of the strain from enlargement the NGOs’ list of functions. There is the same type of discussion on a regional level and in many countries’ domestic spheres⁴⁹. The as yet incipient nature of the consensus on the need to reform the normative framework applying to them, and the lack of regulation on the new activities carried out produces an additional problem to this scenario: the effectiveness of these organisations’ actions begins to be questioned, which means severe questioning of their legitimacy in this new context.

The Latin America perspective: The Mercosur and the Interamerican Human Rights Protection System

Since it was established, Mercosur has been conceived as space for economic integration⁵⁰. The eminently intergovernmental nature of the decision-making procedures in MERCOSUR stand to be a serious institutional obstacle to NGOs’ participating. In this regard, governments are indisposed to take on commitments and create institutions embodying a fuller dimension of citizenship, while standing up for decentralization of policy formulation.

⁴⁸ UN Doc. A/58/817.

⁴⁹ See, for an overview of this tendency, WOODWARD, B.K.: *Global Civil Society and International Law in Global Governance: Some Contemporary Issues*, 2006, pp.51-55.

⁵⁰ In a recent article, former Uruguayan president, Luiz Alberto Lacalle de Herrera, states that “*it is clear and beyond any discussion that the countries have agreed to create an exclusively economic and trade organisation and that the agencies and institutions being established at that moment, as well as those that were to be established in the following stages, were instruments the original goals to be accomplished. (...) this is, therefore the Mercosur we have founded. Any other interpretation is foreign to the letter and spirit of the agreement*”. (LaCalle de Herrera, L.A., DEP April/June 2007, p. 195).

The normative framework relating to embodying decisions made by MERCOSUR agents is another factor discouraging NGOs to act: measures are implemented separately within each member-State and, from this point of view, are not nationwide. In this way, Civil Society's action in domestic spheres has proved more productive, and, in principle, easier to negotiate.

In 1994, within the sphere of performance and competence of the *Common Market Group* – an executive, but not decision-making, entity in the bloc - the Protocol of Ouro Preto established two spaces reserved for participation for civil society: the *Socio-Economic Consultative Forum*⁵¹ and the *Joint Parliamentary Commission for Mercosur*⁵². It is clear, however, in both cases that specific interest groups – a coalition of businessmen and trades unions – participate. This is also the case in other groups and subgroups linked to the Common Market Group⁵³ and the Common Market Council⁵⁴: organisations from the third sector are only granted the status of observers, and the majority of them are representatives of class entities of private groups.

Lastly, the non-institutional efforts to embody civil society's demands in MERCOSUR must be highlighted. The member governments themselves have promoted actions in this regard. The *I Mercosur Social Summit*, also known as the *Brasília Summit*, is an example of this reality. The meeting took place from December 13th to the 15th, 2006, during the *presidency's pro tempore* period in Brazil, and attempted to establish a space for convergence and participations of national and regional organisations from civil society, in harmony with the dictates of the “Social Mercosur” topic provided for in the Labour Programme for 2004 to 2006. The Brazilian government's initiative was received so positively that as of the 32nd Summit Meeting of Mercosur's Heads of State, held in January 2007, in Rio de Janeiro, the permanent nature of the Social Summit was agreed to, and it should be held jointly with the meetings of the bloc's Heads of State.

Another example is the *We are Mercosur* initiative, created while Uruguay's *pro tempore* presidency was in force in 2005. Likewise, the initiative of the Argentine *pro tempore* presidency in promoting the *Meeting for a Productive and Social Mercosur*, on July 19 to 21, 2006 in Córdoba, with the support of the *Training Centre for Regional Integration (CEFIR)* and some German organisations. As a result of the work, the *Integral Programme for Training in Regional and Mercosur Integration* was launched and will be implemented in a virtual form.

In this setting the *Mercosur Social and Joint Programme* is inserted. The programme is also located outside the bloc's institutional context, and is currently financed by the European Union, focusing its performance on the wish to improve

51 Arts. 28, 29 of the Protocol.

52 Arts. 22 to 25.

53 See *Mercosur High Level Strategy for Growth in Employment; and a Meeting of High Ranking Human Rights Authorities from Mercosur and Associated States*.

54 See *Work Subgroup nr.10 (SGT-10) – Labour Matters, Employment and Social Security; Specialised Meeting for Women; Specialized Family Farming Meeting; and Specialised Meeting of MERCOSUR Cooperatives*.

the practice of citizenship and the quality of life of outcast social groups in the South Cone countries. By means of full, effective and distinguishing social participation in regard to the matter – encompassing debating themes such as sovereignty, public policies, equality between men and women, health, human rights and joint economy – it seeks to consolidate democratic processes within Mercosur. To this end, it relies on participation by 18 NGO's from five countries in the region: Brazil, Argentina, Paraguay, Uruguay and Chile.

The Interamerican Human Rights Protection System and the NGO's performance

NGOs have a significant role in the Interamerican Human Rights Protection System. In a distinguishing way, they will perform at all the stages of the system (OAS, Interamerican Human Rights Commission and Court). In this case it is evident that implementing Human Rights is a matter that traditionally provides an opportunity for organization of this nature to participate. The eminently inspecting bias of their institution means that demands placed by civil society are “first generation”. This is why the legal status granted them responds satisfactorily to these inputs, created in an atmosphere of relative stability between the States and Non-Governmental Organisations.

A) NGOs' performance at OAS

Registration at OAS, whose guidelines are acclaimed in resolution P/RES 759 of 1999⁵⁵, ensures the possibility of receiving and demanding information on the processes developed in OAS' main agencies, which, in practice translates into Access to preparatory texts of General Assembly and Permanent Council resolutions, as well as the possibility of taking part in these Organisations. For them to be able to speak at General Assembly meetings, for example, the member States must give up part of their time⁵⁶. This is why they have acted by issuing written opinions to the Permanent Council, as well as to the Interamerican Council for Integral Development (ICID).

As far as preparation of Human Rights Regional Treaties is concerned, they can propose the subject of the treaty or declaration. However, for it to be voted, it must be the object of a preliminary decision by the General Assembly. In the following stage, there is also a possibility for NGOs to take limited part. As of the decision by the Assembly to agree to the document's preparation, the Permanent Council forms a Work Group with the aid of the Committee for Legal and Political Matters, which formulates the articles of the proposed international instrument. This group

⁵⁵ Made from objective (legal representation, general director, head office) as well as subjective criteria (acknowledged reputation, representativeness in their sphere of action, availability of funds to finance their aims).

⁵⁶ This was the case at the General Assembly held in Panamá in 1996, at which the Panamanian State itself allowed an organization defending the rights of the visually handicapped to make its considerations about the provisional text of the Interamerican Convention for the Elimination of all Forms of Discrimination against Handicapped Persons, adopted a few years later.

is made up of representatives from the States, who can request that certain NGOs take part⁵⁷.

B) Non-Governmental Organizations and the Interamerican Human Rights Commission

Within the scope of the Interamerican Human Rights Commission, NGOs have two important functions: perform when visits *in loco* are made (a) and petition when the rights guaranteed by the Interamerican Convention are not respected (b).

In fact, NGOs play an essential role as regard on visits *in loco*. On the one hand they work to convince the Commission about the need for the visit⁵⁸. On the other hand, they constitute an important instrument for the Commission itself to be able to get accurate knowledge of the reality of Human Rights in the State where the visit is carried out⁵⁹.

NGO participation in petitions under the interamerican system is nothing new, but it can only be consolidated from political changes and redemocratisation in Latin America, which would enable the non-governmental organisations' activities on the continent to go deeper. At the moment, it is quite common for petitions to be presented by NGOs, due to the fact that many of them render consultancy and legal assistance services, besides being familiar with the international Human rights protection instruments and having experience with the interamerican protection system⁶⁰.

C) Non-Governmental Organisations and the Interamerican Court of Human Rights

At the Interamerican Court of Human Rights, NGOs act both as consultants and in court cases. In both, they work through the institution of *amicus curiae*⁶¹. As far as consultative jurisdiction is concerned, it is the only way to participate. As far as litigation jurisdiction is concerned, there is, besides the court, the possibility of their acting as witnesses and aiding the victim as his/her/their representatives.

In the Consultative Opinions, the *amicus curiae* letters have been present since the case taken to the Court, at the time of the OC-1/82, requested by Peru, which discusses interpretation of article 64 of the American Convention on Human Rights.

⁵⁷ In this respect, the creation of the Interamerican Convention on the Forced Disappearance of Persons became a paradigm. The first document, produced by the States was such a decline in regard to the Court's jurisprudence – the Velásquez Rodríguez case – that a group of NGOs – Latin American federation of Relatives of Disappeared Detainees (FEDEFAM), Global Rights, International Amnesty and the International Commission of Jurists – requested that civil society institutions be heard for the final document to be prepared. The participating organizations, with significant support from Argentina, Chile, Canada and the USA, actively worked to strengthen the Convention, which established important standards to reduce the number for forced disappearances in the region.

⁵⁸ As Global Justice and Rightful Land did on demanding that Pará state be visited with the aim of monitoring the case of American sister Dorothy Stang, a Human Rights activist murdered in 2005.

⁵⁹ In this regard, meetings are held between the Commission and civil society organizations involved with Human Rights protection, as happened, for example, in the site visits paid in Brazil in 1995, Bolivia and Columbia in 1997, Guatemala in 1998, Argentina, Haiti and México in 2002.

⁶⁰ There are a number of cases showing the significance of NGOs' actions as petitioners in the Commission, by helping victims' claims to be attained without needing to have recourse to the Interamerican Court. In this regard, the case of the Castrated Boys of Maranhão against Brazil (Cases 12,426 and 12,427, Amicable Solutions, March 15, 2006), the case of Sergio Schiavini and María Teresa Schnack de Schiavini against Argentina (Case 12,080, Amicable Solution, October 27, 2005), the case of Paulina del Carmen Ramírez Jacinto against Mexico (Petition 161-02, Amicable Solution, March 9, 2007) and the case of Alejandra Marcela Matus Acuña and others against Chile (Case 12,142, Mérito, October 24, 2005).

⁶¹ Participation by International Amnesty and Rights International as *amicus curiae* was noticed in the case Benavides Cevallos Vs. Ecuador; also International Human Rights Law in the Case of Gangaram Panday Vs. Surinam and in the Case of Barrios Altos Vs. Peru.

On that occasion, a number of NGOs offered their points of view as friends of the Court, such as the International Human Rights Law Group, International League for Human Rights and the Lawyers Committee for International Human Rights, which led to an important precedent being established. Since then, several moves forwards and backwards have taken place in dealing with the matter⁶², but the importance of these organisations' work cannot be neglected.

Since the first litigation case (Velazquez Rodriguez), the Court has received several *amicus curiae* letters from NGOs such as Amnesty International and the Lawyers Committee for Human Rights. However, mention of the NGOs' performance as *amicus curiae* is limited just to receipt of such letters being recorded in the body of the sentence, with no real analyses or references to each one's particular text. As true trial parts, the letters are submitted to court for admissibility.

The NGOs' work is being enlarged, but only after going deeper into the performance of individuals in the litigation sphere, following significant modifications in regulations, which enables oral and written arguments to be presented in parallel with those presented by the Commission. As the victims' lawyers are on countless occasions tied to these organizations, the possibility for them to make themselves heard is enlarged⁶³.

Final Considerations

Participation by Civil Society in government spheres has been broadly debated among Law and International Relations scholars. In this regard, there are several currents explaining this movement, and they go from the approach to global governance through to explanations of a sociological or structural nature. In the scope of this paper, it has been proposed that the relationship between NGOs and the State be tackled specifically. Although it is central to understanding the problem, this relationship, as has been set out, is still neglected or relegated by a large part of traditional approaches.

An analysis model was therefore drawn up based on two independent variables, as follows: legitimacy and the international normative system. According to the argument, dissemination of the notion that Civil Society should take an active part in formulating public policies created a demand for state action legitimacy. The NGOs set themselves up as a response to the transparency and accountability problem in decision-making procedures, inasmuch as the presence of a third party with different interests from the States' would be able to confer credibility on them. In this regard, there was what was called a "first generation" demand in the State-NGO relationship. In a way, this had

⁶² See, for example, decisions OC-16/99; OC-17/02; OC-18/03 and OC-19/05.

⁶³ See, for example, the penal case of Miguel Castro vs. Peru in 2006, in which the sentence bore in mind the petitioner's thesis, changing the trial's direction. In Brazilian cases, NGOs' action is also seen to be relevant. See Ximenes Lopes (2003) and Gilson Nogueira de Carvalho (2005), in which Brazil was nevertheless, not convicted.

been satisfactorily solved inasmuch as action by Third Sector organizations had been institutionally acknowledged and incorporated, mainly by United Nations agencies.

This environment, relatively stable and favourable for the NGOs to act, nevertheless stirred their number to new growth, and this time it was accompanied by diversification of their objectives, functions and activities. From that moment on, their role ceased to be one of just monitoring and aiding in formulating and implementing policy procedures. Many of them are financially autonomous, and capable of creating and carrying out their own programs, with certain autonomy in relation to the state sphere. This setting brought tension between the resulting material needs and the normative framework intended to regulate the issue. In this regard, a problem was perceived to be of two different natures. On the one hand, the NGOs started to pressure for legal modifications providing them with more instruments to act with increasing autonomy in relation to the State. In turn, their new activities meant that their effectiveness was put to the test. As a result, their legitimacy had become a problem, and a demand was created for mechanisms capable of conferring transparency and accountability on their own decision-making mechanisms, to be created. From this context, a different set of demands arises, which have not yet been satisfactorily assimilated and responded to by the international normative system.

Tension from recent developments resulting from NGOs' actions, pervades an uncertain scene, in which their existence can prove beneficial or extremely compromising. So, as a suggestion for a future survey agenda, the main chances and risks of the NGOs were mapped out. Their later development can provide relevant insights into the best way the issue is to be dealt with.

Lastly, an overview of NGOs' actions in two of the Americas' main regional organizations, MERCOSUR and OAS, is taken. From this analysis, the conclusion was that, in the case of OAS, its greater participation is due, on the one hand, to its defining Human Rights as its central objective and, on the other hand, to a normative framework that assimilates Civil Society demands much more consistently.

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