NGO - PRIVATE ACTORS AT AN INTERNATIONAL LEVEL

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Abstract

International law, taken by globalization, helps emerge "private actors at an international level" by generating "a removal from territories of problems and solutions". The question of NGO accessing international jurisdictions is situated at this intersection, which is a dangerous one for jurists. The ways of national laws intersect, in fact, with those of international law. More over, private international law, more specifically, the private judicial nature of NGOs that enter into contact with public international law, an intersection that will imprint a plural-disciplinary character that marks this study. Thus, we must follow this rocky road and try a private approach of a question disputed by public law, which is also a part of international law. The risks of maladroitness are numerous, but must be assumed according to their importance and of the rarity of clarification attempts. NGOs, legal persons from private law exercising their activities in international context contain, in fact, elements of foreign origin that result in specific problems of international law. And if "international law can not be the domain of perfect solutions" it can allow however the adoption of others which, that can seem less perfect to some, will possess the aptitude of "creating the laws of a state". Thus, only by allying public international law to private law, the question of NGOs access to international jurisdictions can receive an answer.

Keywords: *NGO, international jurisdictions, arbitration jurisdictions, private actors, motivation, regulation.*

Introduction

The paradox surrounding NGOs hasn't erased them definitively from international justice, these have proven a will already ancient, always more powerful, to access international jurisdictions by trying to bypass their absence as international legal persons. The idea of will doesn't have to be taking as a consented act[1] , but as being relevant to the impulse offered by the NGO. The will of NGO doesn't have to, in any case, limit to hypotheses or to member states by offering access to an international jurisdiction.

• The access of Non Governmental Organismizations to international jurisdictions

NGOs want to be actors of the international life, to become actors of international justice. They desire to be included in "*the cycle of international judicial actors"*[2]. This will to accede an

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[1] COHEN-JONATHAN (G.) and FLAUSS (J.-F.), The European Convention on human rights and member states will, in The role of will in judicial act. Studies in the memory of prof. Alfred Rieg, Bruylant, Bruxelles, 2000, page s 161-186.

[2] RANJEVA (R.), *Les ONG et la mise en oeuvre du droit international*, RCADI 1997, vol. 270, page s 91

international judge may be synonym to the will to accede a jurisdiction[3]. This could be mistake a right to a judge[4], a right to an equitable case, a right to an effective recourse, a right to a jurisdictional recourse[5].

They have been satisfied with the use of mechanism that exists for example in front of the EDH Court or community jurisdictions. NGOs do not dispose of a quality of member in front of the EDH Court[6] (article 34 of the EDH convention), TPICE (article 230 EC for the recourse in annulment, the same article for ECJ) and the ECJ (but in a limited manner in front of the latter jurisdictions). In reality NGOs are not expressly seen as a part of the procedure that in front of the EDH Court are the beneficiaries of the right to recourse.[7]

By multiplying the trials of access and by being inventive, without receiving the quality of subject of international law, NGOs have put into perspective the movement that pushes them towards international judges. And if evolutions are slow in action, the doctrine isn't wrong. There are article that question the access of NGOs to different international jurisdictions and these seem to be multiplying[8]. It seems difficult to ignore for long the phenomenon that pushes NGOs to desire to accede international jurisdictions. This determination affirmed by NGOs to accede and international judge will make possible the apparition of the purpose.

In other occasions[9], they tried to force a way to conducted them towards a judge by deposing memoirs or by demanding meetings. An NGO, the International League of human rights, has demanded to be able to communicate its resentment regarding a problem of a right to asylum that was opposing Columbia to Peru in front of ICJ (20 November 1950). Even if ICJ has rejected this demand it doesn't erase the will of NGO to associate to international contentious procedures.

Should we speak about *locus standi*? The notion of party in a court seems more appropriate or we have to limit to the idea of having the right to express in front of a judge? Is this an access to contentious[10]

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[3] BRUNO (R.), *Access of private parties to international dispute settlement: a comparative analysis,* www.jeanmonnetprogram.org/papers/97/97-13.html : in this article, close to the subject we try to treat, the notion of access isn't well defined as the author states it, in the first part, what he tries to understand by the subject of international law. The question of signification of access to justice is also put in the work of CAPPELLETTI (M.) and GARTH (B.), *Access to justice : the wolrdwide movement to make rights effective. A general report,* work mentioned in RIDC 1979, page s 617-629

[4] SIMON (D.), *"Droit au juge" et contentieux de la légalité en droit communautaire : la clé du prétoire n'est pas un passe-partout,* in Mélanges en hommage au Doyen Gérard Cohen-Jonathan, Libertés, justice, tolérance, Volume 2, Bruylant, Bruxelles, 2004, page 1399-1419. COHEN-JONATHAN (G.), Le droit au juge, in Gouverner, administrer, juger. Liber amicorum Jean Waline, Dalloz, 2002, page s 471-504.

[5] RENOUX (T.), *Le droit au recours juridictionnel,* JCP ed. G 1993, doctrine, I, 3675.

[6] Marian Mihăilă, Claudia Andriţoi, *Drepturile omului şi strategii antidiscriminatorii*, Eftimie Murgu Publishing House, Resita, 2009, page 85.

[7] The beneficiaries to the right to a recourse, in the Procedure of the new European Court for human rights after protocole no. 11, collection law and justice, no. 23, Nemesis-Bruylant, Bruxelles, 1999, page 7-27 ; DE SCHUTTER (O.), The new European Court for Human Rights, CDE 1998, no. 3, 4, page 319-352) article 34 (former article 25) of the EDH Convention (PEUKERT (W.), The right to an individual recourse according to article 25 of the European Convention of human rights, RUDH 1989, page s 41-49 and especially page s 44 et 45 for the association of persons and NGOs; COHEN-JONATHAN (G.), The European Convention for Human Rights, Economica, 1989, page s58-60).

[8] DE SCHUTTER (O.), L'accès des personnes morales à la Cour européenne des droits de l'homme, in Mélanges offered to Silvio Marcus Helmons, Bruylant, Bruxelles, 2003, page s 83-108.

[9] SOUMY Isabelle, L'accès des organismisations non gouvernementales aux juridictions internationales, PhD Thesis, Limoges University, Faculty of Law and Economic Sciences, page 30 and the following.

[10] GHERARI (H.), *L'accès à la justice interétatique,* in L'émergence de la société civile internationale. Vers la privatisation du droit international ? , CEDIN Paris X, Cahiers internationaux no. 18, Pédone, 2003, page s 141-166.

or participation[11] to it, or is this an access to justice [12] or to a judge and access to a right[13]?…
It is the general idea of *locus standi* of NGOs in front of international jurisdictions which must have preference. *Locus standi* means "*the right to be heard directly by judges".* For the other authors, as professor Pierre-Marie Dupuy, *locus standi* would be "*the right to an action in justice". Locus standi* define as a right to action in justice doesn't correspond to the idea that we may access it.

The will of NGOs, legal persons of private law, to implicate in the international world and mainly in the international justice can not offer them an international legal personality and neither the quality if subjects of international law. Still these voluntary approaches must be the point of start for a reflection that desires to facilitate their access to international jurisdictions.

The will to accede an international jurisdiction is not enough. We also need a profound motivation for an NGO to be sustained, motivation amines[14]. Still, the idea of motivation, taken in a common sense, couldn't allow a real judicial reflection. In fact, this approaches the question: why do NGOs desire to enter an international jurisdiction? It seems preferable to offer this journalistic interrogation and a little bit judicial, some rigor. The notion of judicial interest will allow the consolidation of this thinking. It seems difficult to leave aside al social consideration in order to finalize a reflection and to not consider interest but from a judicial point of view, and more often, from a procedural point of view. It doesn't seem acceptable to see this study as over passing all sociologic consideration and even moral one because it will risk erasing an entire part of the problem.

In fact, it limits the access to the possibility if being a part of the process that restrains this subject. NGOs want to be heard by an international and it would be wrong to thin that they do not have the quality of party. Contrary, and they proved this on many occasions, NGOs want to accede the courtroom in order to make themselves heard by a judge and not just to be a party of the case[15].

• Pertinent international jurisdictions

International jurisdictions[16] contain arbitration international jurisdictions and penal international jurisdictions[17]? Are the permanent or *ad hoc*, regional or universal, specialized or not? … These many questions receive in reality a great number of answers. But, the mentioning of the jurisdictions that will be studied, represents a part of the subject delimitation and can not be

[11] CAPPELLETTI (M.) (managed by), *Accès à la justice et Etat providence*, Publication of the universitary institute, collection of legal studies, Economica, 1984.

[12] SHELTON (D.), *The participation of nongovernmental organismizations in international judicial proceedings*, AJIL 1994, vol. 88, no. 4, page s 611-642.

[13] QUÉNEUDEC (J.-P.), *Liberté d'accès au droit et qualité des règles juridiques*, in Mélanges en hommage au Doyen Gérard Cohen-Jonathan, *Libertés, justice, tolérance,* Volume 2, Bruylant, Bruxelles, 2004, page s 1317-1326. FRISON-ROCHE (M.-A.), *Principes et intendance dans l'accès au droit et l'accès à la justice*, JCP ed. G 1997, doctrine no. 4051. FAGET (J.), L'accès au droit : logique de marché et enjeux sociaux, Droit et société 1995, page 367 et s. La réforme de l'accès au droit et à la justice, Rapport du garde des sceaux, ministre de la justice, la documentation française, 2001. ROLIN (F.), Considérations inactuelles sur le projet de loi relatif à la réforme de l'accès au droit et à la justice, Dalloz 2002, Chroniques, Doctrine, page s 2890-2892. RIBS (J.), L'accès au droit, in Libertés, Mélanges Jacques Robert, Montchrestien, 1998, page s 415-430.

[14] SOUMY Isabelle, L'accès des organismisations non gouvernementales aux juridictions internationales, PhD Thesis, Limoges University, Faculty of Law and Economic Sciences,, page 33 and the following.

[15] DUPUY (P.-M.), *L'unité de l'ordre juridique international,* RCADI 2002, vol. 297, page 114

[16] KOVAR (R.), La notion de juridiction en droit européen, in Gouverner, administrer, juger. Liber amicorum Jean Waline, Dalloz, 2002, page s 607-628

[17] SANTULLI (C.), Qu'est-ce qu'une juridiction internationale ? Des organismes répressifs internationaux à l'ORD, AFDI 2000 , page 58-81.

left to hazard, especially now that we observe a multiplication of international courts[18]. A few simple definitions may the starting of the reflection and also allows a sorting of jurisdictions that may enter the purpose of those that need to be excluded. Still, these definitions are not of a real interest because the question to be put here isn't of knowing what an international jurisdiction is but what pertinent international jurisdictions[19] are.

In a general manner, works treating international contentious law classify as "*jurisdictional organism"*[20] arbitration organisms and regulations of a permanent jurisdiction[21]. In *Vocabulaire juridique* of M. le Doyen Gérard Cornu[22] an international jurisdiction may be "*a permanent jurisdiction instituted for the settling of international litigations or (and) for the ensuring of an interpretation and the respect of conventions or international treaties, which are composed of members from different states".*

This can also refer to "*a denomination offered to an arbitration state regarding international arbitration"*. The idea of incorporating arbitration courts to the notion of international jurisdiction can also be found in other definitions: "*institution invested with the power to judge, that is to decide in litigations between states by compulsory decisions, if an arbitration or judicial organism is involved or another organism disposing of jurisdictional powers".*

TSL is a part of jurisdictions called "internationalized", "hybrids" or "mixed" which are a part of the new approach of international penal justice. This type of court have as particularity being "half-internal half-international" regarding the law the application and their composition[23]. Courts that are strictly international are created by an international instrument, their composition is pluri-national, they apply international law and their decisions apply immediately without any recourse at an internal judicial order. In exchange, mixed courts answer partly only to these criteria and to variable proportions. In the same manner, special courts may be different and each of them represent an original experience. From Cambogia to Liban, passing through Sierra Leone, Kosovo and Timor Oriental, internationalized special jurisdictions recover different realities. TSL, being a part of this category of jurisdictions, can not remain an organisms that is original, regarding its modalities of institution and its internal and international dosage proposed. Moreover, the institution of TSL poses new questions regarding objects and issues of international penal justice. If it is incontestable that the apparition of international courts are witness of "remarkable booms of international penal justice", it is sure that numerous question will appear regarding TSL.[24] What is the degree of internationalism of TSL? How can we distinguish it from other types of non-international crimes? And, is TSL an element of international penal justice or it has to be understood as an international element of administration of national justice? The factual and political context explains the incapacity if Liban judicial order to follow the persons responsible for the directed attacks against Libanese polical personalities (1). Demanded by the Libanese government and desired by the "international community" the institution of an internationalized court, besides the conventional one, will be imposed unilaterally by the Council of Security under the title of Chapter VII of the Charta (2).

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[18] KARAGIANNIS (S.), La multiplication des juridictions internationales : un système anarchique ?, in La juridictionnalisation du droit international, French Society for international law, Lille Colloquy, Pédone, 2003, page s7-161.

[19] SOUMY Isabelle, L'accès des organismisations non gouvernementales aux juridictions internationales, PhD Thesis, Limoges University, Faculty of Law and Economic Sciences, page 27 and the following.

[20] COMBACAU (J.) et SUR (S.), *Droit international public,* Domat droit public, 6ème édition, Montchrestien, 2004, page 572.

[21] CAVARÉ (L.), *La notion de juridiction internationale*, AFDI 1956, page 31

[22] CORNU (G.), *Vocabulaire juridique,* Association Henri Capitant, PUF, 2004.

[23] Youssef BENKIRANE, *Le Tribunal spécial pour le Liban, une juridiction pénale internationale*? Revue Averroès – Variations, September 2009

[24] A. Azar, « Le tribunal spécial pour le Liban : une expérience originale ? », RGDIP, 2007/03, page 645.

The exclusion of arbitration jurisdictions: arbitration jurisdictions don't seem to have their place in this study. So how can we motivate their exclusion from this study? Arbitration is according to the definition offered by the *Vocabulaire juridique* of M. le Doyen Gérard Cornu, "*a manner considered amiable or pacific but always jurisdictional in the regulation of a litigation by an authority (or by arbitrator) which has the power to judge, but a permanent delegation of the State of an international institution, but of a convention of the parties (which can be simple or belonging to a state").* Arbitration depends on the will of the NGO to see a solving from third parties, a dispute that opposes the other party. We must refer to the writings of Motulsky who considered that "*once a pretension is presented to an invested person by the Law with the power to accept of reject this pretension by applying a rule of law, we find ourselves in front of a jurisdiction"*[25]. He continued by stipulating that the arbitrator is a judge, he rejects the jurisdictional theory of arbitration and marks his preference for the thesis that attributes a "mixed" or "complex" of arbitration. Motulsky considered that the arbitration function may also be jurisdictional and private: arbitration is *"a private justice, the origin of which is ussualy conventional".* The exclusion of arbitration jurisdictions doesn't result from its private character, but from a conventional essence. If an NGO can accede by simply agreeing with the other party, this wouldn't represent a real interest. In fact, it's about the forcing classical law ways by going against the generalized will of refusing NGOs the access to an international judge. International arbitration is defined by article 37 of the Hague Convention as having "*as object the regulation of litigations between state by chosen judges and on the basis of respecting law"*. This ancient definition doesn't underline the contemporary aspect of arbitration that regulates more and more often litigations regarding privates. Still this evolution can not be deceiving. These litigations of member state with privates regard especially problems of investments and implicate powerful transnational societies far from NGOs[26].

Arbitration through its consented aspect and its commercial connotation must be excluded from this study which puts an accent in institutionalized international jurisdictions.

Conclusions

We have to present a method that allows the motivation of an interest. The reasons of the creation of an NGO may be different and its domains of action are also numerous. It seems delicate to state that there is an unique motivation that sustains the will of NGOs to accede international jurisdictions. Thus we may have to find a common point in the motivation of NGOs to be interested in children's rights, the abolition of torture, the planet warming, the conservation of marine species, the fight against poverty, against world hunger, social development... Motivation doesn't have to be presented from a sector manner, unless there are enough motivations in the sector in which NGOs are invested. Contrary, these must be understood from a global manner and be researched beyond their specificity of actions. The unique motivation of NGOs is to advance the reasons for which these were created and by different means, for different activities which are represent by terrain actions to political actions, or even trials of contribution of the elaboration of international law. But we haven't spoken about these activities: in this study, the NGO desires to realize its social object by acceding international jurisdictions due to procedural actions. In order to advance their demand NGOs must fold to the demands of the international

[25] MOTULSKY (H.), *Etudes et notes sur l'arbitrage*, Dalloz, 1974

[26] Mihăilă Marian, *Tratat de drept internațional public*; Vol. III, BREN-V.I.S.PRINT; Bucharest; 2006, p.405 and the following.

judicial procedures of control. Thus, these must be placed in a procedural point of view. By studying the existing access means existent in front of pertinent international jurisdictions, it would be possible to consider their adaptation to other jurisdictions and even to create new procedural methods that connect international jurisdictions to NGOS.

References

- AZAR A., « *Le tribunal spécial pour le Liban : une expérience originale* ? », RGDIP, 2007/03, page 645
- BRUNO (R.), *Access of private parties to international dispute settlement : a comparative analysis,* www.jeanmonnetprogram.org/papers/97/97-13.html
- BENKIRANE Youssef, *Le Tribunal spécial pour le Liban, une juridiction pénale internationale* ? Revue Averroès – Variations, September 2009
- CAPPELLETTI (M.) et GARTH (B.), *Access to justice : the wolrdwide movement to make rights effective. A general report,* ouvrage cité dans la RIDC CAVARÉ (L.), *La notion de juridiction internationale*, AFDI 1956, page 31 1979, page 617-629
- COHEN-JONATHAN (G.) et FLAUSS (J.-F.), *La Convention européenne des droits de l'homme et la volonté des Etats, in Le rôle de la volonté dans les actes juridiques*. Etudes à la mémoire du professeur Alfred Rieg, Bruylant, Bruxelles, 2000, page 161-186.
- COMBACAU (J.) et SUR (S.), *Droit international public,* Domat droit public, 6ème édition, Montchrestien, 2004, page 572.
- CORNU (G.), *Vocabulaire juridique,* Association Henri Capitant, PUF, 2004.
- DAILLIER (P.) et PELLET (A.), *Droit international public,* 7ème édition, LGDJ, 2002, n°437 et s.
- DE SCHUTTER (O.), *L'accès des personnes morales à la Cour européenne des droits de l'homme*, in Mélanges offert to Silvio Marcus Helmons, Bruylant, Bruxelles, 2003, page 83-108.
- DUPUY (P.-M.), *L'unité de l'ordre juridique international,* RCADI 2002, vol. 297, page 114
- FRISON-ROCHE (M.-A.), *Principes et intendance dans l'accès au droit et l'accès à la justice*, JCP ed. G 1997, doctrine n°4051.
- GHERARI (H.), *L'accès à la justice interétatique,* in L'émergence de la société civile internationale. Vers la privatisation du droit international?, CEDIN Paris X, Cahiers internationaux no.18, Pédone, 2003, page 141-166
- KARAGIANNIS (S.), *La multiplication des juridictions internationales : un système anarchique?*, in La juridictionnalisation du droit international, Société française pour le droit international, Colloque de Lille, Pédone, 2003, page 7-161.
- KOVAR (R.), *La notion de juridiction en droit européen, in Gouverner, administrer, juger.* Liber amicorum Jean Waline, Dalloz, 2002, page 607-628
- MIHĂILĂ Marian, *Tratat de drept internațional public*; Vol. III, BREN-V.I.S.PRINT; Bucharest; 2006.
- MIHĂILĂ Marian, ANDRITOI Claudia, *Drepturile omului şi strategii antidiscriminatorii*, Eftimie Murgu University Publishing House, Resita, 2009
- MOTULSKY (H.), *Etudes et notes sur l'arbitrage*, Dalloz, 1974, p.
- QUÉNEUDEC (J.-P.), *Liberté d'accès au droit et qualité des règles juridiques*, in Mélanges en hommage au Doyen Gérard Cohen-Jonathan, *Libertés, justice, tolérance,* Volume 2, Bruylant, Bruxelles, 2004, page 1317-1326.

- RANJEVA (R.), *Les ONG et la mise en oeuvre du droit international*, RCADI 1997, vol. 270, page 91
- RENOUX (T.), *Le droit au recours juridictionnel,* JCP ed. G 1993, doctrine, I, 3675.
- SIMON (D.), *« Droit au juge » et contentieux de la légalité en droit communautaire : la clé du prétoire n'est pas un passe-partout,* in Mélanges en hommage au Doyen Gérard Cohen-Jonathan, Libertés, justice, tolérance, Volume 2, Bruylant, Bruxelles, 2004, page 1399-1419.
- SANTULLI (C.), *Qu'est-ce qu'une juridiction internationale* ? Des organismes répressifs internationaux à l'ORD, AFDI 2000, page 58-81.
- SOUMY Isabelle, *L'accès des organismisations non gouvernementales aux juridictions internationales*, PhD Thesis, Limoges University, Faculty of Law and Economic Sciences,, p.30 and the following.
- SHELTON (D.), *The participation of nongovernmental organismizations in international judicial proceedings*, AJIL 1994, vol. 88, n°4, page 611-642.