Non-State Actor Dynamics in International Law

From Law-Takers to Law-Makers

Edited by
Math Noortmann and Cedric Ryngaert

Non-State Actors in International Law, Politics and Governance series

Non-State Actor Dynamics in International Law

From Law-Takers to Law-Makers

Edited by

MATH NOORTMANN
Oxford Brookes University, UK

and

CEDRIC RYNGAERT
Leuven University and Utrecht University

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data
Non-state actor dynamics in international law : from law-takers to law-makers. -- (Non-state actors in international law, politics and governance series)
1. Non-state actors (International relations)
2. Non-governmental organizations.
I. Series II. Noortmann, Math. III. Ryngaert, Cedric.
346'.064-dc22

ISBN-13: 9781409403166

Library of Congress Cataloging-in-Publication Data
Non-state actor dynamics in international law : from law-takers to law-makers / by Math Noortmann and Cedric Ryngaert.
p. cm. -- (Non-state actors in international law, politics and governance series)
Includes bibliographical references and index.
ISBN 978-1-4094-0316-6 (hardback) -- ISBN 978-1-4094-0317-3 (ebook)
1. Non-state actors (International relations) 2. Non-governmental organizations. I. Noortmann, Math. II. Ryngaert, Cedric.
KZ3925.N66 2010
346'.064--dc22

2010014678

ISBN 9781409403166 (hbk)
ISBN 9781409403173 (ebk)

Mixed Sources
Product group from well-managed forests and other controlled sources
www.fsc.org Cert no. SA-COC-1565
© 1996 Forest Stewardship Council

Printed and bound in Great Britain by
MPG Books Group, UK

List of Contributors

Jean d'Aspremont is associate professor and senior research fellow of the Amsterdam Center for International Law (ACIL) at the University of Amsterdam. He also is guest professor of international humanitarian law at the University of Louvain in Belgium. He is a senior editor of the *Leiden Journal of International Law* and has acted as counsel in proceedings before the International Court of Justice.

Leyla Davarnejad is a doctoral candidate at the Department of Public Law at the University of Bochum, Germany, where she specializes in European law, public international law and international economic law. She is also a teaching and research assistant at the same department. Previously she has worked at the Law Schools of the Universities of Munich, Giessen and Frankfurt.

Noemi Gal-Or is director of the Institute for Transborder Studies (ITS) and professor at the Department of Political Science at the Kwantlen Polytechnic University, Canada. She has published extensively in security and strategic studies, international law, dispute resolution and regional integration. A licensed sole practitioner in British Columbia, she is an active member of the Law Society of British Columbia and the Canadian Bar Association and other legal professional and academic associations, where she served in various positions.

Peter Muchlinski is professor in international commercial law at the School of Oriental and African Studies (SOAS) of the University of London. He specializes in international and European business law, development and commercial regulation, and has authored numerous papers and articles within these fields. His more recent work concentrates on the social dimension of the regulation of international business, with emphasis on human rights and multinational enterprises. He acts as a principal adviser to the United Nations Conference on Trade and Development (UNCTAD) on their major issues papers series concerning international investment agreements.

Janne E. Nijman is a senior lecturer and researcher at the International Law Department and research fellow at the Amsterdam Center for International Law (ACIL), University of Amsterdam. Here she participates in the international rule of law research program. Nijman is also a member of the ILA International Committee on Non-State Actors, editor of the *Netherlands Yearbook of International Law* (NYIL) and features on the editorial board of *Grotiana Journal*.

Math Noortmann is professor in international relations and public international law at the School of Social Sciences and Law of the Oxford Brookes University. He holds a Ph.D. in International Law and a M.Sc. in Political Science. He lectured and published on a variety of subjects including the relationship between international law and politics, sanctions, international responsibility, conflict resolution, non-state actors and international legal and political theory. He is the initiator of Ashgate's series titled *Non-State Actors in International Law, Politics and Governance* and chairs the ILA Committee on Non-State Actors.

Cedric Ryngaert is lecturer in public international law at Leuven University and Utrecht University. He is a co-rapporteur of the Non-State Actor Committee of the International Law Association and holder of a Dutch research grant on non-state actors (VENI NWO).

List of Abbreviations

ACIL	Amsterdam Center for International Law
ACP	African, Caribbean and Pacific Group of States
ATCA	Alien Tort Claims Act
BCSD	Business Council for Sustainable Development
BIAC	Business and Industry Advisory Committee
BIT	bilateral investment treaties
CEP	Committee for Environmental Protection
CFC	chlorofluorocarbon
CNPC	China National Petroleum Corporation
COC	Code of Conduct
COP	Communication on Progress
CSR	corporate social responsibility
DNA	Deoxyribonucleic Acid
ECAFE	United Nations Economic Commission for Asia and the Far East
ECOSOC	United Nations Economic and Social Council
EU	European Union
FCN	Friendship, Commerce and Navigation Treaties
FDI	foreign direct investment
FLO	Fairtrade Labelling Organization International
FTA	free trade agreement
GAL	global administrative law
GDP	Gross Domestic Product
IC	investment committee
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	Convention on the Settlement on Investment Disputes between States and Nationals of Other States
ICTY	International Criminal Tribunal for the Former Yugoslavia
IGO	intergovernmental organization
IIA	international investment agreement
IL	international law
ILA	International Law Association
ILC	International Law Commission
ILO	International Labour Organization
ILP	international legal personality

IMO	International Maritime Organization
IR	international relations
IRoL	international rule of law
ITA	international trade agreement
KP	Kimberley Process
MAI	Multilateral Agreement on Investment
MEA	Multilateral Environmental Agreement
MNC	multinational corporation
MNE	multinational enterprise
NAFTA	North American Free Trade Agreement
NCP	national contact point
NGO	non-governmental organization
NIEO	new international economic order
NIOC	National Iranian Oil Company
NSA	non-state actor
OAU	Organization of African Unity
OECD	Organization for Economic Co-operation and Development
OEEC	Organization for European Economic Co-operation
PDVSA	Petróleos de Venezuela, S.A. [Petroleums of Venezuela]
RoL	rule of law
RSA	Republic of South Africa
SG	Secretary-General of the United Nations
SRSG	Special Representative of the Secretary-General [of the United Nations]
TNC	transnational corporations
TUAC	Trade Union Advisory Committee
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNCLOS	United Nations Convention on the Law of the Sea
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre for Transnational Corporations
UNDP	United Nations Development Programme
UNGA	United Nations General Assembly
UNRISD	United Nations Research Institute for Social Development
UNSC	United Nations Security Council
US	United States of America
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization
WWII	World War II

Foreword

This volume, edited by Math Noortmann (Oxford Brookes University, UK) and Cedric Ryngaert (Leuven University, Belgium), deals with non-state actor dynamics in international law. The state has lost its exclusive position as law-taker as fragmented sets of international rights and obligations have been attributed to various non-state actors. The idea to investigate non-state actors in a shift from law-takers to law-makers came from the Non-State Actor Committee of the International Law Association in 2008. This international law volume, the first in our series, deals with topics such as transnational corporations, corporate social responsibility, the imposition of international duties, international legal status, contemporary world society and international law-making. In it, the editors reflect on the changes of the discourse on non-state actors in international law and the present world community. More specifically, they question whether non-state actors matter in international law-making to: who matters when, where and how?

Bob Reinalda
Radboud University Nijmegen, The Netherlands

Preface and Acknowledgements

During and after the meeting of the Non-State Actor Committee of the International Law Association, the notion grew that we should address the possibility that non-state actors are no longer merely indirectly affecting international law-making, through such political processes as advocacy and lobbying, but that they could also be perceived as elements in the law-making process in their own right.

Once the Committee's co-rapporteur, Cedric Ryngaert, had obtained a grant from the Flemish Fund for Scientific Research to establish an international 'Research Community' on Non-State Actors, 16 experts in the field were invited to submit chapters for this edited volume and come to the University of Leuven (Belgium) to discuss the contents of this publication.

Seven chapters which found their way into this publication benefitted greatly from the comments and remarks of Michèle Olivier, Tarcisio Gazzini, Malgosia Fitzmaurice, Eric De Brabandere, Aristotelis Constantinides, Veronika Bilkova, Beate Rudolf and Idesbald Goddeeris, who themselves contributed their views to a Special Issue of *Human Rights & International Legal Discourse*. Geert Van Calster and Wouter Vandenhole also participated as discussants. Peter Muchlinski is to be credited for the second part of the title, which constituted the title of his own contribution.

Our editing work was wonderfully supported by Dilan Khoshnaw – a student assistant at the Institute for International Law of Peace and Armed Conflict of the Ruhr-University of Bochum. Dilan 'translated' each individual paper into Ashgate's required format and corrected obvious mistakes while he was 'formatting'. Within Ashgate we had Natalja Mortensen, who reminded us of each deadline and allowed us to break some of them.

Last, but not least, there are those that were not directly involved in the publication of this edited volume, but whose spirit and ideas are inherently linked to the discourses on, and concepts of non-state actors. Similarly we thank those who have actively encouraged research in the field of non-state actors, such as Christine Chinkin, the Director of Studies at the International Law Association. Christine's engagement and support for the establishment of the ILA Committee on Non-State Actors has contributed to this opportunity to take 'non-state actors' to another level of empirical and theoretical significance.

Math Noortmann and Cedric Ryngaert
Oxford and Leuven

Contents

PART THREE

Chapter 1
Introduction: Non-State Actors: International Law's Problematic Case

Math Noortmann and Cedric Ryngaert

The difference between those who 'make' the law, those who determine and enforce the law and those who 'take' the law is generally considered to be a formal distinction, which is exclusively determined by the constitutional characteristics of the legal system in question. As a rule, law-takers outnumber law-makers. The international legal system has been the traditional exception to that rule: states were at the same time the exclusive law-makers and law-takers in an exact ratio of 1:1.

With the definitive and recognized breakthrough of entities, which are not nation-states at the international plane, the state has lost its exclusive position as law-taker. Fragmented sets of international rights and obligations have been attributed to a most diverse cluster of non-state actors (NSAs). The label 'non-state actor' can hardly be considered to constitute a term of art because it includes such wide range of identifiable organizations as non-governmental organizations (NGOs) (Weiss 1999, Charnovitz 2006), multinational enterprises (MNEs) (Kokkini-Iatridou 1983, Muchlinski 1999), national liberation armies (Wilson 1988) and intergovernmental organizations (IGOs) (Huntington 1973), as well as more amorphous groupings such as armed NSAs (Zegveld 2002, Chesterman 2006), indigenous peoples (Howitt 1996), criminal and terrorist organizations (Alexander 2001) and social movements (Keck 1989). The list of NSAs is in contrast to the list of states simple inexhaustible. What is more, each typography of non-state actor contains a specific sub-categorization, which makes it even more difficult to understand and explain every single NSA under one single heading, be it from a legal, political or social disciplinary perspective (Noortmann 2001, Reinalda 2001, Schneckener 2006).

That fragmentation, however, does not undermine the observation that NSAs have, as a category, acquired enforceable and less enforceable international legal entitlements and – what is perhaps more important – it does not determine the general consensus, that NSAs (of whatever nature) should be subjected to regimes of global responsibility and accountability. The International Law Commission's (ILC) conclusion that 'the topic "responsibility of international organizations"

was appropriate for inclusion in its long-term programme of work'[1] in 2000 was due ever since the International Court of Justice (ICJ) observed in 1948 that 'the progressive increase in the collective action of States, has already given rise to instances of action upon the international plane by certain entities, which are not States.'[2] That the ILC's work on the responsibility of international organizations is only the beginning of a long set of reports on the responsibility of different kind of NSAs is evidenced by the recent appointment of Prof. John Ruggie as the UN Secretary General's Special Representative on Business and Human Rights.

The mushrooming of non-state actors has not only triggered question as to the diversification of international responsibilities and rights, but also with respect to the question as to the role and position of non-state actors in the international law-making and decision-making process. Notwithstanding the political dimension of that question, it is clear that it transcends the concepts of political power and influence. Unfortunately, the impact and influence of non-state actors and more in particular NGOs and MNEs is rather uncritically assumed then that it is critically investigated in most studies.

The role and position of non-governmental organizations in global humanitarian, human rights and environmental issues has been the subject of an increasing number of legal, political and sociological studies (Arts, Noortmann and Reinalda 2001, Boli 1999). However, as these studies focus on a limited number of specific NGOs, they fail to grasp the complexity and diversity of normative multi actor frameworks such as the small arms complex, investment regimes and diverse forms of corporate social responsibility (CSR) initiatives. The question whether, and if so to which extent, NSAs effect international law with respect to the idea of corporate social responsibility, and whether and to which extent these actors are affected by international law, has been the subject of significant and longstanding interdisciplinary and societal debates. The Late European Middle Ages and the birth of the modern company is often taken as the starting point of the public debates on the enterprise as a socio-economic and political phenomenon, but one could equally take the pre-medieval times or the 'rise of big business' as the focal point for the start of enterprise critical discourses (Micklethwait and Woolridge 2003).

However that may be, there is little doubt that corporate responsibility has become a major issue in both society and in the disciplinary debates of public international law; the question on controlling and regulating MNEs is a thriving subject. Multinational enterprises or transnational corporations have undoubtedly become one of the most discussed and targeted non-state actors in the international system. Since the normative quality of governmental codes of conduct has not been clarified in detail, the CSR debate has been intensified by the increasing

1 See Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10), paras 726–728 and 729 (1).

2 Reparation for Injuries suffered in the service of the United Nations, Advisory Opinion: ICJ Reports 1949, p. 174 at 180.

number of private initiatives in recent years. These exclusively non-governmental initiatives, in practice and the public and academic debate seem to eclipse the soft law initiatives in the CSR field. The contributions of Leyla Davarnejad and Peter Muchlinski analyse the particular role and influence of the legal epistemic community, NGOs and corporate actors in the legal CSR debate. Their papers describe and analyse one of the (most important) empirical domains in the NSA discourse in international law.

Leyla Davarnejad in particular, argues that the combination of economic and political power of MNEs, the unclear international legal status, their debated impact on human rights, labour or environmental standards has been ameliorated by the actuality intergovernmental organizations (IGOs), NGOs and MNEs themselves have issued an innumerable amount including (CSR) codes. The new concept of CSR has started to depart the usual boundaries between state and market and entails a complete new division of accountability between public and private actors. What is the impact of these codes? Do they change the law or do they change the actors ... or both? Are they considered adequate from a legal perspective? In the end Leyla Davarnejad seems to argue that because governmental codes of conduct set themselves apart from private initiatives due to their public authority and their ability to reconcile and to balance the conflicting interests that characterize the CSR debate, the normative difference between law and non-law is of continued relevance.

Peter Muchlinski shares Davarnejad's socio-political assessment that, given the technological, financial and managerial advantages of MNEs, which are organized and operate across national borders, these actors have significant power and influence in the development of national and international economic and social policy. In the international legal domain, however, Muchlinski observes a process of law-making, which undermines the traditional notion of law-making processes as state or governmental processes. The conceptual separation between (1) the power of MNEs to substantially interact with national policymakers and intergovernmental organizations to develop policy and to exact legal regulation and (2) the constitutional notion of law-making is too formalistic. The question whether MNEs and other NSAs can be considered to act as 'law-makers' in the international legal process is the subject of this edited volume. MNEs set the empirical stage to our contribution to the general NSA discourse. Muchlinski's examination aims to develop a model of the process of international law-making, which takes account of corporate power, and the power of other non-state actors to influence the content of the law.

Part Two of this volume promotes a more particular (re)consideration of such typical legal topics as 'legal personality' (Janne Nijman and Noemi Gal-Or) and 'legitimacy' (Cedric Ryngaert). Janne Nijman's investigation appreciates non-state actors in the context of the notion of the 'rule of law' and discusses the revival of a realist theory of international law. She does so on the basis of a critique on the traditional approach to international legal personality as the conceptual lens through which the position of non-state actors in international law is generally

questioned. Her contribution in particular explores a more 'internally' pushed and inter-subjectively created international legal personality of the non-state actor.

Noemi Gal-Or discusses whether, from an international legal perspective, which presumes some legal status for some NSAs, it is desirable to enhance the legal status of the NSA. Hence, the question is not whether a specific NSA should or should not be recognized as a subject of international law, but rather, whether the NSA should be recognized as a general category of an actor to which a basic set of rights and obligations in international law applies and if so which rules and procedures apply to determining who is and who is not entitled to legal personality. These questions will be addressed from two angles. First, stock will be taken of the current state of the art regarding the status of the NSA in international law. Second, a legal theoretical discussion will follow to assess the desirability of any further changes to the present condition of the law measured against the role and nature of international law.

The link between the legitimacy of international law and the participation of non-state actors in the law-making and -implementation process is the topic of the argument of Cedric Ryngaert. He investigates the relevance of (1) liberal internationalism, constructivism and the transnational legal process theory, (2) political (input legitimacy) theories, in particular deliberative democracy/theory of communicative action (Habermas), and (3) law and economics theories (tying regulatory design to expected norm-compliance and social effectiveness; these are utilitarian theories focused on output legitimacy). It will be ascertained how these theories could provide building blocks for the regulation of a global society constituted by a variety of international actors, including non-state actors. The said theories have originally been conceived as applying to states or state regulation. International relations theories typically take the *state* as the chief actor at the international level, and both democracy and economic theories are primarily developed with a view to their application at the domestic (intra-state) level. It is the aim of this article to (1) examine how leading international relations theories could nonetheless be used, or as the case may be, amended with a view to accommodating the role of non-state actors; (2) analyse whether, and to what extent, domestic democracy and law and economic theories could be extrapolated to the international level.

Finally, in Part Three, Math Noortmann and Jean d'Aspremont critically reflect on the added value of a wider non-state actors perspective in the efforts to understand and explain international law. Math Noortmann does so by raising the question whether the notion of 'participants' as advocated by the New Haven School should be reintroduced or whether we should stick to the conceptually poor notion of non-state actors.

The notions of transnational law and international law as an authoritative decision-making process (the policy-orientated approach or New Haven School) were the first to conceptualize the idea of a legal space beyond the classic international legal system of states, in which both states and non-state actors would participate in a constitutive manner. Elaborated in the 1950s, both concepts

had lost much of its attraction by the late 1970s to be revived again in the 1990s in response to the unbridled increase of actors which are not states in the global realm. Both notions transcend the confinements of the international legal discipline either because the concept has a corollary in socio-political sciences (trans-nationalism) or because the concept was set up as a trans-disciplinary approach to world order in the first place. The paper scrutinizes both approaches and critically assesses their value for contemporary debates on the role of non-state actors in the law-making process.

Last but not least, Jean d'Aspremont raises the ultimate question: is the notion of non-state actors in international law a scholarly invention? He argues that the contemporary assertion that the law-making role of non-state actors in international law is less the result of an actual practice and empirical evidence than it is the outcome of an inclination of international law scholars to expand their field and subjects of study. While the aspiration for the import of new legal materials into the ambit of international legal scholarship can provide a rational explanation of the proneness of international scholars to depict international law-making processes as diverse and heterogeneous, it is not sufficient to explain all the underlying motives of such a leaning. It is submitted here that, in a few circumstances, the tendency to play down the state-centrism of international law-making processes and the magnification of their heterogeneity can also be traced back to a more general and fundamental endeavour of international legal scholars to convey a cosmopolitan vision of international law with a view to fostering the legitimacy of their object of study. This chapter also explains the attraction of scholars to these heterogeneous representations of international law-making as an attempt by international legal scholars to preserve the importance of their expertise and that of their discipline in areas where they have been subject to the competition of other social sciences.

References

Alexander, Y., Swetnam, M.S. and Levine, H.M. 2001. *ETA: Profile of a Terrorist Group.* Ardsley, NY: Transnational Publishers.

Arts, B., Noortmann, M. and Reinalda, B. (eds). 2001. *Non-State Actors in International Law, Politics and Governance.* Aldershot: Ashgate Publishing Company.

Boli, J. and Thomas, G.M. 1999. INGOs and the Organization of World Culture, in *Constructing World Culture: International Nongovernmental Organizations since 1875*, edited by J. Boli and G.M. Thomas. Stanford, CA: Stanford University Press.

Charnovitz, S. 2006. Non-Governmental Organizations and International Law. *American Journal of International Law*, 100, 348–372.

Howitt, R., Connell, J. and Hirsch, P. 1996. *Resources, Nations, and Indigenous Peoples: Case Studies from Australasia, Melanesia, and Southeast Asia.* Melbourne and New York: Oxford University Press.

Huntington, S.P. 1973. Transnational Organizations in World Politics. *World Politics*, 25, 333–368.

Keck, M.E. and Sikkink, K. 1998. *Activists beyond Borders – Advocacy Networks in International Politics*. London: Cornell University Press.

Kokkini-Iatridou, D. and de Waart, P. 1983. Foreign Investments in Developing Countries; Legal Personality of Multinationals in International Law. *Netherlands Yearbook of International Law*, 14, 87–131.

Micklethwait, J. and Wooldridge, A. 2005. *The Company: A Short History of a Revolutionary Idea*. London: Phoenix.

Muchlinski, P.T. 1999. *Multinational Enterprises and the Law*. Malden: Blackwell Publishing.

Noortmann, M. 2001. Non-State Actors in International Law, in *Non-State Actors in International Relations*, edited by B. Arts, M. Noortmann and B. Reinalda. Aldershot: Ashgate Publishing Company.