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***The Role of NGOs in International Law***

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## **Introduction**

In recent years it has been witnessed an unprecedented development of Non-Governmental Organisations at the international level. This phenomenon grows thanks to the globalisation and the opportunity of a better network that have created a greater consciousness about the local problems at the international level. In order to find out an immediate solution to them, it has spread an important inter-individual and global cooperation in which Non-Governmental Organisations have played a crucial role. This fact has led them to increase their professionalism, to specialise in different sectors and to extend themselves at word-serving. In fact, nowadays, the NGOs are not just present in developed countries, but also in developing countries that are low represented beforehand. The request of participation to intergovernmental *forum* of Non-Governmental Organisations which are coming from different geographical areas, are more and more pressing; in that way NGOs are mainly qualified and they are able to represent different interests.

Firstly, this development is accompanied by a gradual extension of conditions of NGOs' participation in the elaboration and guarantee of international law. Secondly, Non-Governmental Organisations have been a driving force in some of the major innovations in the international system, as the establishment of a permanent International Criminal Court, but also vital partners in the day-to-day enforcement of international standards and programs <sup>(1)</sup>. Moreover, since the time of the League Nations, NGOs have developed a close collaboration with intergovernmental organisations in response to a convergence of interests between them.

The phenomenon in exam is particularly important in light of the changes that are happening at international level, because Non-Governmental Organisations represent the class of "new actors" or "non-state actors", promoters of that transformation. A great debate arises from that process about NGOs' role in global system by deifying which are

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<sup>1</sup> REBASTI, VIERUCCI, *A Legal Status for NGOs in Contemporary International Law?*, 2005, pubblicato sul sito web della European Society of International Law: <http://esil-sedi.eu>

their current tasks and it concerns, also, the participation of them to production, monitoring and promotion of international law.

Despite some controversial opinions, it is attributed to Non-Governmental Organisations the fundamental credit to guarantee *accountability* and democratic legitimacy to international processes of decision-making, and, moreover, the capacity to defend collective interests and values of international law, where there is a *deficit* about it from the States.

In light of these considerations, the research wants to analyse, in the first part, the role of Non-Governmental Organisations at international law system during the transformations of it over the years and, in the second part, their contribution to the production, monitoring and promotion of international norms.

### ***First chapter***

The term "Non-Governmental Organisation" was used for the first time on 26th June 1945 in the article 71 of United Nations Charter. Despite the absence of a common definition about it at international level, the *Encyclopaedia of Public International Law* defines 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. The members of NGO may be individuals (private citizens) or bodies corporate. Where the organisation's membership or activity is limited to a specific State, one speaks of a national NGO and where they go beyond, of international NGO", overlooked to pursue interests in matters that cross or transcend national borders.

Moreover, it is possible to underline some other common features of them. Firstly, the NGOs are freely created by private initiative and are not profit seeking. Such NGOs are usually international in the sense of drawing members from more than one country and this aspect is fundamental to guarantee the international character to them. Secondly, the doctrine adds to pursue public interests, specific scopes and the possession of a standing body.

The rise of Non-Governmental Organisations can be traced back to the mid nineteenth century. During these years they had maximum spread in Occident, where NGOs could find principles similar to theirs. Significantly, the NGOs began to develop a close

relationship with International Organisations by creating a new multilateral diplomacy. Since that time, the interaction between IGOs and NGOs have been represented a central part of NGOs activities at international level. In addition, as Professor Charnowitz notes in his article entitled "Two Centuries of Participation: NGOs and International Governance", by the year 1900, 425 peace societies had been formed and many important NGOs concerned with the maintenance of international peace, labour law, free trade, started to enhance.

During the twentieth century the NGOs extended their contributions through an active participation in the drafting of international standards, in particular about the protection of human rights and the safeguarding of the environment. After the Second World War and the birth of United Nations, the use of consultative relationship that has been considered for long time the most advanced tool for non-governmental participation in the activities of IGOs arose. The article 71 of UN Charter set that ECOSOC bodies could use the consultive status of NGOs in order to obtain a specialised contribution and, in that way, the freedom of speech of civil society could be guaranteed.

## ***Second chapter***

Even though Non-Governmental Organisations have been active in the international world for three centuries, it still exists different and conflicting points of view, as their spread has happened in recent times, by leaving doubts about their role and functions in the international order. The praxis, however, is ensuring to them an increasing position and is guaranteeing a growing involvement of the "new actors" in different sectors and in the international law.

In that context, the NGOs play an important role because they help the transformation of international law and they contribute the development, judicial application, interpretation and enforcement of international law. Specifically, the NGOs give a fundamental contribution to the elaboration, monitoring and promotion of international norms.

First and foremost, during the elaboration of transnational law, the NGOs produce treaties or no-binding agreements, they influence the development of processes through their activities and they promote international *standards* of behaviour. On the other hand, the monitoring activities of NGOs concern the possibility of individual and direct recourse of them at some international entities after the check of an illicit. Moreover, the Non-Governmental Organisations can carry out a mere activity of assistance to the judge and

the parts involved, and, at the end, they take part in the "Tribunals of opinion". In the monitoring phase, NGOs can participate, also, as *amicus curiae*. In fact, they seek to contribute to international adjudication by making *amicus curiae* submissions to tribunals. Even though their participation as *amicus curiae* is accepted by most international and regional organisations, e.g. European Court of Human Rights, the African Court of Human Rights and International Criminal Court, there is widespread scepticism about it. Another major contribution of NGOs is possible to discover the checking and promotion phases of transnational law. They play an important role with their activities of investigation, research about the violation of international norms through the use of periodical procedures that analysis the state reports and campaigns of raising awareness of public opinion about the conduct of State, if it is guilty.

In the international system the NGOs are so important because they express, as *Global Constitutionalism* sustains, the "legal consciousness" of transnational community through their contribution to the production and guarantee of norms which highlight the protection of its values. In addition, Non-Governmental Organisations have a fundamental role in the international processes thanks to the information that they have, groups of *expertise* and tools of communication to be able to mobilise the international public opinion about some main issues.

This positive aspect, together with the awareness of the inappropriateness of cooperation tools to manage the globalisation, has risen many questions about the role of NGOs in the international law system and how they could evolve their participation to the phase of production, monitoring, checking and promotion of international norms.

In order to understand better how NGOs operate in the international order, the paper analyzes a recent case of monitoring of international norms. The case is about the Greenpeace icebreaker Arctic Sunrise, on September 2013, which was used as a support vessel during a protest at Gazprom's Prirazlomnaya platform, which is expected to become the first to produce oil from ice filled Arctic seas. Even though the protest was specific, all activists and the two freelance journalists were arrested by Russian commands and charged with piracy and then hooliganism. After over 300 days in Russian custody, the ITOLS decided that the Arctic Sunrise and its equipment were not guilty and could sail back into Dutch territorial waters.

## ***Conclusion***

At the end, the analysis tries to outline which are the future prospectively of the evolution of Non-Governmental Organisations in relation to the changes of international laws system and in the light of *global governance* system and *global civil society* during the twentieth and twenty-first century.

The relationship between NGOs and international law is a continuing evolution and, for this reason it presents several problems. At the beginning of twenty-one century has started a slow change of international law under the impact of *global governance* <sup>(2)</sup>. According to the report "Our Global Neighbourhood", 1995, the *global governance* can be defined as "broad, dynamic, complex, process of interactive decision making that it is constantly evolving and responding to changing circumstances". Furthermore, it isn't just a simple sum of intergovernmental relationship, but it has been viewed as also involving Non-Governmental Organisations, minorities, citizen's movements and multinational co-operations. The growing involvement of NGOs and transnational enterprises in the law-making and law-enforcement processes, has contributed to the transformation of international law system. In particular, the NGOs have been incorporated in the preparation of many conventions, like the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Antipersonnel Mines and on Their Destruction, the Convention on International Trade in Endangered Species and, the establishment of International Criminal Court.

According to the doctrine, the increasing participation of the "new actors" to law-making and law-enforcement processes linked to the activities of NGOs' self-regulation has brought the decline of sovereign States, as the creators and guarantors of international norms. This fact could determine the birth of a "global law" and it could transform the transnational system from a *state-centred* to *people-centred*. Nonetheless there are some doubts about this change.

Even though it is certain that the Westphalian system, in which the States were the main actors of international law, has, over the past of few decades, undergone quite substantial changes, it doesn't mean that the growing participation of "non-state actors" has to be followed by a decrease of centrality of the States. The States decide which NGOs can

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<sup>2</sup> NOWROT, *Global Governance and International Law*, Beiträge zum Transnationalen Wirtschaftsrecht, Heft 33, 34 Seiten, Halle (Saale) 2004.

participate to the production of international law and if NGOs can be guarantors of it, yet. Therefore, the States keep their power of decision and they play a central role in the global system.

However, the role of Non-Governmental Organisations seems fundamental after these changes.

In the opinion of the supporters of importance of NGOs at international system, the NGOs help the inter-governmental institutions to keep democratic legitimacy and to enhance the accountability of them. In fact, the NGOs offer their technical expertise to enable more informed decisions, they have often sources of information that the States may not have and, finally, they raise the quality of policy deliberations so that the possibilities of choice are better understood (<sup>3</sup>).

Moreover, the recognition of an improved involvement of civil society in international decision-making implies a more transparent specification of the role of international institutions and to require a more careful consideration of their democratic legitimacy and accountability.

In the light of these changes, the praxis gives a formal credit to NGOs of their social role and underlines their importance in the elaboration, monitoring and promotion of international norms. The relationship between NGOs and global law starts not to be dependent, but it seems to be a relationship in which the NGOs play a fundamental part thanks to their formal and informal activities.

Since the influence of Non-Governmental Organisations in international decision-making processes is today an established reality, the studies currently highlight that the issue is no longer whether, but how, to manage NGOs participation.

According to this point of view, the analysis ends with the answers to two important questions. Firstly, how is it possible to manage NGOs participation in order to be really efficient and, secondly, what has to change to make it feasible.

For this purpose, it is fundamental that there is a redefinition of traditional non-legal status of NGOs and it is necessary to create new guidelines to improve the cooperation between NGOs and intergovernmental organisations. In fact, on the one hand, the international cooperation provide NGOs with the forum they necessitate to make voice to some transnational issues. On the other, IGOs have more and more looked at Non-Governmental

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<sup>3</sup> CHARNOVITZ, *Nongovernmental Organizations and International Law*, in *AJIL*, 2006, pp.366-367.

Organisations as strategic allies to ensure the success of their policies. To guarantee a more active participation of NGOs to the intergovernmental conferences is required, in particular, to modify their terms of participation. It can be induced to advocate enhanced participation of NGOs, in terms of *amicus curiae*, in international judicial proceedings or the extension of NGOs participation to the most important conferences for the cooperation. This would become fundamental in the monitoring and supervision phases because the NGOs would operate in the collective interest and in the respect of international law.

However, the number and influence of problematic issues about increased participation of private associations, like Non-Governmental Organisations, would entail a reflection on ways to regulate a similar change in the system. The need to reform the working methods of NGOs shows that participation of involved actors is progressively seen as a standard of “good governance”, but it is necessary to guarantee a major legitimacy of NGOs and to check their proliferation. In this perspective, it is possible to use the auto- and self-regulations both in the proceeding of accreditation and in order to ensure a major legitimacy. In fact, the respect of the principles and codes of behaviour set by NGOs could become a necessary requirement for their participation to the IGOs' activities, where they have the role of promotion of themselves. This fact would help them to be mainly transparent about their role and what they do in the international sphere. An example of this is provided by the European Commission that includes the NGOs involved in lobbying activities, while this issue is still in debate in the United Nations.

At the same time, these changes are important to guarantee a major transparency and accountability to the same Non-Governmental Organisations. The increased proliferation, influence and visibility of NGOs at international level, together with the increasing amount of money which NGOs have to manage, has created attention on NGO accountability and not just on their aims. There is a widespread opinion that good goals are not enough to ensure accountability for NGOs and that their power should be checked and balanced so that it can be guaranteed an increase in accountability.

In fact, the NGOs are often criticised for the lack of democratic and transparent proceeding inside them and for the absence suitable tools to prevent and apply sanctions in case of offences. Furthermore, they are accused of dependency from their supporters and sponsors. In order to improve this aspect, some Non-Governmental Organisations of the same sector are creating a network of cooperation in order to avoid unhelpful behaviour and in order to adopt new standards of form and management of projects. These NGOs take part in some



federations with other organisations that come from other States, like Friends of the Earth. At European level an example is given by the subscription of some Spanish NGOs to the AECID, the Agency of Spanish Cooperation for the Development. It is interesting to see how the changes of NGOs have been started from local level with the hope to extend beyond the national borders.

The changes presented, both in the terms of NGOs' participation and procedural guideline on their involvement, are crucial in order to guarantee a major accountability and transparency. In addition, they want to underline the importance of their role at international level and to promote a positive evolution of NGOs in their participation to the production, monitoring and promotion of international law.

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