

■ BOOK REVIEW

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**Pierre-Marie Dupuy / Luisa Vierucci (eds.),
NGOs in International Law – Efficiency in Flexibility?,
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The book edited by *Pierre-Marie Dupuy* and *Luisa Vierucci* starts, as research usually does, with an unsolved question. The attempt to find answers is surprising in two aspects – the first one will be revealed right at the beginning of this review, the second one will be revealed later on, certainly with the intention to keep the reader's curiosity.

As far as the first unconventional aspect is regarded, the contributions to the book did not originate from research in libraries or online searches, but had their starting point at a workshop in 2002 at the European University Institute (EUI, Florence, Italy). The workshop sought to address the issue of the status of NGOs in modern international law, and in particular the modalities of cooperation of NGOs with IGOs and international judicial bodies, with the aim of finding preliminary answers to the question whether there is a need for a revised legal status of NGOs in international law (p. 8). The relevance of this question is underlined in the introduction by summarizing the various legal theories recognising or denying legal personality of non-state actors like NGOs in the international legal order, and by giving an overview on the difficult task of finding a definition of NGOs in the absence of a commonly accepted notion. While probably difficult, the existing normative loophole leads to unfavourable developments like an increasing number of so-called GONGOs, government-oriented NGOs, which lack independence from the state of origin and often pursue the policy goals of the state financing them. Both unsolved problems – the status of NGOs and their definition – raise the question on the need of further regulation concerning NGOs under international law.

Emanuele Rebasti introduces the first part of the book, "NGOs and Intergovernmental Organizations", examining different forms of interaction between NGOs and IGOs as models of reference in the debate on reforms of the legal status of NGOs (p. 22-70). The historically early reference models range from informal contacts with IGOs which lack arrangements for NGOs' participation to official granting of consultative status, as is the case of the UN organ ECOSOC (Economic and Social Council) where this model goes back to 1946. *Rebasti* concludes that granting of a consultative status, though having "proved to be an effective tool within the narrow limits of its declared scope" (p. 25), is an inadequate means of controlling participation as well as of facilitating it. In fact, NGOs have found many ways to overcome formal limits to participation and formal requirements, having experienced new modalities of interaction as

operational partners in the implementation of IGOs' projects, in shaping the intergovernmental decision-making process and in setting the international agenda. Examples are the UN's General Assembly, which has invited NGOs since 1997 to speak at special sessions in the main plenary debate, the "NGO working group on the Council Activities" established in 1997 meeting on a regular basis with the Security Council members in order to provide briefing on issues of upcoming importance, and various indirect forms like NGOs' petitioning of national delegations etc. These developments of the last two decades can explain the interesting statement that, "at the EUI workshop, NGOs' representatives were unanimous in recalling that formal participatory rights are not relevant in se but in that they give them the opportunity to lobby governmental organizations" (p. 32).

However, *Rebasti* does not overlook the fact that NGOs' activities are influenced by extrinsic circumstances like the anti-terrorism-measures introduced after 2001 or the lack of material means usually affecting small and highly specialized NGOs as well as organizations of the southern hemisphere. Possible answers to these problems are innovative modalities of interaction like the ECOSOC's Permanent Forum on Indigenous Issues or the so-called "multi-stakeholder dialogues" within the ECOSOC functional Commission on Sustainable Development (CSD).

These "laboratories of new patterns of interaction" show a significant gap between the legal status and the factual dimension of NGOs' roles and leave the problem unaffected – nothing is yet said about the forms and the degree of formalization that should be assumed, as the author of the contribution states. There are more issues for a comprehensive reconsideration of the NGO-IGO relationship at the core of the ongoing debate. Generally they should aim at rationalizing and coordinating procedures, improving transparency and defining the respective responsibilities of IGOs and NGOs. Another problem to face arises from the new quantitative and qualitative dimensions of NGO participation. The growing demand for legal certainty and uniformity of interaction cannot be satisfied with ad hoc arrangements and fragmented participation: "In short, a higher degree of regulation is deemed necessary" (p. 47).

Although noting all of these unsolved questions, *Rebasti* is quite optimistic on the outcome of this process when prognosing that "varying degrees of self-regulation and legal formalism may be effectively combined to provide tailored solutions to the problems raised by the interaction [of IGOs] with civil society" (p. 47).

In order to confirm this statement, he subsequently describes newer approaches to the problems, namely the Council of Europe's framework for NGOs' participation of 2003, heavily relying on self-regulation in order to avoid the dangers inherent in formalization (evidenced clearly in the book's second contribution, see below), the harmonization of accreditation procedures within the Organization of American States (OAS), and a third innovative model of reference introduced by the African Union (AU) in 2004 which led to the creation of the Economic, Social and Cultural Council (ECOSOCC) as a self-regulating AU organ composed solely of NGOs' representatives. *Rebasti* finally states that the need for case-by-case solutions is due to the diversity among IGOs as well as among NGOs and emphasizes the requirement of further study on "the role that civil society

participation can play in supporting the legitimacy of intergovernmental action [...] at the international level" (p. 70).

The above mentioned threat inherent in regulations entirely up to the members of an IGO becomes evident when reading the second contribution of *Olivier de Frouville* "Domesticating civil society at the United Nations" (p. 71-115). Thrilling no less than a novel could be, it is essentially a snapshot of the way the role of NGOs in the Commission on Human Rights and the new Human Rights Council, as well as in the ECOSOC, has been increasingly undermined since 1996 by a coalition of countries which managed to establish several GONGOs as observers and threatened other NGOs by withdrawing the consultative status of a few of them that expressed criticism with regard to their country of origin. *Frouville* describes these occurrences as "(1) the strategy tending to the creation of a servile society" coming along with "(2) a vigorous policy of bringing civil society into line" (p. 73). His contribution is even more unsettling when diagnosing that the attempt of the United Nations' Secretariat to improve this situation by creating UN-IRENE, the "NGO Informal Regional Network", tends to institutionalize the problem rather than solve it. "At stake are both the future of the United Nation's protection of the Human Rights system [...] and the principle of letting NGOs contribute to the works of international organizations" (p. 111).

While really worth reading, I want to limit myself to note that this article convincingly explains what I initially announced as the second "surprise": the book's general conclusion stating that the role of NGOs within IGOs and their normative process does not really need further regulation and formalization. Instead, the threats undermining the NGOs' influence (like their sheer and ever-growing number) are rather prevented by sorts of soft law instruments, especially self-regulation. This conclusion may not surprise common-law-trained legal professionals that much, but continental Europeans usually tend to look at self-regulation with disfavour and to rely more on normative solutions to problems.

The two following contributions illustrate innovative approaches to NGOs' participation. *Valentina Bettin* (p. 116-134) scrutinizes the role of NGOs in the implementation of the development policy of the European Union. First contacts of NGOs with the EU going back to the 1960, the process can be described as an evolution from NGOs as Aid Implementers acting like "de facto agencies of the EC [European Communities] rather than as autonomous actors" (p. 120) towards Development Partners authentically participatory not only in the phase of implementation of the development policy, but also during its "formulation" (p. 123). This goal is mainly achieved by a sort of formal consultation which was introduced by a self-binding declaration of the EU Commission in 2002 (p. 132).

Attila Tanzi (p. 135-152) gives an overview on public participation in the field of international environmental laws. These tend to grant to the so-called PINGOs, public-interest NGOs, formal participatory rights in administrative processes (leading to the permission or denial of a project with potentially hazardous environmental effects). The controversies in this field do not regard the question of whether or not to grant participatory rights, but concern the question of how to define the NGOs legitimized through their expertise and quality of action to engage in these decision-making processes as well as in the more recently debated participation during the implementation phase of such projects. While the Aarhus Convention, adopted within the United Nations Economic Commission

for Europe (UNECE), and the 1976 OECD (Organisation for Economic Co-operation and Development) Guidelines for multinational enterprises establish principles of public participation at the domestic level, the picture on the international level in environmental decision making is less clear, as *Tanzi* states (p. 142). Whereas the first of the mentioned problems – participation itself – probably is overcome by the "Almaty Guidelines on Promoting the Application of the Principles of the Aarhus Convention in International Forums" of 2005, the second one on legitimate representation remains unsolved. However, the expert group elaborating the "Almaty Guidelines" concluded that substantive selection criteria should be set out in the Guidelines. Transparency, breadth of representation, co-ordination, preparation of meetings, consultation with constituencies were some of the issues raised in this respect, and "consensus was reached that this was a matter of self-organization by NGOs", which should go hand in hand with "an effort [...] to balance the differences concerning the financial capacity to participate between environmental NGOs and business organizations" (p. 147). Finally, partnerships for sustainable development consisting of multi-stakeholder activities, projects and actions should lead to the shift of focus from decision-making to the implementation process.

Part II (p. 155-215) of the book is dedicated to "NGOs, international courts and compliance review mechanisms". *Luisa Vierucci* describes in her article "NGOs before international courts and tribunals" access to justice as one of the major components of the relations between IGOs and civil society, along with access to information and to decision-making. While welcoming the "proliferation of international courts and tribunals we have been witnessing in the last 15 years" (p. 155), these developments call for a re-assessment of the relationship between them and civil society represented by NGOs. Almost all of the international judicial and quasi-judicial bodies allow access to entities other than states, but only five of them can be considered as granting legal standing to NGOs (p. 158). "In this respect, it is remarkable that NGOs [at the EUI workshop] appear[ed] to be generally convinced that their participation before international courts and tribunals is fruitful" (p. 156). *Vierucci* suggests this conviction is due to the fact that NGOs such as Amnesty International (AI) are able to influence the outcome of judicial bodies through informal mechanisms, and, even more than this, "it is feared that, by giving NGOs the right to file complaints, this would limit their ability to lobby and paradoxically restrict their margin of manoeuvre" (p. 161). She does not hide though that NGOs representing individuals or groups before the European Court of Human Rights (ECHR) expressed conflicting views on this issue.

Less controversial is the granting of forms of indirect participation, mainly through the so-called *amicus curiae* briefs, meant to constitute an impartial aide to the judge in cases of a highly technical nature and meanwhile widely accepted even by arbitral tribunals like the NAFTA (North American Free Trade Agreement) Free Trade Commission and the ICSID (International Centre for Settlement of Investment Disputes). When addressing representation issues though, *Vierucci* suggests – as a possible way to achieve entitlement to present *amicus curiae* briefs – giving this status *ipso facto* to NGOs having consultative or similar status with an international body (p. 166) – certainly a finding not in line with the conclusions of the authors of part I of the book. Informal Regulation by NGOs'

codes of conduct which could produce legal effects in some instances (p. 169 et seq.) as well as regulations by the judicial authority (p. 172) which offer more flexibility are in this respect more convincing. Starting off as self-regulatory mechanisms, they might pave the way for generally accepted formal rules (p. 171). However, especially with regard to *amicus curiae* briefs, NGOs will first of all have to make clear whether they represent public interests or interests of a different nature.

The contribution of *Cesare Pitea* (p. 181-203) analyzes the legal status of NGOs in environmental non-compliance procedures (NCP) in law and in practice. The role of NGOs in such NCPs may vary and includes monitoring of the workings of the dedicated body, triggering the proceedings themselves by bringing individual cases to the attention of the international body, and submitting information and technical advice. While most of the NCPs do not contain explicit provisions on NGOs' participation (p. 184), they are formally recognized in a few treaties (Aarhus Convention, Espoo Convention, Protocol on Water and Health), but even the latter still leave space for questions on NGOs' powers. Once again there can be stated, though, that "lack of recognition of such a formal status does not necessarily imply denial of any role for NGOs" and in practice they usually are accepted as sources of information (p. 188). Giving an overview on a few cases involving the Committee created by the Espoo Convention and the Meeting of Parties (MoP) of the Aarhus Convention, *Pitea* concludes that NGOs in practice have proven diligence and efficiency when being entrusted with a significant role in NCPs and seem to have enhanced their transparency and accountability (p. 199).

Pierre-Marie Dupuy finally summarizes the conclusions of the EUI workshop and the subsequent studies (p. 204-215). The book "NGOs in International Law" does not give self-contained, final answers to the question at its beginning, but mainly describes and reflects the situation found today in the relations between IGOs, judicial bodies and NGOs and contributes to a better understanding of the problems to be faced in future. The findings of the workshop and the contributions to the book have the potential to give first answers on how to solve the issues arisen by stating convincingly that forms of "informal" regulation and self-regulation at present seem to offer the best way in order to prevent undermining of NGOs' roles and achievements. Therefore the initial question of the book on their legal personality seems to be of little importance to them, as *Dupuy* finds (p. 211), and can be left open as it might not actually be the right one.

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