

THE ROLE OF NON-GOVERNMENTAL ORGANISATIONS IN CREATING STANDARDS IN INTERNATIONAL ENVIRONMENTAL LAW

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Abstract

The participation and influence of non-governmental actors in areas of international environmental governance has increased tremendously over the last decades.

Some of these non-governmental organization (NGOs), like International Union for Conservation of Nature, World Wide Fund for Nature or Greenpeace, have a global character and an intense activity in promoting environmental protection. Of great importance is the fact that some NGOs have gained a consultative status in international and regional organizations influencing the process of drafting and adopting norms of international environmental law.

The study analyses the contribution of NGOs in international environmental field and their essential role as „guardians of the environment” in promoting and respecting the provisions of international environmental agreements, in particular of Aarhus Convention.

Keywords: *non-governmental organisations, international environmental governance, guardians of the environment, Aarhus Convention, NGOs consultative status.*

1. Introduction

Non-governmental organizations (NGOs) had a very important influence on environmental international law. NGOs are not formed by governments initiative, and there are not governments representatives either., nor an organization formed for a profit purpose..

Antonio Donini wrote about United Nations that „ The Temple of States would be a rather dull place without NGO.”¹ His observations expressed the reality that NGOs existence is vital for today international society.

The history of NGOs is dating for more than 100 years. One of the first NGOs that acted in environmental matters was The Society for Protection of Birds (now the Royal Society) founded in United Kingdom in 1889. The next environmental organization that was a pioneer in this field was Sierra Club, founded in the United States on May 28, 1892.

In 1903 was created in United Kingdom the world's first international conservation organisation, the Society for the Preservation of the Wild Fauna of the Empire. In the following years the number of environmental NGO had increased significantly.

Among the most relevant international organisations in environmental field are World Wide Fund for Nature(WWF)², International Union for the Conservation of Nature (IUCN)³, Friends of the Earth (FoE)⁴ and Greenpeace.

The important role of NGOs was shaped by their high presence at Stockholm conference (1972) and Rio conference(1992). At Stockholm conference more than 400 intergovernmental and nongovernmental organizations attended and at Rio conferences over 8000 NGO. This huge presence of international NGOs drew public and political attention to their work on environment protection and environment justice. At Rio Conference NGOs got involved in an active manner, by preparing the hearings, lobbying at the meetings and influencing the members of national delegations in matters of environment. Their positive influence was felt also at Johannesburg Conference works from 2002. Of great importance is the fact that some NGOs have gained a consultative status in international and regional organizations influencing the process of drafting and adopting norms of international environmental law.

Sometimes the weakness of States and the lack of political action in environmental issues, in this case, determined private individuals grouped in NGOs, to create a pressure for change on international organizations and multinational corporations or to take actions themselves by lobbying in environmental issues and research on environment.

The aim of this study is to focus on the influence of NGOs in drafting and adopting standards in international environmental law. It is widely recognised the importance of NGOs in protection of the environment and of human rights. Their value was recognized also by Aarhus Convention which gives

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¹ Antonio Donini, *The Bureaucracy and the Free Spirits: Stagnation and innovation in the Relationship Between the United Nations and NGOs*, 16 *THIRD WORLDS Q*.421 (1995).

² WWF was founded on April 29, 1961 based in Morges and from 1979 at Gland (Switzerland).

³ IUCN was founded in 1948 in Marges (Switzerland)

⁴ FoE was founded in 1969. It became the international network Friends of the Earth International (FoEI) founded in 1971 by four organizations from France, Sweden, England and the USA.

them the right of taking part in the compliance mechanism or to bring matters into court by themselves.

2. Legal status of NGOs and their influence in environmental matters

NGOs definition had been given by Article 2 of Suzanne Bastid's resolution⁵ which stated that the international associations are groups of persons or of societies, freely created by private initiative, which are engaged in some international activity of general interest, without seeking pecuniary profit and without any object of a purely national character.

World Bank defines also a non-governmental organization (NGO) 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".

A first step in the direction of cooperation between United Nation and NGOs was outlined by the Article 71 of United Nation Charter which states 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”.

Today UN ECOSOC⁶ Resolution 1996/31 governs the relationship between ECOSOC and NGOs by establishing the eligibility requirements for consultative status⁷, rights and obligations of NGOs in consultative status and procedures for the withdrawal or suspension of consultative status. NGOs that have consultative status can attend international conferences and events and make oral and written statements on this events, lobbying and networking.

The relationship between ECOSOC and NGOs is positive for both sides. ECOSOC has the opportunity to avail itself of valuable and expert advice from NGOs, the NGOs in turn also have the opportunity of expressing their views and influencing the work of the Council.

After obtaining a consultative status with ECOSOC, an NGO has the duty to send a report of

activity every four years. This guarantees that an NGO is respecting and is continuing to meet the requirements established at their accreditation.

But there are voices that had been criticized the work of ECOSOC's Committee in granting the accreditation of NGOs because of lack of due process and the huge political influence in accreditation⁸.

It is also important the discussion about NGOs personality, because it is essential in determining the immunities and the rights of an NGO and their standing before courts⁹. NGOs have legal personality only in municipal law, not in international law¹⁰.

Because usually the NGOs interests cross national borders they face problems like conflicting laws and the impossibility to carry out their purpose. In the lack of NGOs international legislation, some transnational NGOs have managed to sign agreements with States that gives them rights and immunities.

International legal personality had been difficult to achieve from two points of view. Firstly because States did not want to reduce control of NGOs activities and secondly, even NGOs fear that they may lose their autonomy.

NGOs legal status had been to the attention of the Council of Europe who drafted the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations in 1986, which sets a common legal basis for the existence and work of NGOs in Europe. Article 11 of the European Convention on Human Rights protects the right to freedom of association, which is also a fundamental norm for NGOs.

NGOs developed over the years into strong advocacy networks that have influenced environmental politics¹¹.

Not all domestic NGOs work at international level, but some of them developed strong links with international NGOs. It is the case of some environmental protection organization or human rights organization that formed effective communication network by linkage with each other with the purpose of emerging into an international advocacy network.

NGOs can form global networks with national offices, like WWF, FoE or Greenpeace. Often the national offices are autonomous and have their own priorities and funding. By their structure, NGOs can be of universal interest (as International Union for Conservation of Nature) or of regional interest

⁵ Resolution on Granting of International Status to Associations Established by Private Initiative adopted by the Institute of International Law at its 49th Session.

⁶ United Nation Economic and Social Council: www.csonet.org.

⁷ “... Consultative arrangements are to be made, on the one hand, for the purpose of enabling the Council or one of its bodies to secure expert information or advice from organizations having special competence in the subjects for which consultative arrangements are made, and, on the other hand, to enable international, regional, sub-regional and national organizations that represent important elements of public opinion to express their views.”— ECOSOC resolution 1996/31, part II, paragraph 20.

⁸ Jurij Daniel Aston, The United Nation Committee on non-governmental organization: Guarding the entrance to a politically divided house, 12 EUR J.INT L 943 (2001).

⁹ Steve Charnovitz, Nongovernmental Organisations and International Law, 100 Am. J. Int L 348 (2006)

¹⁰ Martens, Kerstin (2003) "Examining the (Non-) Status of NGOs in International Law," *Indiana Journal of Global Legal Studies*: Vol. 10: Iss. 2, Article 1.

¹¹ Margaret E. Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, N.Y.: Cornell University Press, 1998).

(African Wild Foundation –Kenya or European Environmental Bureau - Belgium).

In the same time it is worthy to mention that not all NGOs have the same goals and visions. There is not a homogeneous global community of environmental NGOs¹². In spite of they advocate for the cooperation between human rights and the environment, NGOs have different objectives, priorities mostly depending on their size, goals, ideology and on their capability to transcend national borders.

2.The role of NGOs in environmental litigations

The most striking issue concerning the presence of NGOs in environmental litigations is the way they are representing public interest and the possibility of bringing matters to court themselves.

By adopting the Aarhus Convention¹³, the rights of environmental NGOs had been strongly reinforced in national, international and European Law.

According to Christian Schall, in determining public interest there are three factors *inter alia*: (1) there is a public interest in the outcome of the litigation; (2) the applicant has no personal, proprietary or pecuniary interest in the outcome, or if such interest exists, it does not justify the litigation in a economic way; (3) the issues raised by the litigation are beyond the immediate interests of the parties¹⁴.

NGOs can participate in procedures before international courts and tribunals in two forms, as party (or third party) and as *amicus curiae*¹⁵.

2.1. Access by NGOs in procedures before international courts and tribunals

a) NGOs difficulties in standing before international courts and tribunals

International Tribunal of the Law of the Sea, unlike International Court of Justice where by the competence *ratione personae*, only States may be parties in cases before the Court, access to Tribunal jurisdiction is opened not only to States Parties of the Convention of United Nation on Law of the Sea from 1982, but also to non-state entities¹⁶.

Article 187 of the Convention states that juridical persons and State enterprise may have access as parties before the Tribunal of the Law of the Sea. There are thought opinions that only profit-organisation can stand in proceedings before the Tribunal¹⁷, and in this case it is difficult for NGOs to overcome this practice.

European Court of Justice, can be invoked by Member States, EU institutions, by individuals but also by national courts. Regarding NGOs they can stand before Court only if their members themselves lodged a complaint to the Court Article 230, para.4, of the EC Treaty states that „ An natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or addressed to another person, is of direct and individual concern to the former.” Of relevance is the Greenpeace case to the European Court where the Court held that „ the association formed for the protection of the collective interests of a category of persons can not be considered to be directly and individually concerned for this purpose of the forth paragraph of Article 173 of the Treaty by a measure affecting the general interest of the category, and is therefore not entitled to bring an action for annulment of where its members may not do so individually...”.

b) Effective access for NGOs before human rights bodies: European Court of Human Rights, African Commission on Human Rights and Inter-American Court of Human Rights

Human Rights systems in Europe, Inter-America and Africa are the exception bodies that allow not only the States to bring case to the Court by also give the possibility to individuals and NGOs to stand before courts. The three Courts form a network of international human rights treaties of international and regional application¹⁸.

The requirements for admissibility before *European Court of Human Rights* (ECtHR) are set out in Article 34 and Article 35 of the Convention. According to Article 34 the applications must be submitted by any person, group of individuals or NGOs. The primary condition is that the claimant to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or in the Protocols thereto. We must say that the quality of victim is a *sine qua non* condition for the applicants. As the Court stated in many decisions, in order for applicants to be able to claim to be a victim, they must produce reasonable and convincing evidence that a violation affected them personally. In this case we speak about direct victim status. There is also the possibility of representation, indirect victim status, this is the case of NGOs, that act in certain situations as

¹² McCormick, John. "The Role of Environmental NGOs in International Regimes" *Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada, Mar 17, 2004.*

¹³ 1998 UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention).

¹⁴ Christian Schall, *Public Interest Litigation Concerning Environmental Matters before Human Rights Courts: A Promising Future Concept?*, *Journal of Environmental Law*, Oxford University Press, 2008, p. 419.

¹⁵ Beyerlin, Ulrich. "The Role of NGOs in International Environmental Litigation." (2001).

¹⁶ See Raluca Miga Beșteliu, *Drept internațional public*, vol. II, Ed. 2, Editura C.H.Beck, 2014, p.21

¹⁷ McCormick, John. "The Role of Environmental NGOs in International Regimes" *Paper presented at the annual meeting of the International Studies Association, Le Centre Sheraton Hotel, Montreal, Quebec, Canada, Mar 17, 2004.*

¹⁸ Harris, O Boyle & Warbrick, *Law of the European Convention on Human Rights*, Third Edition, Oxford University Press, 2014, p. 5.

representatives for the direct victim¹⁹. There is though an exceptional case, when an NGO is bringing a case to the Court which does not fall into any of the above classification (direct victim or indirect victim). It is the exemple of Valentin Câmpeanu v. Romania case, and even if it is not a case with link to environment, it is a good exemple of how an NGO may stands before the Court even if it is not direct victim or indirect victim. In this case the Court found that Valentin Câmpeanu was a vulnerable person with no next-of-kin, so it was a direct victim in the sens of Article 34 of the Convention „, of the circumstances which ultimately led to his death and which are at the heart of the principle grievance brought before the Court”. The Court stated that the NGO in this case can not stand as indirect victim but in some exceptional circumstance and bearing in mind the serious nature of allegations, the NGO should act as representative for the victim, notwithstanding the fact that the victim had no power to act on his behalf and that he died before the application was lodged under the Convention. The reason way the Court held as admissible *ratione personae* this case was as it stated: „, To find otherwise would amount to preventing such serious allegations of a violation of the Convention from being examined at international level, with the risk that the respondent State might escape accountability under the Convention as a result of its own failure to appoint a legal representative” to act for the victim.

In Asselbourg and Greenpeace Luxemburg v. Luxemburg the Court examined whether the applicants are the victims of violation of Article 8 of the Convention within the meaning of Article 34 of the Convention. Regarding the claim of Greenpeace Luxemburg, the Court held that that NGO can stands as a representative of its members or employees, in the same way, a lawyer represents his client.

In their applications before the Court NGOs can invoke rights as, the right to life (Article 2), the right to fair trail (Article 6), the right to respect for private and family life (Article 8), freedom of expression (Article 10), freedom of assembly and association (Article 11).

Under the *Inter-American Human Rights* system the applicants, individuals or NGOs, may lodged a claim but only to the Inter-American Human Rights Commission not to the Inter-American Court of Human Rights. According to Article 23 of the Rules of Procedure of the Inter-American Human Rights Commission the applicants does not have to demonstrate that they have the victim status.

In Yanomami Indians v. Brazil²⁰ case, the Commission determinate that was violated the right to life because of the environmental degradation of Yanomami lands and the health problems following this. The case was submitted by several individuals that were directly affected by living conditions of

Indians and the Commission treated them as legitimate representatives of Indians.

According to Articles 55 and 56 of *African Commission on Human and Peoples Rights* (ACHPR) individuals and NGOs may lodged a petition to ACHPR. For this petition to be held admissible there must be an identification of the victim and the State Party to the Commission must be found responsible for violation of one of the rights protected by it. NGOs may participate before ACHPR as legal representatives or as *amicus curiae*.

The African Commission has a very small number of decisions in respect to environmental NGOs and most of them lack of effective enforcement mechanism.

2.2.1. Access of NGOs as *amicus curiae*

The role of NGOs as *amicus curiae* in international litigations procedures, although very modest in influencing courts judgements, became more a practice than an exception in courts.

NGOs have benefited from the intensification of international litigation procedures to gain access to the courts, often as "friends of the court" (*amicus curiae*). The advantage of participation as *amicus curiae* is that in this case NGO is not a party to the dispute but is nevertheless allowed to contribute in many ways to the work of the Court, by acting as a valuable source of information, sensitize the Court on particular issues, raise the attention of public opinion etc.

For exemple, International Court of Justice had been reductant to NGOs *amicus curiae* participation to their hearings. Yet, Article 34 paragraph 2 provides that „, the Court may request the public international organizations informations relevant to cases before it...”. In the case Gabcikovo-Nagymaros the Court admitted unofficially that received written NGOs submissions.

In ECtHR the Court invites an *amicus curiae* submission or a third-party seeks to provide information to the Court on its own initiative. Rule 44 of the Court provides that, once notice of an application has been given to the respondent State, the President of the Chamber may invite, or grant leave to, any person concerned who is not the applicant, to submit written comments or, in exceptional cases, to take part in hearings

Amicus curiae participation should not be confused with the third party intervention, as the latter is designed to protect the legal interest and rights of the intervening entity likely to be affected by the Court judgement²¹.

¹⁹ Asselbourg and 78 Others and Greenpeace Luxemburg v. Luxemburg (Application no. 52620/99) EctHR June 1999.

²⁰ Yanomami Indians v. Brasil, Case 7615, Resolution no 12/85, Annual Report 1984-85.

²¹ Beyerlin, Ulrich. "The Role of NGOs in International Environmental Litigation." (2001).

3. Conclusions and future perspectives

The role of environmental NGOs as „guardians of the environment” has increased tremendously over the last decades. Important was the enormous presence of NGOs at the three most important conferences on environment: Stockholm, Rio and Johannesburg.

Their contribution in lobbying governments and international organizations by influencing negotiation on international environmental agreements had been also considerable.

Of great importance is the fact that some NGOs have gained a consultative status in international and regional organizations influencing the process of drafting and adopting norms of international environmental law.

Unfortunately, NGOs does not have proper access to justice in international courts and tribunals, exception being the access of NGOs before human rights bodies: European Court of Human Rights, African Commission on Human Rights and Inter-American Court of Human Rights.

NGOs influence on environment international standards is not as it was expected at the begings,

mostly because its hard to overcome the political will and the governments interests.

Over the years NGOs developed strengths and weaknesses regarding their activities. The most important strengths for NGOs are the independence and the good public reconaissance. The weakness is mainly about the fragmentation of environmental NGO, about the fact that most of them act without a common vision and a common purpose and sometimes the huge number of environmental NGO and the very different manners in approaching environmental protection creates confusion and lack of effectiveness in relation with States and international organizations.

In sum, even of the increased number of NGOs in taking part in the mechanism of environmental law making and the participation, in different forms, in international juridical procedure, the legal status of NGOs in international law did not progres much.

On consideration of this facts, it is obvious the need for environmental standards, in the form of an international convention, that shall regulates the status and the activities of NGOs at international level.

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