

ANALYSIS OF THE INCREASING ROLE OF NGOS IN INTERNATIONAL PUBLIC LAW

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Abstract

In this paper we offer an analysis of the increasing role of NGOs in international public law and assess whether NGOs can be considered subjects of international law.

We give a brief overview of how modern NGOs came into being in the 19th century, and how they gained prominence on the world stage with the growth of international public law in the 20th.

Using the examples of Interpol and the International Federation of the Red Cross, we give our view on the debate concerning whether these as NGOs can be considered subjects of international law.

As we subscribe to the definition of professor Bestelieu that NGOs must be a creation of „legal personalit[ies] registered in the domestic legal order of a state” we come to the conclusion that, although the importance of NGOs has grown tremendously in an international legal context, currently no NGO can be subject of international law.

Keywords: NGOs, international public law, United Nations, Interpol, International Federation of the Red Cross

1. Introduction

As Non-Governmental Organisations (NGOs) are growing in size and scope around the world, so is the academic interest on the area. Within the legal field of studies, and in particular that of international public law, this leads to some interesting questions and debates addressing the role NGOs are playing in this context.

The purpose of this paper is to offer an analysis of the increasing role NGOs take on in international public law. We will offer this analysis by giving a brief overview of how NGOs have been incorporated as actors on the international scene. Furthermore, we will explore the extent of this incorporation by answering the question: can NGOs be considered subjects of international law?

In order to do this, we will look at the origin of NGOs and try to offer a definition of NGOs before analysing how NGOs and international public law have grown alongside each other throughout the 20th century, looking to the creation of the League of Nations and the United Nations.

Finally, we will weigh in on the debate on whether NGOs can ever be considered subjects of international law. Currently, some scholars argue that Interpol and the International Federation of the Red Cross are examples of this. However, in this paper we will argue that this is not the case since NGOs can only

be indirect contributors to the creation of new norms and not to any actual law.

2. The historical context that led to the establishment of NGOs

Entities resembling what today would be considered NGOs have always existed in one form or another because people have always been part of associations designed to support different ideals, whether they are social, political or economic.

Because of this we cannot know for sure exactly when the first non-governmental organisation was formed, but what we do know is that NGOs became known in the middle of the 19th century.

According to Szazi Eduard (*NGOs: first known NGOs are from the 19th century. One fought against slavery (The Anti Slavery Society) and another fought for the right to life (The International Committee of the Red Cross).*

NGOs had an important role also in creating international public law, for example the NGOs that did lobbying for the creation of the *Institute of International Law*¹.

The Institute of International Law also promoted the creation of an Arbitration Court which advised countries on signing numerous treaties, among which we can mention the *Hague Peace Conferences*.²

The Peace Conferences in The Hague were perfect occasions for NGOs to lobby in order to support

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¹ The Institute of International Law was founded in Gent, on the 8th of September 1973 by eleven famous lawyers. The institute is a learning platform and the mission of this platform is to promote the progress of international law. The Institute was also offered the Nobel Prize for Peace. More informations can be consulted here: <http://www.idi-iiil.org/en/>

² The Peace Conferences from the Hague (1899 and 1907) represent a number of treaties and international declarations which were signed during the two peace conferences. Together with the Geneva Conventions, the Hague Conventions represent the first treaties that explain the rules of how to conduct war and war crimes are forbidden for the first time in history. More informations can be seen here: <https://www.britannica.com/event/Hague-Conventions>

their causes; lobbying still being one of the main tools that NGO use in order to accomplish their mission.

A very important moment for NGOs in international law is the moment when the

League of Nations was created.

NGOs have collaborated with the League of Nations in various fields such as: education, refugees, minority issues, finances and many more.

In the 20th century, NGO have also had a contribution in drafting important international conventions, from human rights, to the environment and many others.

The most important moment for NGOs was the moment when they were formally recognised by the United Nations. Article 71 of the UN Charter mentions that: „*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.*”

An interesting fact is that in the preliminary version of the UN Charter there was no provision describing the collaboration between the UN and private entities, but the lobbying groups insisted so much on this provision that it was finally included during the San Francisco Conference where the UN Charter was signed.

As a consequence of this, the NGO concept started becoming used by the UN and from the 1970s it became a concept used and known at a global level.

However, even if the NGO concept is used at a global level, there is still no universal definition of it.

So in the next part of the article we plan to present the most important definitions that have been given to NGOs in time and we will also try to give our own definition of the concept.

3. Attempts to define NGOs

Throughout history there have been many attempts to define NGOs.

The Encyclopaedia of Public International Law defines the NGO as: „*a private organisation not established by a government or intergovernmental agreement, which are capable of playing a role in international affairs by virtue of their activities, and whose members enjoy independent voting rights*”³

In Stromquist’s opinion, NGOs: „*do not belong to state structures, they are voluntary organisations that belong to civil society which operate in the field of services for groups or disadvantaged group of people socially speaking, for the implementation of programs aimed at consolidating local communities and promoting sustainable development in collaboration with the state or other entities*”⁴

On the other hand, P. Wahl defines NGOs as: „*voluntary associations, independent from the state and from political parties, charitable and non profit, which accept members regardless of race, ethnicity, religion and sex*”⁵

The International Law Dictionary defines an NGO as a „*private international organization that serves as a mechanism for cooperation among private national groups in international affairs*”⁶

The World Bank defines NGOs as: „*private organizations that pursue activities to relieve suffering, promote the interests of the poor, protect the environment, provide basic social services, or undertake community development*”⁷

NGOs are defined from a sociological perspective as: „*self-governing, private, not-for-profit organizations that are geared toward improving the quality of life of disadvantaged people. They are neither part of government nor controlled by a public body*”⁸

As we already mentioned it is very difficult to give a definition to NGOs. But there are some characteristics of what NGOs cannot be. For example NGOs cannot be criminal organisations.

Lester Salamon and Helmut Anheier mentioned 7 criteria to define NGOs in their paper: „*Social Origins of Civil Society*”⁹:

- Institutionalise
- State separation
- Non distribution of profit
- Autonomy

³ Sabattini, Francesca, „*The Role of NGOs in International Law*”, paper 2013/2014, pag 3, document available at: <https://tesi.luiss.it/13185/2/sabattini-francesca-sintesi-2014.pdf>

⁴ Cace, Sorin, Nicolăescu, Victor, Anton, Andrei, Nicoleta, Rotaru, Smaranda, „*Organizațiile Non Guvernamentale și Economia Socială*”, Expert Publishing House, Bucharest, Romania, 2001, pag 26, available at: http://www.catalactica.org.ro/files/organizatiile_neguvernamentale_si_economia_sociala.pdf

⁵ Cace, Sorin, Nicolăescu, Victor, Anton, Andrei, Nicoleta, Rotaru, Smaranda, „*Organizațiile Non Guvernamentale și Economia Socială*”, Expert Publishing House, Bucharest, Romania, 2001, pag 26, available at: http://www.catalactica.org.ro/files/organizatiile_neguvernamentale_si_economia_sociala.pdf

⁶ Charnovitz, Steve, „*Two centuries of participation: Ngos and international governance*”, 18 Mich, J INT.,1 L 183 (1997), pag 5, available at: <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1466&context=mjil>

⁷ „*Types and Roles of Non Governmental Organisations Commerce Essay*”, published on the 5th of December 2016”, available at: <https://www.ukessays.com/essays/commerce/types-and-roles-of-non-governmental-organizations-commerce-essay.php>

⁸ Cakmak, Cenap, „*Civil Society Actors in International Law and World Politics: Definition, Conceptual Framework, Problem*”, pag 9, document available at: <http://www.data.unibg.it/dati/corsi/68030/38344-CIVIL%20SOCIETY%20ACTORS%20IN%20INTERNATIONAL%20LAW%20AND%20WORLD%20POLITICS.pdf>

⁹ „*Social Origins of Civil Society*”, work which was quoted at this article: <https://www.scribd.com/doc/75662984/Rolul-organizatiilor-neguvernamentale>

- Volunteering
- Not having a religious mission
- Not being part of a political party

According to professor Besteliu, an international non-governmental organisation can be defined as: „*an international association created by a private or a mixed initiative, groups of natural or legal persons with different nationalities, which has a legal personality registered in the domestic legal order of a state and which does not pursue lucrative goals*”.¹⁰

We subscribe to the definition given by professor Besteliu. Furthermore, we would also add the 7 criteria described above by Salamon. In our opinion, the members of an NGO must also have the same goal in mind.

4. NGOs in the UN system

NGOs have been playing a key role in the UN system for some time now.

We now plan to present the most relevant legal documents that describe the role of NGOs in the UN system.

The first document which created a formal structure between the United Nations and NGOs was article 71 from the UN Charter.

4.1. Article 71 from the UN Charter

Article 71 of the United Nations Charter: „*The Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations... Such arrangements may be made with international organizations and, where appropriate, with national organizations after consultation with the Member of the United Nations concerned.*”

Even if also during the League of Nations NGOs were consulting the member states of this organisation, still the introduction of article 71 in the UN Charter represents a very important step in our opinion. It is the first multilateral treaty where the international community recognises the importance of NGOs in international relations.

4.2. ECOSOC Resolution 1296/1968

From the preamble of the ECOSOC Resolution 1296 the UN makes its intention of growing its partnership with NGOs clear: „*Recognising that arrangements for consultation with non-governmental organisations provide an important means of furthering the purposes and principles of the United Nations, Considering that consultations between the Council and its subsidiary organs and the non-*

governmental organisations should be developed to the fullest practicable extent”.¹¹

According to this ECOSOC Resolution, the role of NGOs can be divided into three categories:

- NGOs which are covering part of the activities conducted by ECOSOC;
- NGOs which have a special mandate and which are only interested in some activities conducted by ECOSOC, where they can have relevant contributions;
- NGOs that are in the roster system; these types of NGOs can be consulted ad hoc.

4.3. ECOSOC Resolution 1996/3

This ECOSOC Resolution defines NGOs as: „*any international organisation not established by a governmental entity or by an intergovernmental agreement.*”¹²

The ECOSOC Resolution 1996/31 explains the types of consultations that exist between NGOs and the UN: the general consultative status, the social consultative status and including the NGOs in the roster. What is then the difference between them?

The first category refers to the general consultative status. This type of status applies to big NGOs, which have various activities regulated by ECOSOC.

The second category refers to special consultative status. This type of status only applies to NGOs that have some skills, in some of the activities which are regulated by ECOSOC.

The third category refers to including NGOs in the UN roster. The NGOs which are included in the roster can have occasional contributions to the work conducted by ECOSOC.

5. The role of NGOs in international law

The role of NGOs is becoming more and more important in international law. According to Charnovitz from Yale University „*This is especially true in environmental affairs where NGOs regularly take part in multilateral conferences and monitor the implementation of treaties*”.¹³

The importance is also recognised in the 1993 Vienna Declaration which stresses „*the important role of NGOs in the promotion of all human rights and in humanitarian activities at national, regional and international levels [...] to the promotion and*

¹⁰ Article 71 of the The United Nations Charter, the document is available here: <http://legal.un.org/repertory/art71.shtml>

¹¹ ECOSOC Resolution 1296 (XLIV) adopted on 23rd of May 1968, document available here: <https://www.globalpolicy.org/component/content/article/177/31832.html>

¹² ECOSOC Resolution Nr 1996/31, document available here: <http://www.un.org/documents/ecosoc/res/1996/eres1996-31.htm>

¹³ Charnovitz, Steve, „*Two centuries of participation: Ngos and international governance*”, 18 Mich, J INT., 1 L 183 (1997), pag 3, document available at : <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1466&context=mjil>

protection of all human rights and fundamental freedoms”¹⁴

The lobbying activities by NGOs have increased in the last 20 years within the UN system. We can give examples such as The Rio Declaration on Environment and Development,¹⁵ World Conference on Human Rights,¹⁶ World Conference on Women,¹⁷ United Nations Conference on Human Settlements,¹⁸ The Fourth Conference on Landmines,¹⁹ and World Summit on Sustainable Development.²⁰

Furthermore, the *Cardoso Report*²¹ reiterates the importance of the partnership between the UN and NGOs. There are voices who claim that NGOs have to be included in the daily activity conducted by the General Assembly but also other important events.

The Cardoso Report also mentions the importance of involving civil society more in the General Assembly and the Security Council.

Because our aim in this paper is to emphasise the increasing role of NGOs in international public law, in the next part of the paper we plan to present the Red Cross and the Interpol.

Both the Interpol and the Red Cross are considered by some to be subjects of international law, together with states and intergovernmental organisations. We do not agree with this argument but we do consider that these NGOs represent the best examples of NGOs which help develop international law.

5.1. Interpol

The status of Interpol as an NGO is disputed within the academic community. The debate centres around the membership structure of the organisation; while some treat Interpol as an intergovernmental organisation, others argue that it is a non-governmental organisation because its members are official police bodies (which are public legal persons of national law) and not states directly (public legal persons of international law). For the purposes of this paper, we subscribe to the view that Interpol is an NGO for this reason.²²

Interpol’s role is to facilitate the work conducted by police forces across the globe. In order to achieve this, Interpol has a complex infrastructure.

The mission of Interpol is to connect police departments from across the globe and help them

communicate and share information in the most efficient way possible. Interpol’s motto reads: „*Connect the police for a safer world*”.²³

As we said before, Interpol is considered by some as a subject of international law. It is considered a subject of international law because it ensures mutual assistance between all the authorities working in criminal law, and which are creating a new criminal law framework across the globe.

Interpol could not function without the protection given by international law. Its daily activities are conducted under the framework of its constitution, a legal document which was agreed upon by the founding states in 1956 and which has binding force.

Interpol’s constitution defines its scope, objects and reiterates the importance of police cooperation across the globe.

The constitution also defines and explains the structure of the organisation, its budget and its partnership with other organisations, focusing also on the respect for the Universal Declaration of Human Rights.

Because the respect for human rights is such an important thing for the Interpol, it collaborates frequently with other international criminal tribunals in order to process the data of people in the most lawful way possible.

Furthermore, the Interpol also collaborates with other entities in order to achieve its mission. We can give the example of the United Nations or the European Union, not to mention the help offered by the signatory states, which signed among themselves different documents meant to facilitate the trade of sensitive information.

Without this support the Interpol could never accomplish its mandate.

Also, according to its constitution, the Interpol can sign international agreements on its own behalf; this right has been used by the organisation in the past.

However, even if the Interpol is contributing to the creation of international public law norms, due to the structure already described, we do not consider this sufficient for the organisation to be a subject of international law.

¹⁴ Marcinkute, Lina „ *The Role of Human Rights NGOs : Human Rights Defenders or State Sovereignty*”, the Baltic Law and Politics Journal, , pag 9, document available at : <https://www.degruyter.com/downloadpdf/j/bjlp.2011.4.issue-2/v10076-011-0012-5/v10076-011-0012-5.pdf>

¹⁵ The Rio Declaration on Environment and Development http://www.unesco.org/education/pdf/RIO_E.PDF

¹⁶ World Conference on Human Rights, more informations on this website: <https://www.ohchr.org/en/aboutus/pages/viennawc.aspx>

¹⁷ World Conference on Women, more informations on this website: <http://www.un.org/womenwatch/daw/beijing/>

¹⁸ United Nations Conference on Human Settlements, more informations on this website: http://www.un.org/en/events/pastevents/UNCHS_1996.shtml

¹⁹ The Fourth Conference on Landmines, more informations on this website: https://www.africa.upenn.edu/Urgent_Action/apic_12296.html

²⁰ World Summit on Sustainable Development, more informations on this website: <https://sustainabledevelopment.un.org/milestones/wssd>

²¹ Rossi, Ingrid, „*NGOs in International Law: Has regulation come to a halt?* ” , The International Law Institute, 2008, article which can be consulted at the following website:<https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP123e.pdf>

²² Runjic, Ljubo, „*The legal nature and status of Interpol in the context of contemporary international law*”, Conference paper: 22nd International Scientific Conference on Economic and Social Development – „*Legal Challenges of Modern World* ”, at Split, Croatia (June 2017)

²³ Interpol website: <https://www.interpol.int/About-INTERPOL/Vision-and-mission>

5.2. The International Federation of the Red Cross

The International Federation of the Red Cross is an independent and neutral organisation which offers assistance to victims of arm conflicts as well as other types of violence.

The International Federation of the Red Cross is formed by the Red Cross and the Red Crescent and its members consist of national Red Cross societies.

The International Federation of the Red Cross is regulated through the Geneva Conventions from 1949, the Geneva Protocols and the Statute of the organisation.

The main activities of this organisation are to organise humanitarian actions meant to respond to different emergencies across the globe, while respecting international humanitarian law.

6. Conclusion

NGOs started getting prominence in the 19th century with the establishment of recognised civil society groups fighting for causes such as the abolition of slavery and, noticeably, the international Red Cross movement.

With the introduction of intergovernmental organisations in the 20th century (most importantly the League of Nations followed by the United Nations) and, as a consequence, of modern international law, NGOs started enjoying special status under these new legal frameworks. In 1945 the UN Charter became the first official document to recognise NGOs in an international context.

However, the definition of an NGO to this day is still not clear, with various definitions are used for different purposes. Core to the argument we use in this paper is that NGOs are a construct of legal personalities

of national law which is what separates them from intergovernmental organisations.

As we have seen in this paper, the closest definition of NGOs as established in international law comes from the ECOSOC Resolutions. However, this definition only works by way of exclusion („*no governmental entity or intergovernmental agreement*”) and does thus not offer a definition as such, but it relates nicely to our argument that NGOs are separated from intergovernmental organisations on these exact terms.

The ECOSOC Resolutions also identify the different ways in which NGOs can enter into partnership with UN agencies and thus play an important part in the increasing role of NGOs in international public law.

This leads to the discussions we have addressed as to *how* big a role NGOs play in international public law and more specifically: if NGOs can now be considered subjects of international public law. In this context, some scholars have argued that two NGOs specifically present an example of this, namely the International Federation of the Red Cross and Interpol.

However, as we have argued in this paper, we do not share this view as subjects of international law must be a construct of legal personalities of international law, and both Interpol and the Red Cross are per definition not. And seeing as these two are the most prominent examples of NGOs which by some are considered subjects of international law, we can conclude that, according to the arguments we put forward in this paper – and although NGOs have enjoyed an increasingly special status within international law for several centuries now – NGOs can still not be considered subjects of international law.

Further research in this topic would monitor future legal developments in the area of NGO mandates and compositions, as well as changes to the creation of international public law.

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