

NGOs participation before international tribunals
and
The Arctic Sunrise Case

Introduction

On November 22, 2013 the International Tribunal of the Law of the Sea (ITLOS) announced an Order referred to *The Arctic Sunrise Case*, about a litigation between the Kingdom of the Netherlands and the Russian Federation. The case revealed important issues related to international law and raised the attention of media starting a controversial debate between the experts of the subject. The main issue was the participation of NGOs in international litigation and, in the specific, of Greenpeace International that was involved not only in the events of September 19, 2013 that led to the arrest and detention of the vessel *Arctic Sunrise* and its crew, but most of all of its role in the juridical proceedings.

The ship, operated by Greenpeace, was flying the flag of the Netherlands and was carrying people of different nationalities, twenty-eight were Greenpeace activists and two were photographers. Moments before the arrest, the icebreaker was within the Russia's Exclusive Economic Zone (ZEE) where some crew members were about to protest against the operation of the offshore fixed oil platform *Prirazlomnaya*, the first in the vulnerable but still uncontaminated Arctic Ocean. The *Arctic Sunrise* was towed to the Russian port of Murmansk and was subsequently seized by the Leninsky District Court where the crew was charged of piracy. On October 4, 2013 the Netherlands, as flag state, requested for provisional measures before the ITLOS claiming violations of the United Nations Convention on the Law of the Sea (UNCLOS), and referring specifically to the freedom of navigation. The Russian Federation instead rejected the Tribunal's jurisdiction and decided not to appear before it. The Order represented the first occasion in the history of the International Tribunal for the Law of the Sea in which an NGO made request to intervene in a contentious proceeding. In fact, during the last decades, this kind of demands have multiplied and more and more studies are pointing out the progressive openness of international tribunals and courts. The involvement of NGOs in the international sphere is increasing in many areas, from the law-making to the implementation, changing the usual

state-oriented view of the international law. According to some experts the non-governmental openness is to consider an all positive factor of democratization of the international system, while others doubt this kind of statements asserting that NGOs' participation is not related to a wider protection of public interests.

In my paper I try to contextualize ITLOS's approach to Greenpeace's request starting with explaining the purely formal issues deriving by NGOs' participation. I will maintain an intentionally agnostic and analytical perspective during the analysis in order to make a list of the many normative aspects and to clarify the both positive and negative consequences of the non-governmental openness.

Content

During the last decades of the twentieth century it is possible to observe an inclination to the proliferation of international dispute settlement bodies. The institution of universal jurisdictions (as the ITLOS or the International Penal Court) has been followed by the institution of tribunals with limited *ratione temporis, loci* and *materiae* jurisdictions (as the International Criminal Tribunal for the former Yugoslavia) and by the one of the hybrid courts as the Special Court for Sierra Leone. To this kind of proliferation many studies added an evolution of the international system in a more "public" way, in which States are gathering around common principles and values, in order to develop the already mentioned non-governmental participation. This phenomenon is receivable both on the law-making level than on the level of the implementation of international law. In fact, since the first half of the Nineties, NGOs are also getting to work with monitoring State's conduct and eventually report their violations. This was possible with independent instruments of condemnation or with the traditional intergovernmental systems of guarantee. So, the existing correlation between the expansion of international courts and tribunals and the openness to non-state entities in the international justice system is going to led to a re-evaluation of the relationship between juridical bodies and that part of the civil society that is represented by NGOs. It is possible to observe this in a gradual new formalization of the judicial procedures that is going to give legitimacy to NGOs direct participation that is consisting in their actual *locus standi* before international tribunals.

In the contemporary practice of the many international judicial bodies, there are different approaches to the intervention of non-state actors. These approaches could be divided into two specified categories: direct participation in the form of the right of *locus standi* before the tribunals; and indirect participation on which I will concentrate exclusively on the *amicus curiae* submissions.

- a) First of all, although an analysis of the constitutive instruments or internal regulation of international judicial and quasi-judicial bodies could highlight that almost all of them allow access to entities other than states in a variety of degrees, only four of them can be considered as granting *locus standi* to NGOs. The European Court of Human Rights authorizes an application by a non-governmental organization or group of individuals only if direct victims of a violations. The European Court of Justice, instead, has admitted applications by NGOs even if they are not individually affected by the decision constituting the cause for action. Outside Europe, the Inter-American Commission of Human Rights allow this kind of participation not only on their own behalf but also on behalf of third persons, even without naming the victim; the only condition is the recognition of the applicant NGO in one or more member states of the Organization of American States. At the end, the African Commission for Human and Peoples' Rights gives a blanket right to NGOs in submitting communication on behalf of the victim without any restriction. Furthermore it has to be noticed that in some cases before the IAmComHR a petition submitted by an NGO could be assimilate to an *actio popularis*, whereby the organization has the power to represent a public interest before a judge. However, it is necessary to consider that this kind of openness could be very well-seen in this last kind of geopolitical regions, where it is deeply difficult for individuals that are illiterate and in a vulnerable situation to access to international organs of guarantee. So, the possibility for NGOs not only to participate but also to initiate international legal proceedings before jurisdictions is currently an increasing awareness on the part of the international judge of the fruitful contribution that they may bring to the proceedings.
- b) *Amicus Curiae* (friends of the court) are persons or groups of people who are not part of a dispute, and yet they are allowed, under the judicial process, to bring information about their point of view in relation to point of fact and of law, in order to provide explanation to the judges. According to the American Law Institute and International Institute for the Unification of Private Law (UNIDROIT), the *amicus curiae* procedure consists in a «Written submission concerning important legal issues in the proceeding and matters of background information brought by third persons with the consent of the court, upon consultation with the parties.» The origins of this practice are purely local because this kind of petition evolved as part of common law procedure, then a number of civil law countries have recently adopted the procedure as well. In this national level was also denounced an expansion of their role from neutral informers on matters which the tribunal would have otherwise overlooked to advocates of parties whose interests might have been prejudicated by impeding judgment. However, as Luigi Crema points out, the introduction of *amicus*

curiae in international courts came through English and American lawyers, especially when at the end of the twentieth century a wave of amici curiae admittance in the procedures of international courts and tribunals resulted from the activism of certain North-American NGOs, with voices in support that were coming from the US Governments. Nowadays several jurisdictions inserted these rules in their possible procedures, and many reasons at the base of this introduction have been highlighted by experts: they are able to enhance transparency; they allow civil society to participate in distant international disputes; they may substitute to *locus standi* to otherwise excluded stakeholders; and they give legitimacy to international courts and democratize international law. The more exemplar of regulation that allows *amicus curiae* submissions can be found in the International Investment Arbitrations where the possibility to submit amici curiae is today envisaged at both levels, the material (the treaties), and the procedural (the arbitration rules). NGOs, that at the current stage of the development of international society are playing the role of transnational inspectors/monitors in favor of fundamental rights, may be qualified by certain jurisdictions as the best candidates for this kind of participation, particularly those specialized in the protection of fundamental individual rights such as the regional human rights courts and the international criminal jurisdictions. In order to sum up, the participation of NGOs as *amicus curiae* in international courts seeks to strengthen the position of individual applicants, offering them outside support for the arguments raised in the process and also to protect the interests of the ones that are not represented by *locus standi*, drawing the attention of the international public opinion to strategic cases.

Also the International Tribunal for the Law of the Sea has a specific approach to *amicus* intervention. The Tribunal, founded as a dispute resolution mechanism under the United Nations Convention on the Law of the Sea (UNCLOS), has jurisdiction in two kind of proceedings: contentious and advisory. There has been extensive academic discussion on whether the Tribunal allows access to NGOs as applicant and as *amicus curiae*, most of all because Rule 84 that regulates the procedure of such intervention in the proceedings is not totally complete. The Rule, even riddled with Article 133 of the Statute, establishes such form of participation also to entities other than States, but without specifying or identifying this subjects and just calling them “intergovernmental organizations”. It is important to inquire whether the “intergovernmental organizations” mentioned in the Rules of Procedure are equivalent to NGOs. This problem however had not been tested in practice prior to the Case No.17, an advisory opinion in which two NGOs (Greenpeace and the WWF) petitioned the Tribunal to accept their *amicus* brief.

Instead, in the range of *The Arctic Sunrise Case*, the proceeding also gave ITLOS an opportunity to set precedent on the admission of *amicus curiae* submission in contentious proceedings. Greenpeace International requested ITLOS' permission to file submissions as *amicus curiae* and attached a copy of its submission to the request. While the Netherlands stated that they "did not have any objection to such petition", the Tribunal decided that Greenpeace's request should not be accepted and that its submissions would not be included in the case file. The Tribunal's decision on the request had not specific reasons published, but is considered in line with the Seabed Disputes Chamber's rejection of case No. 17, even though in that case ITLOS published the *amicus curiae* submission on its website, stating that the submission was not part of the official case file. As a result, and in the absence of any specific rules on *amicus curiae* submission by NGOs, their admissibility remains somewhat unclear. Until the Tribunal will define the meaning of "intergovernmental organization", clarifying if the admissibility of NGOs brief is possible, the situation will stay static. However the submission of the *amicus* brief in the case is also relevant for a number of perspectives. First of all, Greenpeace petition before ITLOS could have damaged the position of one of the parties. In fact, according to Dodlize the «Tribunal's task of ensuring the equality of arms, including giving both sides "equal opportunities to put their side of the story and to challenge the evidence put by the other side" was made even harder by the absence of the Russian Federation», and so the decision to give exposure to a position unwelcomed by one of the parties could have raised a problem in the treatment. Secondly in this case Greenpeace was directly affected not only in the events of the arrest, but also in some financial arrangements, and this could led to an evolution of the practice of the *amicus curiae* submission in the international level, from the traditional role of neutral friend of the court to a more questionable role of advocacy. Finally, Greenpeace petition is useful in order to examine the implication of NGOs participation in international law-making, that could be seen whether as a fundamental step forward the creation of a transnational space of dialogue with the civil society or as an opening to other individual and private interests.

Conclusion

In the paper I tried to read the impact of *The Arctic Sunrise Case* with the contemporary doctrine about non-governmental participation before international tribunals. Although ITLOS rejected the request because according to the judges it was not in compliance with the Rules of Procedures of the Tribunal, and although they decided not to publish online the brief; the transmission of the brief to the parts represented an important step forward

in judges' position. Moreover, for the first time in a contentious procedure, the approach of the ITLOS did a serious action in order to recognize NGOs subjectivity.

As Tramontana points out, the contemporary debate is anything but conclusive and touches many aspects. Experts asked themselves if the growing role of NGOs in international juridical sphere could represent a reduction in the traditional State centrality. They observed that NGOs involvement inside the main international institution could constitute a solution to the well-known democratic deficit of which they are sick. But most of all NGOs were questioned to be the only entities that were able to solve the issues about the guarantee of common values protected by international law.

To better understand NGOs role in judicial proceedings we have to consider also the main critics that had been made. This kind of critics concentrated themselves on NGOs legitimacy and accountability. The first one is questioned most of all because of their representation issue, according to the fact that it is possible to notice that NGOs actions don't have a specific mandate from individuals of the civil society. This led to a major difficulty in legitimate NGOs participation justified by their suitability in representing entire sectors of the world's population. Switching to the accountability issue, it is possible to divide it into two profiles: an "internal" one, according to which their organizational structure and decision-making are not always noticeable and democratically regulated; and an "external" one, that consists in the possible absence of the adequate instruments to prevent and punish illegal actions, especially in the circulation and production of fake and adulterated information.

These multiple problems can lead to various considerations about the modalities and the discipline of these participations in the international judicial proceedings, but to clarify this points only the practice of the tribunals can help us. Practice, not at last the one undertaken by ITLOS in *The Arctic Sunrise Case*, let us understand the expression of the many particular points of view that NGOs represent. This however has the main limit in not violating the interests of the parties, that could be protected in many ways. First of all, the parties should have the right to answer to amici communications. Secondly, a list of classified NGOs should be overcome the problem of their legitimacy. Finally and summing all this solutions, a much more wide and specific regulation inside the rules and the statutes of the tribunals could help in avoiding any kind of misunderstanding.

In conclusion, ITLOS' approach in *The Arctic Sunrise Case* suggests that NGOs opportunities to participate in international tribunals are in any case growing. Even if the tribunal rejected the request, it still partially helped the diffusion of the arguments of Greenpeace, so we have to look carefully at this kind of international Orders. The question

whether or not the international jurisdiction will continue in this direction of opening themselves, need just one more element to be answered: time.