

## A Legal Status for NGOs in Contemporary International Law?

Emanuele Rebasti and Luisa Vierucci\*

### Introduction

In recent years we have witnessed an unprecedented activity of Non-Governmental Organisations (NGOs)<sup>1</sup> at the international level. NGOs have played a crucial role in setting the international agenda, in influencing international rule-making and in contributing to the implementation of international norms. They have proven to be a driving force in some of the major innovations undergone in the international system (e.g. the establishment of a permanent International Criminal Court) but also vital partners in the day-to-day enforcement of international standards and programs.

The new dimension of the phenomenon raises the problem of whether (and if so, how) it is necessary to redefine the traditional (non) legal status of NGOs in the international order and to provide civil society with a clear legal framework for its action. Following the outcomes of a workshop held at the European University Institute in 2002 (Florence Workshop), we have specifically focussed on two privileged fields of NGOs action: the relationship with Inter-Governmental Organisations (IGOs) and the participation in international judicial proceedings.

Interaction with intergovernmental organizations has always represented a central part of NGOs activity at the international level. Since the time of the League of Nations<sup>2</sup>, forms of cooperation have developed in response to a convergence of NGOs and IGOs' interests. On the one hand, the institutional structures of international cooperation provide NGOs with the *forum* they necessitate to make their voice heard beyond the boundaries of the nation State and with a political target for the exercise of their non-governmental diplomacy. On the other, IGOs have increasingly looked at non-governmental organizations as strategic allies to ensure the success of their policies and programs, either by disseminating information and raising public awareness or by means of direct action on the field.

---

\* The paper draws on the outcomes of the Workshop on 'A Legal Status for NGOs in Contemporary International Law? A Contribution to the Debate on "Non-State Actors" and Public International Law at the Beginning of the Twenty-First Century' which was held at the European University Institute (EUI) of Florence on 15 and 16 November 2002 at the initiative of Prof. Pierre-Marie Dupuy. A report of the workshop is available at <http://users.unimi.it/sociv/documenti/report.doc>. Emanuele Rebasti is a Phd Candidate at the EUI (emanuele.rebasti@iue.it); Luisa Vierucci is a Lecturer in law at the University of Florence (luisa.vierucci@unifi.it).

<sup>1</sup> The notion of NGO is not univocal in the international practice or in academic debate. In the present study the term is used to identify organizations established by private initiative, formally free from any governmental influence and without profit-making aim. The notion is considered equivalent to the one of "Civil Society Organization" or more generally to "civil society". The latter term is thus meant to have a narrower meaning than the one retained by some IGOs (e.g. UN) where it includes also the private sector.

<sup>2</sup> See Seary "The Early History – From the Congress of Vienna to the San Francisco Conference" in Willets ed., *The Conscience of the World – The Influence of Non-Governmental Organisations in the UN System*, 1996.

However the growth of non-governmental action both in quantitative and in qualitative terms has put under pressure the existing participatory tools and raised new problems<sup>3</sup>. Non-governmental organizations claims a broader involvement in the intergovernmental process, which they criticize for being auto-referential and undemocratic. Conversely, as civil society gains more power, it is called upon to justify its legitimacy and to meet higher demands for accountability and transparency. Moreover, an higher level of participation requires that the existing patterns of relationship are streamlined in order to avoid duplication, loss of information and waste of resources.

The first part of the paper looks at the way the contrasting exigencies raised by NGOs participation in IGOs' activities can be accommodated. Thus, after having outlined the inadequacy of existing formal arrangements to regulate the new dimensions of NGO participation, we will discuss the two approaches which face each other in the current debate on NGOs/IGOs relationship, namely the one proposing a more institutionalised role for civil society and the different one promoting an higher degree of self-regulation by Non-State actors. A brief survey of recent reforms adopted (or proposed) by IGOs will finally show that the two approaches are not necessarily exclusive and can combine to provide tailored solutions to the problems raised by civil society's enhanced participation in IGOs' activities.

Access to justice is one of the major components of the relations between IOs and civil society. This component has become increasingly crucial by reason of the proliferation of international courts and tribunals that has been taking place in the last 15 years. While international justice was until recently prerogative of states, with the limited exception of some human rights and investment treaties granting legal standing to physical or legal persons, the last decade of the XX century bore witness to the creation of international jurisdictions with competence over individuals (e.g. the International Criminal Court (ICC)), the International Criminal Tribunal for the former Yugoslavia (ICTY) and for Rwanda (ICTR)).

The proliferation of judicial bodies coupled with enhanced public participation of NGOs at the international level calls for a re-assessment of the interrelationship between these two entities mostly with a view to verifying the state of the art from an international law angle. This means investigating whether NGOs are satisfied with the access to justice they are currently experiencing as well as speculating on the opportunity eventually to suggest changes *de lege ferenda* in order to making their participation to international justice more fruitful.

To this end, the second part of the paper firstly sketches the main problematic questions prompted by the role played by NGOs before international courts and tribunals; it then focuses on the desirability of enhanced regulation of NGOs' participation in international adjudication; and, finally, it provides some tentative proposals on ways to address some of the shortcomings inherent in the present form of participation. It is to be noted that the scope of the analysis is confined solely to two forms of participation in judicial proceedings: *locus standi* and *amicus curiae* (friends of the courts) intervention before international judicial bodies, with the exception of the regional Commissions on human rights and the dispute settlement bodies of the WTO.

## 1. NGOs and Intergovernmental Organizations

---

<sup>3</sup> The present contribution deals essentially with civil society's participation in intergovernmental institutional processes. It does not take into consideration hypotheses of purely operational cooperation which have a bilateral structure and are generally regulated by national law or international private law.

### ***A. The Growth in NGO Participation and the Model of Consultative Relationship***

The relationship between NGOs and IGOs may assume a variety of forms ranging from full membership in IGO organs<sup>4</sup>, to mere administrative links, such as the ones established with the various “NGO Liaison Services” set up by IGOs’ Secretariats. However, leaving aside the exceptional cases in which NGOs participate in IGO organs on equal footing with State representatives<sup>5</sup>, consultative relationship has been considered for long time the more advanced and formalized tool for non-governmental participation in the activities of IGOs<sup>6</sup>.

In general terms, the “consultative relationship” has demonstrated to be an effective tool. The presence of non-governmental representatives in meetings and their participation in debates has influenced the agenda and shaped the policy approach, for example by adding a human rights and environmental dimension to a number of political issues. Information provided by non-governmental organisations has become fundamental for the functioning of specific ECOSOC bodies or other UN organs which have adopted similar participatory mechanisms. However, in the Nineties an impressive growth in civil society mobilization at the international level and a mounting demand for accountability in the functioning of intergovernmental bodies have led to an even stronger claim for non-governmental participation in IGOs’ activities; a claim for

---

<sup>4</sup> See the tripartite structure which informs the composition of the ILO collegial organs, where workers’ and employers’ representatives sit in the same right of governmental delegates (art.3 ILO Constitution).

<sup>5</sup> Lindblom recalls that in the case of ILO, “*it was the focus on labour legislation rather than general considerations on the participation of civil society which opened the doors of the organization*”. See A.-K. Lindblom, *The Legal Status of Non-Governmental Organisations in International Law* (2001), p. 376.

<sup>6</sup> The model of consultative relationship was firstly introduced in the United Nations to give implementation to article 71 of the Charter (For the current regime of NGOs/UN ECOSOC consultative relationship see E/RES/96/31 adopted on 25<sup>th</sup> July 1996): Similar arrangements were then adopted by a number of international organizations, including UN Specialized Agencies, the Council of Europe (Resolution (93)38 adopted on 18 October 1993 and now reformed – see *infra*)<sup>the Organization of American States</sup> (CP/RES 759 (1217/99), *Guidelines for the Participation of Civil Society Organizations in OAS Activities*, 15 December 1999): Under consultative relationship an international organisation formally recognises that NGOs have a role to play in the intergovernmental process and vests them with a corresponding legal status but retains control on the access through an accreditation procedure and often restricts participation to specific bodies or field of activity. The role recognised to civil society, defined as a consultative one, intends to exclude non-governmental organizations from the decision making process: NGOs have a set of rights which may include the right to attend meeting and, to a certain extent, to circulate statements, speak and propose agenda items; however since it is excluded that they may engage in negotiating functions, their role is more one of observers than of participants. The accreditation mechanism is conceived as a political filter: an organ composed by representative of member states is established to assess a predefined set of admission conditions which are drafted in non restrictive terms but are general enough to “shut the door” when required by political considerations. See on the latter point J.D. Aston, “The United Nations Committee on Non-Governmental Organizations: Guarding the Entrance of a Politically Divided House”, 12 *EJIL* (2001), at 943.

participation which the consultative model of relationship has proven more and more difficult to meet.

The phenomenon has both a quantitative and a qualitative dimension. In quantitative terms, the figures show that the number of NGOs enjoying a consultative status has significantly increased in the last decade. For instance, civil society organisations applying for consultative status with UN ECOSOC were 20-30 per year in the 70s and 80s, 200 in '98-99, 400 in 2000-01 and 500 subsequently<sup>7</sup>. It is clear that the higher the number of NGOs enjoying the status, the more relevant the impact on the functioning of the consultative relationship: overcrowding slows down the accreditation procedures, and, once accredited, prevents NGOs from effectively exercising their participatory rights.

In qualitative terms, not only do more NGOs want to participate but they want to participate more. The scope of participatory rights provided by formal statuses does not represent but a share of the actual interaction between civil society and IGOs. To start with, practice shows that formal restrictions to non-governmental participation do not prevent NGOs from participating informally and “beyond the rules”, for example by joining “umbrella organizations” which already enjoy the consultative status or simply by continuing the practice of informal consultations with the IGO. In other cases the need to enhance civil society participation beyond the strict limitations imposed by consultative status is shared with IGO organs which, however, prefer engaging with NGOs on an *ad hoc* basis more than providing a formal extension of their participatory rights. When this happens, informal practices of cooperation are established which superimpose the formal relationship.<sup>8</sup> However, the nature of the matter concerned and the intensity of the non-governmental mobilization may lead States to accept the establishment of new formal mechanisms of participation which makes the “privileges” of traditional accreditation largely redundant. Within the UN system, this phenomenon has already led to a significant proliferation and fragmentation of NGO-IGO patterns of relationship.

The growing complexity of NGO-IGO interdependence puts in question the pattern of relationship which has traditionally underpinned the “consultative formula”. Originally conceived as passive participants of intergovernmental processes within the limited field of economic and social cooperation, NGOs play now a broader role which IGOs are more keen to accept (or less able to contrast). Thus, while a new semantic emerges to describe the relationship in terms which are legally ambiguous<sup>9</sup>, the question arises whether the times has come to envisage a new legal framework for NGOs action in the international intergovernmental processes.

---

<sup>7</sup> See *UN System and Civil Society – An Inventory and an Analysis of Practices*, Background Paper for the Secretary General’s Panel of Eminent Persons on UN Relation with Civil Society, May 2003, <http://www.un-ngls.org/UNreform.htm>

<sup>8</sup> This is the case of the *ad hoc* relationships established with civil society by the UN General Assembly in its ordinary sessions and by Security Council (Arria meetings). See *UN System and Civil Society*, *supra* note 7, p 10

<sup>9</sup> In official IGOs documents civil society organizations have started being qualified as “partners” of governments and IGOs in the pursuit of global goals and “active participants” of intergovernmental processes. The relationships between NGOs and IGOs have been qualified as “partnerships” and “dialogues”. A good example of the legal ambiguity of the new terminology, at least in the UN framework, is represented by the definition of “partnership” provided by the 2003 Secretary General’s Report on “*Enhanced Cooperation between the UN and all the Relevant Partners, in particular the private sector*”. See UN Doc. A/58/227.

## ***B. Formalization vs. Self-regulation***

We could argue that the recognition of an enhanced participation of civil society in the activity of international organisations should be logically reflected in a new formal status replacing the consultative one. The practice of the Organisation of American States, of the Council of Europe and of the UN ECOSOC shows that once consolidated in practice, informal participatory mechanisms are often reproduced in formal arrangements<sup>10</sup>. However, what would make “indispensable” the formalisation of the new role played by civil society in a new legal regime is hardly spelled out in explicit terms.

A first set of reasons is certainly connected with a growing demand for legal certainty and uniformity in the interaction between civil society and international organisations. The experience has shown that the plethora of ad hoc arrangements and informal practices so far developed has fragmented participation and created incoherencies. In a number of cases, organisations or organs which have complementary competence and cooperate in their activities have developed diverging policies towards NGOs participation, thus threatening the effectiveness of civil society’s contribution.<sup>11</sup>

However, the strongest argument in favour of a more formalised relationship between civil society and IGOs is generally found in the need to face the new quantitative and qualitative dimensions of NGO participation.

On the one hand, the multiplication of NGOs seeking participation in IGOs activities requires to face an “openness dilemma”: the more IGOs are open to civil society, the more difficult it is to select the information channelled by NGOs and to benefit from their potential contribution<sup>12</sup>. The dilemma is in the first place a challenge for the intergovernmental process: since any engagement with civil society has an “opportunity cost”, the process is strengthened only if the added value of participation exceeds the cost. As a consequence, there is a growing IGO interest to adopt the necessary measures to make sure that the “appropriate” actors are involved. But over-crowding is equally a concern for NGOs since more participants imply less participation. And in fact, practice shows that in some “high demand” bodies, like the

---

<sup>10</sup> The informal dialogue that used to take place between State delegates in the OAS General Assembly and representatives of civil society organisations has been recently formalised in an official activity of the organisation. See General Assembly Resolution “*Increasing and strengthening civil society participation in OAS activities*”, 10 June 2003, AG/RES. 1915 (XXXIII-O/03). In a similar way, the major innovations introduced by the 1996 reform of the ECOSOC arrangements (general accreditation procedure for international conferences; easier access to consultative status for national NGOs) formalised trends and practices which had already been established informally. See ECOSOC Resolution “*Consultative Relationship between the UN and Non-Governmental Organisations*”, 25 July 1996, E/RES/1996/31. On the reform of consultative relationship in the Council of Europe, see *infra* in text.

<sup>11</sup> The problem is particularly apparent within the UN system whose institutional architecture contemplates a coordinated action of Specialised Agencies, the UN itself and, more generally, the different organs involved in decision-making. It is not surprising that one of the reasons most frequently invoked in support of NGO participation in the works of the General Assembly is precisely the fact that it is incoherent to prevent NGOs from making their contribution when the GA has to consider reports from ECOSOC or has to formulate policy on follow-up conferences in which civil society organisations have played an active role.

<sup>12</sup> Statement by Prof. De Schutter at the EUI workshop.

Commission on Human Rights, the increase in number of civil society organisations asking to participate has already had drastic effects<sup>13</sup>.

On the other hand, an higher degree of regulation is also seen as the necessary response to the drawbacks of the informal patterns of relationship so far developed. Informality, and in particular the practice of lobbying, is a source of inequalities among different categories of non-governmental organisations and it can be itself a barrier to participation. Even worst, the grey areas of informal relationship allow the so called “uncivil society” to push forward its interests in the intergovernmental process<sup>14</sup>.

Finally, informal participation affects the transparency of IGO functioning since it prevents from tracing to what extent and by which specific interest IGOs decision-making is affected. While these distortions raised limited concerns as long as civil society participation had a moderate impact on the outcomes of the intergovernmental processes, they become more and more problematic as NGOs gain political weight and are formally recognised as “participants” in those processes. Thus the recognition of an enhanced involvement of civil society in IGO decision-making seems to imply a more transparent specification of their role and to require a more careful consideration of their legitimacy and accountability. In this perspective, an higher degree of regulation both in the selection of civil society interlocutors, in the definition of the modalities of interaction and in the supervision of NGO activity seems highly desirable.

### *1. The Drawbacks of Formalization*

As soon as we move on from the enunciation of general principles to devise concrete proposal of formal regulation serious problems do emerge. The legitimacy of civil society involvement in the IGO decision making process is difficult to define and even more difficult to assess. Recent academic and political debates have warned against the danger of simplistic solutions. On the one hand it has been underlined that it would be misleading to confuse legitimacy to voice an opinion with representativity. Most organisations make their voice heard on the ground of their technical expertise, ability to mobilize people, operational effectiveness and more generally from the values they embody. Thus, any selecting criterion or participatory device aiming at enhancing the representativity of these civil society organisations by ways, for instance, of fixed quotas for different constituencies or of membership requirements would finally end in a loss of information and policy inputs and would maybe raise the danger of “corporatist mechanisms” among civil society<sup>15</sup>. The opposite could also be true. Civil society includes organisations genuinely representative of social and professional groups which claim to speak *for* the people whose interest they reflect and it goes without saying that such organisations should be asked to give account of their representativity. More broadly, practice seems to suggest that representative NGOs are more suitable to engage in institutionalised forms of participation, such as the

---

<sup>13</sup> In 2003, speaking time for NGOs on some agenda items of the UN Commission on Human Rights was reduced to 1,30 minutes per speaker. However, overcrowding seems to be a problem affecting only some bodies according to the function performed and their procedural arrangements. See *Summary Report of the Meeting of NGO and Civil Society Focal Points from the UN System and International Organizations* convened by the UN Non-Governmental Liaison Service (NGLS), 6-7 March 2003, at page 6; <http://www.un-ngls.org>

<sup>14</sup> See the paper presented by O. De Frouville at the 2005 ESIL Conference: “Une société servile à l’ONU?”

<sup>15</sup> See “*Summary Report*”, *supra* note 12 , page 11

establishment of a specific body made of selected NGOs representatives (e.g. ILO). Thus an argument could be made for a different regulation of the participation of different categories of civil society.

It could also be questioned whether any legal regulation is suitable at all. The effectiveness of a legal regime of participation is far from being proved: a set of formal rules would not necessarily prevent NGOs from acting as informally as they already do today and therefore it would likely fail in addressing the problem raised by informal relationship<sup>16</sup>. Moreover, an higher degree of institutionalisation is perceived as a threat by a significant part of civil society, and in particular by the most influential organisations. There is a creeping concern that any proposal to tailor a formal participatory status for NGOs may actually hide the attempt by IGO member States to reduce non-governmental influence: bound by the constraints of an institutional function and deprived of the most effective informal means of pressure, NGOs would be finally prevented from effectively playing their advocacy role.

Thus, we wonder whether the challenges raised by civil society participation could not be faced in a radically different way. According to this perspective, *self regulation* is proposed as the best answer to the problems raised by NGO participation in intergovernmental processes. Other than introducing disputed criteria on NGO selection, IGO should push civil society to self organize in coalitions and networks in order to meet the challenges raised by overcrowding and fragmented participation. Informal participation should be recognised as an inherent pattern of IGO-civil society interaction and its drawbacks should be addressed by exerting pressure on NGOs to engage in self-commitments such as the compliance with “codes of conduct” jointly drafted by NGO and IGO representatives. The issues of legitimacy and accountability could be significantly played down by encouraging a voluntary engagement by NGOs to be more transparent about “who they are and what they do”. In this framework, the scope of legal regulation should be limited to establish some form of supervisory mechanism that would guarantee the respect of self-assumed obligations.

### ***C. Multiplying the Frameworks of NGO-IGO Cooperation***

In the last 24 months the official initiatives aimed at reframing the relationship with civil society have multiplied<sup>17</sup>. This unprecedented attention paid by governmental institutions to the mechanisms of cooperation with non-state actors shows a change in the political climate. Unlike what happened in the early nineties when only partial responses were given to the growing claim

---

<sup>16</sup> Statement by Prof. De Schutter at the EUI Workshop

<sup>17</sup> In November 2003 the Council of Europe has introduced a new “participatory status” for NGOs (see *infra*); in June 2004 a comprehensive reform of the relationship with civil society has been proposed in the framework of the debate of the UN Reform (see *infra*); in June 2004 the Member States of the African Union approved the Statutes of the new Economic, Social and Cultural Council (*infra*); in March 2004 and in March 2005 comprehensive studies on the existing procedures for civil society participation has been carried out in the framework of the Organization of American States (*Review of the Rules of Procedure for Civil Society Participation with the Organisation of American States*, 31 March 2004, OEA/Ser.G CP/CISC-106/04, pag.2) and of the World Bank (*Issues and Options for Improving Engagement Between the World Bank and Civil Society Organisations*, March 2005. [http://siteresources.worldbank.org/CSO/Resources/Issues\\_and\\_Options\\_PUBLISHED\\_VERSION.pdf](http://siteresources.worldbank.org/CSO/Resources/Issues_and_Options_PUBLISHED_VERSION.pdf).)

for civil society participation<sup>18</sup>, a comprehensive reconsideration of NGO-IGO relationship appears today at the core of the debate. The new approach reveals a generalised need to combine the recognition of the role played by civil society in the intergovernmental processes with the definition of a clearer framework for their action. In short, an higher degree of regulation is deemed necessary.

Here the political debate meets the academic speculation. The scholarly alternative between a model of relationship grounded on institutionalisation and a different one grounded on self-regulation does not seem to find confirmation in the reforms so far proposed or already adopted. In practice, the two approaches are not necessarily exclusive, since varying degrees of self-regulation and legal formalism may be effectively combined to provide tailored solutions to the problems raised by the interaction with civil society. Thus, instead of a single framework, a plurality of models of interaction are emerging which can be classified according to a decreasing degree of legal formalisation. We will limit ourselves to provide a general overview of the emerging patterns of NGO/IGO relationship while reserving an in-depth analysis for a future contribution.

*Institutionalisation of civil society participation.* The newly established Economic, Social and Cultural Council (ECOSOCC) of the African Union (AU) represents an attempt to institutionalize the participation of civil society in the intergovernmental process through membership in an organ of the organization. Unlike the other cases of non-governmental membership in IGO organs<sup>19</sup>, civil society participation in ECOSOCC is neither combined with traditional governmental membership nor restricted to organizations representing specific interests: rather, ECOSOCC is conceived as a comprehensive interface between the broad complex of civil society and the African Union in all its fields of action.

The ECOSOCC is vested with a general advisory role and has the power to submit recommendations to the other organs of the Union<sup>20</sup>. Its composition consist in 150 representatives of civil society organizations, including organizations representing social and professional groups, cultural organizations, NGOs and community-based organizations.<sup>21</sup>The classical problem of how to select civil society organizations and to assure an even participation of the different interests they represent is here enhanced by the quasi-representative nature of the organ. The solution adopted in the ECOSOCC Statutes is to refer the determination of the modalities for election of ECOSOC members to civil society organizations themselves (art.5 of ECOSOC Statutes). However, eligibility is qualified by specific requirements, including criteria on composition and funding (art.6) and a system of quotas is set up to guarantee an even representation from a geographical, gender and age point of view (art.4); quite interestingly, no

---

<sup>18</sup> The demands for more participation pushed forward by civil society organisations in the aftermath of the conferences of early nineties were met in the UN both with the refusal of any general reform of the existing formal relationships and with the establishment of innovative mechanisms of cooperation in specific fields of IGO action; the idea prevailed that informality and the multiplication of the patterns of interaction would have represented viable solutions to the instances of civil society.

<sup>19</sup> ILO, UN Permanent Forum on Indigenous Issues, an advisory body of the UN ECOSOC established by E/RES/2000/22 and which is partially composed by representatives of indigenous organizations.

<sup>20</sup> Art. 3 and 7 of the ECOSOCC Statutes.

<sup>21</sup> Art. 3 and 4 of the ECOSOCC Statutes.



specific mechanisms, neither the reference to a general principle of equal representation, are provided for balancing the representation of the different component of civil society.

*From consultative to participatory status.* In the UN and the Council of Europe the debate on the reform of consultative status has not put into discussion the preference for a formalized, but yet not institutionalized, pattern of interaction with civil society. Rather than exploring the possibility of incorporating CSOs into the institutional machinery of the IGO, the debate has focussed on how to face the shortcomings of existing statuses and to take into consideration the new role played by civil society at the international level. Quite interestingly, both the reform adopted by the Council of Europe and the one currently debated in the UN, stress the need to adapt the working method of the organization and recognize self-regulation as a key-tool for organizing civil society participation.

In the Council of Europe, a “participatory status” has replaced the existing consultative one<sup>22</sup>. According to the new rules, civil society is not simply “consulted” but “involved” in the definition of CoE policies and programmes<sup>23</sup>. In practice the new formula does not correspond to a new set of participatory rights, but rather formalises a change occurred in the aptitude of the IGO. The new approach clearly results from the preamble of Resolution (2003)8 where reference is made to the “Quadrilogue” among the Committee of Minister, the Congress of Local and Regional Authorities, the Parliamentary Assembly and civil society as a *working method* which aims at informing the CoE decision-making procedures on the values of democratic pluralism.

The new resolution promotes self-regulation of civil society by attributing a formal role to the Liaison Committee and the Thematic Groupings, bodies established by NGOs themselves to coordinate their activity within the Council of Europe. In particular, they are expressly recognized as preferential interlocutors for CoE organs and the Liaison Committee is vested with an advisory role in the procedures for the granting and the withdrawal of the participatory status<sup>24</sup>.

In the UN system, the debate on the reform of the relationship with civil society is still going in on. In June 2004, the Panel established by the Secretary General to advance proposals on the topic submitted its final report<sup>25</sup>. The report moves from the idea that the growing influence of civil society in global policy is a terrific opportunity to enhance the effectiveness of intergovernmental processes and to reduce the democratic deficit to which they are prone. It is suggested that in order to seize this opportunity, the change should first of all concern the working methods of the Organization. In the Panel’s vision, the UN should be “outward-looking” and act as a global convener of different “constituencies”. While the role of member states as final decision-makers is not put into question, it is underlined that UN should play a new role in

---

<sup>22</sup> See respectively Resolution (93)38 *Relations between the Council of Europe and International Non-Governmental Organizations*, adopted by the CoE Committee of Ministers on 18 October 1993 and Resolution (2003)8 *Participatory Status for International Non-Governmental Organizations with the Council of Europe*, adopted on 19 November 2003.

<sup>23</sup> Compare para. 3 of Appendix to Resolution 93(38) and para. 4 of Appendix to Resolution (2003)8.

<sup>24</sup> Para.4 and 13 of Appendix to Resolution (2003)8.

<sup>25</sup> The panel was appointed in 2002 in the framework of the further actions proposed by the UN Secretary General to achieve the Millennium Declaration goals. See “Strengthening of the United Nations: an agenda for further change”, report of the SG, UN Doc. A/57/387, 09/10/2002, para. 141. Its final report has been submitted in June 2004. See UN Doc. A/58/817. A first response to the report has been given by the UN Secretary General in UN Doc. A/59/354.

global governance by promoting the establishment of a plurality of forums tailored to specific tasks and open to the contributions of every relevant actor, including the private sector<sup>26</sup>.

The Panel recognises, however, that direct NGOs relationship with UN organs will remain important and that it should be kept formal. Therefore it advances some concrete proposals to improve the existing legal status and accreditation procedures according to three different guidelines: participation in UN governmental bodies should be *extended* by establishing a consultative status for NGOs in the General Assembly and by formalising the existing practices of consultation with the Security Council<sup>27</sup>; the accreditation procedures should be *streamlined and depoliticised*, in particular by establishing a common system of accreditation for all UN forums and by recognising a greater role of UN administration in the accreditation process<sup>28</sup>; *self-regulation and self-organisation* should be promoted by recognising broader participatory rights to civil society networks and umbrella organizations and by encouraging NGOs to draft codes of conduct and self-policing mechanisms.<sup>29</sup>

*Civil Society Participation as a Principle of Good Governance.* Finally, it is worth noting that the dialogue with civil society can be fostered regardless of any formal mechanism of accreditation or institutionalisation. In the EC system, wide consultation with civil society is recognised as one of the principles of good governance which shall inform the European policy-making<sup>30</sup>. Thus, more than establishing a general formal status for NGOs which by definition would imply a selection of participants and thereby make the dialogue with civil society less open<sup>31</sup>, the Commission has elaborated a set of *minimum standards* for the conduct of consultation with NGOs and interested parties. The standards define the basic principles and guidelines which should be applied throughout all the Commission departments when interacting

---

<sup>26</sup> In the Panel's view, different forums should be used at different stage of an issue's life cycle in the global debate. Each would have a different style of work and degree of formality, with participation determined accordingly: high-level round tables made up of selected governmental and non-governmental participants should tackle emerging issues; once the issue becomes familiar, global conferences open to all the interested constituencies should be convened to define norms and targets; in the implementation phase, cooperation with NGOs and the private sector should be sought to monitor compliance.

<sup>27</sup> *Panel Report*, proposals 6 and 12.

<sup>28</sup> On the model of what is already happening in the Council of Europe, the Secretariat would pre-screen the applications of NGOs and submit recommendations for accreditation to the political Committee in charge of the accreditation procedure. The Committee would then decide on accreditation on a non-objection bases by a given delay. *Panel Report*, proposals 6, 19 and 20.

<sup>29</sup> *Panel Report*, proposal 23. The Panel recognizes however that self-regulation cannot always be sufficient to face some of the traditional unbalances which affect NGOs participation. It can therefore be necessary to take positive action. Thus proposal 27 envisages the establishment of a trust fund to promote NGOs participation from developing Countries.

<sup>30</sup> *Protocol(n°30) on the Application of the Principles of Subsidiarity and Proportionality* adopted via the Amsterdam Treaty.

<sup>31</sup> Report produced by the Commission as part of the process of preparing the White Paper on Governance, *Consultation and Participation of Civil Society* of June 2001 retrievable at [http://europa.eu.int/comm/governance/areas/group3/report\\_en.pdf](http://europa.eu.int/comm/governance/areas/group3/report_en.pdf). Obviously nothing prevents the Commission to established structured or even formalised consultative processes when it is so required by specific circumstances. The complete list of existing structured and formalised consultation processes can be found in the CONECCS database. See *infra* note 32.

with civil society. In particular, it is prescribed that the consultation processes shall be designed in order to have a clear object; all the relevant parties should have opportunity to express their views; adequate publication should be ensured to reach all the interested parties; adequate feedback should be provided to the contributors.<sup>32</sup> Administrative measures are then envisaged to facilitate and rationalize the process of consultation and in particular to identify the organization which may be interested or affected by a specific proposal and therefore which should be consulted.<sup>33</sup>

While doubts may be raised on the observance of standards which are expressly meant not to have a legal effect<sup>34</sup>, the Community approach has the merit to pose the problem of civil society participation in term of correct exercise of the decision-making power, that is in terms of accountability of the organization.

## 2. The Participation of NGOs in International Judicial Proceedings

### A. Problematic Issues

Some of the main problematic issues that permeate the relationship between NGOs and international adjudication bodies have been put forward by the NGOs participating at the Florence Workshop. This is believed to be an appropriate starting ground for the present analysis as the thorniest issues were identified by the actors that are directly involved in the matter.

At the Florence workshop, the NGOs voiced differing degrees of satisfaction with the relation they entertain with international courts and tribunals but they all agreed that the main argument in favour of enhanced participation in terms of *locus standi* and *amicus curiae*<sup>35</sup> intervention laid in their privileged position to voice collective or public (or general) interests. It was rightly underlined that this NGOs quality is not of marginal significance/interest by reason of

---

<sup>32</sup> *Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission*, Communication from the Commission, 11 December 2002, COM (2002)704

<sup>33</sup> A good example is provided by the database CONECCS (*Consultation, the European Community and Civil Society*) which gathers information on non-profit-making civil society organizations at the European level. Every organization which aims at participating in EC activities is invited to register with the database: the information will eventually help the Commission in identifying the organizations which shall be involved in consultation in a given case. See [http://europa.eu.int/comm/civil\\_society/coneccs/index.htm](http://europa.eu.int/comm/civil_society/coneccs/index.htm).

<sup>34</sup> See *Towards a reinforced culture of consultation*, *supra* note 31, page 10.

<sup>35</sup> International lawyers are rightly focusing on the current developments concerning *amicus curiae* intervention in judicial proceedings as this practice is visibly increasing and may be conducive to more active participation of private entities in international trials. Among the very fertile doctrinal production see, in particular, Ascencio, 'L'*amicus curiae* devant les juridictions internationales', *RGDIP* (2004) 897 and Mackenzie, 'The *Amicus Curiae* in International Courts: Towards Common Procedural Approaches?', in T. Treves et al. (eds), *Civil Society, International Courts and Compliance Bodies* (2004) 295.

the reluctance of parties to litigation, in particular states, to bring forward arguments of a collective or public nature.<sup>36</sup>

Interestingly, many more arguments have been advanced *against* enlarging *locus standi* or *amicus curiae* rights to NGOs than *in favour* of them. In the first place, some NGOs deny the need for a more formalised and broader legal status before international tribunals by stressing the ability to convey their views to the relevant judicial body also absent any official modality of participation in the proceedings.<sup>37</sup> In other words, at least large NGOs do not conceal their ability to achieve their goals informally not only, as we have seen in Part I, in their relations with IGOs but also in the more formalised arena of international adjudication. Secondly, major concerns arise in relation to the rights of the parties to the proceedings. As practice shows,<sup>38</sup> not all NGOs are well-intentioned and their participation to the proceedings as *amici curiae* may negatively affect due process rights of one of the parties in litigation. Thirdly, allowing NGOs to directly submit a complaint before a body where they do not have standing or by relaxing the victim-requirement that some courts, such as the European Court of Human Rights, requests would open the floodgates and hence delay the delivery of the judgment unless a reform of the judicial mechanism is carried out. Fourthly, confronted with the possibility of taking up, or intervening in, an increased number of cases, NGOs will have to devise criteria for accepting or declining participation in a case. Such criteria are far from being identified and inherently difficult to mould given the broad subject- and personal-matter competence of most NGOs.

These four arguments couched by a number of NGOs in order to maintain the current state of the art with respect to their role before international courts and tribunals should be complemented by another remark which was understandingly not mentioned by the organisations at the EUI workshop: the representation issue. As extensively treated in the first part of this paper, the crucial question of who do NGOs represent remains largely unanswered today. NGOs self-declare to be representative of a specific collective and/or public interest or right, but mechanisms capable of controlling the veracity of such statements begin to loom large. Most remarkably, this point is very closely linked to the only argument in favour of a more active participation of NGOs in international proceedings, namely the ability of such organisations to voice public or collective interests. Therefore unless the representation issue is promptly addressed, the very quality of NGOs which makes them potentially unique, i.e. credibility based on knowledge and expertise is jeopardised (the point will be further discussed below in par. 3).

---

<sup>36</sup> Shelton, 'The Participation of Nongovernmental Organisations in International Judicial Proceedings', 88 *AJIL* (1994) at 615 expands on the reasons why states may be reluctant to bring forward public interest arguments in international litigation.

<sup>37</sup> This is the case for the best-known and most influential NGOs in relation to their practice especially before monitoring bodies.

<sup>38</sup> See ICTY Appeal Chamber, *Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995, esp. par. 50 and par. 83, as well as the critics advanced in WT/GC/M/60, 23 January 2001, par. 50 by member states such as Mexico with respect to the WTO appellate decision to admit *amicus curiae* intervention in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products, Additional Procedure Adopted Under Rule 16(1) of the Working Procedures for Appellate Review*, WT/DS135/9, 8 November 2000.

### ***B. Is Enhanced Regulation of the Participation of NGOs in International Judicial Proceedings Desirable?***

A mere quantitative analysis of the reasons in favour and those against a higher degree of participation of NGOs in international adjudication proceedings would easily lead to the conclusion that the current level of participation is satisfactory. Hence no need for enhanced involvement of NGOs at the judicial level would arise. In addition, the difficulty in identifying the very nature of the interest which is vested upon the organisations weakens the argument in favour of a more active role for them before the international judge.

This notwithstanding, we submit that a higher degree of participation of NGOs in international proceedings is desirable and needs fostering. This conclusion is warranted in particular by three factors: first, the lack of a body/entity which may represent collective and public interests in most international courts and tribunals;<sup>39</sup> second, the high degree of formalisation that is inherent in any judicial process; and, third, the ability of NGOs participation to fill the democratic deficit that is reproached to numerous IGOs.

As to the first point, it is well-known that *actio popularis* is virtually unknown in international law, with the only and limited exception of the Inter-American and African Commission on Human Rights and, to some extent, the African Court on Human and People's Rights. Without entering into the delicate debate on the suitability of such type of legal action for the international legal order<sup>40</sup> (we come back to this question in par. 3), it suffices it here to note the visible trend of international tribunals, even those traditionally most conservative, towards addressing questions of a collective or public nature. We shall limit ourselves to quote the *East Timor* case which concerned the rights of peoples to self-determination and the *Gabčíkovo-Nagymaros* case on environmental issues before the International Court of Justice (ICJ).<sup>41</sup> The nature of the international trial is changing: as the subject-matter of disputes has increasing implications for private companies or individuals or associations, growing importance in international law is vested upon non-state actors.

The second point militates against the need asserted by NGOs for 'flexibility' with respect to their judicial participation. The rationale behind the progressive formalisation and institutionalisation of international judicial proceedings lies in the need for transparency and certainty in the procedure, which is likely to be defeated by the degree of informal participation that some NGOs claim to be enjoying and wish to maintain.

---

<sup>39</sup> Such a role could arguably be said to be played by the Prosecutor in the international criminal tribunals.

<sup>40</sup> For a knowledgeable examination of this complex issue we refer to F. Voeffray, *L'actio popularis ou la défense de l'intérêt collectif devant les juridictions internationales* (2004).

<sup>41</sup> In the words of one of the ICJ judges, the Court "is increasingly confronted with issues which are not strictly of inter-party relevance and do not have merely effect on bilateral relations between States. .... the Court seems to recognize the global values which are invoked by non-State actors like humanitarian organizations", P. Kooijmans, 'The Role of Non-State Actors and International Dispute Settlement', in W. P. Heere, *From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal System* (2004) p. 23. However, we agree with those scholars who affirm that the ICJ has not always been able to take the opportunity of the cases instituted before it to clarify the scope of fundamental principles of international law, cf. in this sense P.-M. Dupuy, *L'unité de l'ordre juridique international*, *RCADI*, vol. 297 (2002), pp. 477-478.

In the third place, extending *locus standi* to NGOs or accepting their third party intervention as friends of the court in proceedings constitutes a forceful argument against accusations of democratic deficit with which IGOs are often beset.<sup>42</sup>

On account of the above, higher participation of NGOs both in terms of standing and as friends of the court appears to be desirable in contemporary international law. However, enhanced participation needs regulation in order to limit the negative effects of the four factors which have been mentioned above. It is therefore argued that a form of ‘conditional participation’ for NGOs in international judicial proceedings needs to be devised.

### *C. ‘Conditional Participation’ of NGOs in International Judicial Proceedings*

Once agreed that contemporary international law calls for increased involvement of NGOs at the judicial level, the crucial question becomes the type of regime that should govern such involvement. Albeit not pretending to provide conclusive answers to all the diverse and complex procedural aspects that the question brings forward, we limit ourselves to offering some reflections on possible ways to address two of the principal arguments against enhanced participation: on the one hand, the issue of NGOs representation; on the other, the negative impact on the rights of the parties that NGOs participation may produce.

#### *1. Representation Issue*

The issue of representation of NGOs, which is strictly connected to legitimacy, is so multifaceted and complex that no unique solution appears to be capable of applying to the multiform planet of NGOs.<sup>43</sup> Indeed various ways of dealing with the issue have been experienced and encompass both examples of self-regulation by NGOs and regulation by the judicial body. In terms of self-regulation, codes of conduct which provide standards of behaviour for action have been adhered to by certain categories of NGOs<sup>44</sup>. Although no such codes appear to be specifically drafted to

---

<sup>42</sup> The argument, which has far-reaching ramifications that are beyond the scope of this paper, has been repeatedly advanced with respect to the European Union (see Harlow, ‘Towards a Theory of Standing for the European Court of Justice’, 12 *Yearbook of European Law* (1992) 213, but has also been invoked with regard to other IGOs, especially the WTO (see Charnovitz, ‘WTO Cosmopolitics’, in E.-U. Petersmann (ed.), *Preparing the Doha Development Round: Challenges to the Legitimacy and Efficiency of the World Trading System* (2004) 118).

<sup>43</sup> Cf. Slim, ‘By What Authority? The Legitimacy and Accountability of Non-governmental Organisations’, in *The Journal of Humanitarian Assistance*, 10 March 2002, at <http://www.jha.ac/articles/a082.htm>, and Anderson, ‘The Ottawa Convention Banning Landmines: the Role of International Non-Governmental Organizations and the Idea of International Civil Society’, *EJIL* (2000) 92.

<sup>44</sup> E.g. the 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations in Disaster Relief; and the Code of Ethics and Conduct for NGOs of the World Association of Non-Governmental Organisations, available at [http://www.wango.org/activities/codeofethics/web\\_ccbook1.pdf](http://www.wango.org/activities/codeofethics/web_ccbook1.pdf), which is designed to be applicable to the multifaceted variety of existing NGOs.

guide the behaviour of NGOs acting before international tribunals, most of the principles that they enounce certainly are applicable also to the judicial aspects of NGOs activity.<sup>45</sup>

On the other hand, in a few cases formal regulation of the representation issue has been addressed directly in the treaty establishing the judicial body. A case in point is the recent Statute of the African Court on Human and Peoples' Rights which borrows from the IGOs/NGOs relationship the requirement that only those NGOs enjoying consultative status with the Commission may file a complaint with the Court.<sup>46</sup> Where formal regulation is lacking, the judge may devise ad hoc ways of selecting those NGOs that pass the legitimacy test. Such ways may be based on a *de facto* objective standard, e.g. the reputation of the NGO,<sup>47</sup> or on other criteria such as the interest of the NGO in the dispute. This latter point deserves further attention with regard to *amicus* intervention.

Practice shows that when applying as *amici*, NGOs are generally requested to declare the nature of their interest in the proceeding. Though the interest advanced by *amicus* does not usually have to be a direct one (unlike in third-party intervention) but it is sufficient to be general,<sup>48</sup> the affirmation of the *nature* of the interest is crucial as it provides the adjudicators with an important value element which may guide their determination for acceptance or refusal of the leave. Indeed, this practice has been followed ad hoc in those instances where the treaty and rules contained no explicit provision on *amici*: arbitration disputes<sup>49</sup> and WTO dispute settlement bodies,<sup>50</sup> although it has not always been sufficient to curb critics on the true type of interest that *amici* submissions were representing.<sup>51</sup> Still, self-declaration of the interest defended coupled with the discretion of the judge to allow an *amici* submission in light of the objective of the litigation and the scope of his or her own competence, appears to be one of the main antidotes against the degenerated function of *amici*, namely lobbying in favour of murky interests.

---

<sup>45</sup> Principles such as those of transparency towards the members and donors or independence from governments are undoubtedly relevant also for the participation of NGOs in international judicial proceedings.

<sup>46</sup> Cf. Art. 5(3) of the 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, which entered into force on 15 January 2004.

<sup>47</sup> This seems to be the case for the ECHR, see A.-K. Lindblom, *The Legal Status of Non-Governmental Organisations in International Law* (2001), p. 320.

<sup>48</sup> Shelton, *supra* note 3, at 611, and Ascencio, *supra* note 2, at 911-913.

<sup>49</sup> The undisputable existence of a 'public interest' in the arbitration (citizens' access to drinking water), led the Tribunal in *Methanex* to open to *amicus* participation, *Methanex Corporation v. United States of America, Decision of the Tribunal on Petitions for Intervention and Participation as "Amici Curiae"*, 15 January 2001, par. 49.

<sup>50</sup> *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, *supra* note 5, par. 2(d).

<sup>51</sup> At the meeting of the WTO General Council of 22 November 2000, the representative of Mexico stated clearly with reference to the Additional Procedure adopted by the Appellate Body in the Asbestos case that: 'It was a cause of great concern that the Appellate Body had given precedence to the submissions from interests outside of the WTO over the concerns expressed by many WTO Members. In fact, by imposing such conditions, the Appellate Body had taken a decision that Members themselves had not adopted, thereby clearly contravening Article IX of the WTO Agreement and diminishing the rights and obligations of Members, in contravention of Article 19.2 of the DSU', WT/GC/M/60, 23 January 2001, par. 50.

The above leads us to make the crucial distinction between the interests pertaining to an NGO *per se* and the interests it claims to be representing on behalf of other people or entities. While in adjudicatory proceedings standing is usually granted to the direct victim,<sup>52</sup> it is not to be excluded that in a certain legal order standing (both with respect to *locus standi* and *amicus curiae*) may be recognised also to legal or physical persons acting on behalf of a third person. Such type of legal action can be brought in defence of a collective interest or a general interest (*actio popularis*). While these actions are not rare at the national level,<sup>53</sup> the international legal order has traditionally been reluctant to accept them.<sup>54</sup> However, a trend towards opening in the direction of legal actions in defence of a collective or general interest can be identified. As already stated, some regional mechanism for the safeguards of human rights already allow a form of *actio popularis*, though a restricted one.<sup>55</sup> In addition, the expansion of the subject-matter of interest to international law, which is increasingly devoted to the protection of interests such as environment, development and health, will predictably result in recognising standing to the person entitled to represent the said interest. This has already occurred in a recent case, *Gorraiz Lizarraga and others v. Spain*,<sup>56</sup> where the ECHR provided an evolving interpretation of the term ‘victim’ ex art. 34 of the Convention by admitting the complaint by individuals who had not themselves exhausted local remedies but whose rights were taken up at the national level by the association which was co-applicant of the individuals before the Strasbourg Court.

---

<sup>52</sup> It is well-known that the victim-requirement is maintained in the guarantee system set up by the European Convention for the Protection of Human Rights and Fundamental Freedom as amended by Protocol No. 11, see art. 34 of the Convention.

<sup>53</sup> Legal actions which can be assimilated to the roman *actio popularis* are allowed in Spain (*acción popular*) and the United States (citizen suits), see Voefray, *supra* note 7, at 29 ff.

<sup>54</sup> Cf. the *South-Western African Cases (second phase)*, ICJ Reports (1966) at 29.

<sup>55</sup> Cf. art. 44 of the American Convention on Human Rights and art. 23 of the Rules of Procedure and Evidence of the Inter-American Commission of Human Rights, which only pose as a condition that the applicant NGO be recognized in one or more member states of the Organization of American States. See also art. 55 and art. 58 of the African Charter on Human and Peoples’ Rights, which restrict the NGO *locus standi* to those cases revealing ‘the existence of a series of serious or massive violations of human and peoples’ rights’. Finally, the African Court of Human Rights may entitle NGOs to institute proceedings before it, when the NGO is ‘relevant’ to the case and when it enjoys observer status before the Commission, art. 5(3) of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

<sup>56</sup> Case No. 62543/00, judgment of 27 April 2004. For a commentary on this aspect of the case see Vajic, ‘Some Concluding Remarks on NGOs and the European Court of Human Rights’, in T. Treves et al. (eds), *supra* note 2, at 103-104. The case concerned the flooding of some villages caused by the construction of a dam. In the relevant part the Court stated that: ‘in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively. Moreover, the standing of associations to bring legal proceedings in defence of their members’ interests is recognised by the legislation of most European countries. That is precisely the situation that obtained in the present case. The Court cannot disregard that fact when interpreting the concept of ‘victim’, par. 38.



In addition, a way for addressing similar groups of cases has been experienced by the same Court through recourse to ‘pilot cases’. According to this practice, ‘a first judgment, or a leading case, in a situation where a group of similar, repetitive cases is pending before the ECHR is subsequently to be followed for all cases of the same type, yet in a simplified procedure’.<sup>57</sup> The practice has recently been one of the objects of Protocol no. 14 to the Convention, which at art. 8 empowers the three-judge committees unanimously to declare applications admissible and decide them on their merits, when the questions they raise are covered by well-established case-law of the Court. Needless to say, such procedures also have the advantage of streamlining the whole process and reduce the court’s workload. Hence efficiency and expediency concerns may advise to accept action by representative groups rather than individuals only.<sup>58</sup>

Finally, in the *Methanex* case an ICSID tribunal has specifically allowed *amicus* submissions on the basis of the ‘public interest’ of the case,<sup>59</sup> while the NAFTA Free Trade Commission has inserted the ‘public interest’ character of a dispute among the criteria to take into consideration when deciding to grant leave to *amici*.<sup>60</sup>

While focusing on the notion of ‘interest’ may help solving representation concerns, it is to be noted that all the above ways of addressing the representation issue are procedural in nature. It may not be sterile to investigate whether an appropriate answer to such a pressing concern may lie in a shift from procedure to substance. Would it not be more fruitful to focus on the *content* of the argument presented by an NGO rather than its formal credentials? Examples of such a practice in international adjudication exist, though they appear to be limited to the European Community (EC) system. For instance, in the well-known Chernobyl case, the European Court of Justice privileged “the substantive issue of promoting institutional balance”<sup>61</sup> rather than the application of the formal requirements of art. 230 of the EC Treaty.<sup>62</sup> Also the recently amended Practice Direction XII<sup>63</sup> of the ICJ concerning the submission of written briefs in advisory cases seems to confirm that critical importance is attached to the persuasiveness of the argument advanced by an NGO rather than its reputation. According to the amended Direction, a ‘written statement and/or document’ submitted in an advisory opinion case by an ‘international non-governmental organization’ ‘on its own initiative’, shall not be considered as part of the case file but be treated as ‘publications readily available’. They can thus be referred to by the parties to the case ‘in the same manner as publications in the public domain’. Clearly, the ‘success’ of the NGO brief or document will depend heavily on the soundness of the arguments therein contained, no less than the content of a publication will be determinative of its authority regardless of the reputation of the author.

---

<sup>57</sup> Vajic, *supra* note 25, at 103.

<sup>58</sup> This argument has been developed in relation to the European Court of Justice by Harlow, ‘Public Law and Popular Justice’, 65 *MLR* (2002) 1.

<sup>59</sup> See *supra* note 16.

<sup>60</sup> *Statement of the NAFTA Free Trade Commission on Non-disputing Party Participation*, 7 October 2003, par. 6 (d), at [http://www.ustr.gov/assets/Trade\\_Agreements/Regional/NAFTA/asset\\_upload\\_file660\\_6893.pdf](http://www.ustr.gov/assets/Trade_Agreements/Regional/NAFTA/asset_upload_file660_6893.pdf)

<sup>61</sup> *European Parliament v. Council (Chernobyl)*, Case C-70/88 [1990] ECR I-2041.

<sup>62</sup> Cygan, ‘Protecting the Interests of Civil Society in Community Decision-Making – The Limits of Art. 230 EC’, 52 *ICLQ* (2003), at 1001 ff.

<sup>63</sup> ICJ Practice Direction XII was amended on 30 July 2004.

## 2. Due Process Concerns

Addressing the crucial issue relating to the representation of NGOs leaves unanswered the broad question relating to the potential negative effect that NGOs participation in judicial proceedings may have on one of the parties to the dispute. This question is obviously linked to third party intervention, which we analyse only in the form of *amicus curiae* participation.

Also in this case a unique solution to the question is not viable, but it shall be necessarily tailored-made to the type of jurisdiction we are dealing with. For example, while in inter-state disputes the rights of a party may be affected by the circumstance that *amicus* briefs are not automatically subject to the same evidentiary rules than the issues raised by the parties, in international criminal proceedings *amici* may raise points of law or fact liable to leading to the amendment of the indictment.<sup>64</sup>

However, the excessive emphasis that tends to be put on those concerns overlooks two important facts. In the first place, many rules already exist which determine not only the conditions for application of leave for *amici* but also set out the procedure to be followed once leave is granted. Secondly, practice demonstrates that even in those cases where a treaty is silent on the admissibility of written submissions by third parties, judges have been very cautious to accept such submissions on account of due process concerns by devising ad hoc measures of safeguards.<sup>65</sup> While for the sake of transparency and predictability it is advisable that those jurisdictions find a normative solution to the question, in this transition process, it may be useful that, whatever the decision taken in each and every case, judges motivate their determination in an exhaustive way. The motivation not only provides the succumbing party with arguments that may be raised at a later stage of the proceedings or before another jurisdiction, but also serves the purpose of setting standards which would ultimately lead to (hopefully) the best normative solution for that very jurisdiction. In this respect, it is superfluous to remark that normative regulation is often preceded by uniform judicial practice.

## Concluding Remarks

The influence of civil society in intergovernmental decision-making processes is today an established reality, despite the fierce but weakening resistance offered by certain International Organizations. The studies and reforms currently undertaken by a number of IGOs shows that the question is no longer *whether* but *how* to manage NGOs participation.

The first part of this contribution has shown that the existing patterns of relationship and in particular the “consultative model” of interaction are challenged by the new dimensions of NGOs participation. While the need has emerged for an higher degree of regulation, it is strongly debated whether the necessary rules should be formalized in a new legal status or rather be the result of self-regulation. It is submitted that no pre-defined solution is possible and that the two opposing approaches will finally combine to provide tailored solutions which respond to the different needs of non-governmental participation.

Some common features can however be identified in the spectrum of solutions which are emerging in the international practice. On the one hand, self-regulation is considered of

---

<sup>64</sup> This actually happened to the indictment of *Akayesu* before the International Criminal Tribunal for Rwanda, cf. Lindblom, *supra* note 14, p. 339.

<sup>65</sup> The practice of the NAFTA Free Trade Commission and the WTO Appellate Body is relevant in this respect and has already been mentioned above.

paramount importance in the selection of civil society interlocutors, regardless of the degree of formalization which inform the relationship with civil society. Of course member states retain control, but the trend goes towards a progressive depoliticization of the accreditation processes and self-organization is encouraged as a viable solution to the problems of NGO representativeness and overcrowding. On the other hand, the stress placed on the need to review the “working methods” of IGOs shows that participation of interested actors is increasingly seen as a standard of “good governance” which should inform the intergovernmental decision-making process. In this perspective, relationship with civil society appears a specific aspect of a more general emerging problem: the problem of the accountability of International Organizations<sup>66</sup>.

Several reasons, in particular the expansion of the domain of regulation of international law so as to include general public concerns which transcend the traditionally bilateral and interstate ambit of the discipline, induce to advocate enhanced participation of NGOs, both in terms of *locus standi* and *amicus curiae* intervention, in international judicial proceedings. However, the number and weight of problematic issues that increased participation of private associations would entail call for reflection on ways to regulate a similar change in the system.

Two problematic issues have been addressed in the second part of the paper: the question of the representation and legitimacy of NGOs, and, as far as *amicus curiae* participation is concerned, the possible impairment of the due process rights accruing to the parties to the dispute. It has been suggested that in both spheres concrete attempts on the part of the judge to contrast the pitfalls have already been made and they show that solutions are viable, though need to be tailored-made to the specificities of each jurisdiction. It has also been submitted that a shift from procedure to substance may help in addressing the issue of NGOs representation. In particular, where the arguments put forward by the NGO are persuasive, their credentials should not be an obstacle to participation. Some international practice drawn from the ECJ and the ICJ can be read as confirming such a trend.

As to friends of the court, the attention that scholars are currently devoting to such fast developing practice appears all the more justified considering that through the *amicus* the public interest is brought into international adjudication and that role that NGOs may play in public interest cases can add much to the fairness of the adjudication.

---

<sup>66</sup> See the Final Report on *Accountability of International Organizations* adopted by the International Law Association in its 2004 Berlin Conference. The report is reproduced in, 1 *International Organization Law Review* (2004) page 221 and ff. See also the on-going works of the International Law Commission on the topic of Responsibility of International Organizations.