Participants in the International Legal System

Multiple perspectives on non-state actors in international law

Edited by
Jean d'Aspremont

Foreword by
W. Michael Reisman

Presentation by
Math Noortmann

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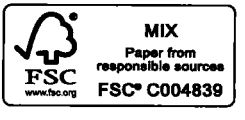

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Foreword

Veritas vos liberabit

Definitions are artifacts which can illuminate or obscure and, in so doing, empower or enslave. International legal scholarship provides an object lesson.

As long as international law scholarship defined itself as a body of rules establishing law between states in a system in which only states were "subjects," the scholarly focus was on states. By contrast, the founders of the New Haven School conceived of jurists as problem-solvers, charged with (among other things) three principal intellectual tasks: (i) explaining why past decisions had been taken the way they were; (ii) predicting possible future decisions; and (iii) influencing the course of future decisions. To facilitate the performance of these tasks, the aperture of observation was opened to enable the jurist to identify everyone who was actually involved in decision. Accordingly, international law was conceived as a *process* of decision in which, in addition to the representatives of states, a much wider range of actors was engaged. Those "participants," as Myres McDougal called them, included national and international officials, the elites of non-governmental organizations concerned with pursuing wealth, enlightenment, skill, well-being, affection, respect or rectitude, transnational business entities, gangs and criminal organizations, terrorists and, acting on behalf of these collective entities or on their own behalf, individuals.

Focusing on a range of actors, encompassing far more than states, allowed for a more accurate picture of actual participation. But that, in turn, demanded a heuristic that would allow the jurist to focus on what those diverse participants were actually doing. Simply saying that they were participating in "decision making" did not enable an observer to gather meaningful data. One innovative concept required other intellectual tools.

One of the most important of these was the concept of decision "functions." Harold D. Lasswell proposed that the word "decision" at any level of social organization be conceived in terms of seven component functions:

- *intelligence* or the gathering of information relevant to decision;
- *promotion* or the identification of a problem as amenable to legal solution and the agitation for a prescriptive response or promotion;

- *prescription* or the enactment of authoritative and effective policy through law-making;
- *invocation* or the provisional characterization of someone's action as deviating from a prescription and the insistence on the application of the prescription;
- *application* or the authoritative confirmation of the facts and identification of the relevant policies and their specification to deviations from a prescription;
- *termination* or the abrogation of existing prescriptions and the provision for ameliorating measures;
- *appraisal* or the assessment of the aggregate performance of the decision process in terms of its major goals or appraisal.

By disentangling the various components of the word "decision" in this fashion, it was easy to see and then gather and organize data on the roles the various categories of actors or participants were playing in the different component functions of international decision. In some traditional arenas for international decision, for example, meetings of heads of states or international diplomatic conferences for purposes of law-making, formal access was limited to duly certified state representatives; non-state actors, insofar as they participated, did so indirectly. In other arenas, however, non-state actors were principal and direct participants.

Theoretical tools such as these have facilitated intellectual inquiry, as amply evidenced in this book. Equally important, the concepts have proved to be liberating and empowering, enabling non-state actors to perceive new opportunities for participating in and influencing the course of international decision. The more radical implications of these conceptions for the study and practice of international law are only now being appreciated.

W. Michael Reisman
New Haven, Connecticut
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Presentation

Presenting the participants in the international legal system in an all-encompassing and coherent manner is, given their multitude and diversity, a rather futile endeavor. Only an encyclopedic approach could grasp both their volume and variety. The empirical problem appears once we have left the realm of the state and its intergovernmental organizations and entered the world of non-state actors and non-governmental organizations in all their forms and appearances. The methodological difficulty of dealing with the sheer mass and eminence of such entities that appears at the same time in our research efforts compels us to differentiate, categorize and label them.

A first rather crude form of indicating dissimilarity is to distinguish between the state and everything else, which are – by our legal definition – not-states. However, give or take a few contested entities (mostly in terms of governmental control), we would have a fairly concise, homogeneous group of some 190+ states and an amalgam of thousands of "non-state actors."

A second accepted distinction in the study of international law is between governmental organizations (GOs) and non-governmental organizations (NGOs), that allows us to engage international entities which, albeit not being states, are closely enough associated to the state through (quasi) legal arrangements. That distinction is then refurbished by the concept of legal personality, which differentiates between primary and original subjects of international law, i.e. states and those entities that are derivative and trivial from the perspective of legal personality. In this we also encounter the first conceptual and perhaps paradigmatic dichotomy between the subjects and objects of international law.

If we move further away from the state and its intergovernmental organizations we enter into the empirical swamp of non-state actors and NGOs, which we seek to master with the help of marked paths and pole vaults which are constructed to guide one through and surmount the natural hindrances one might encounter in exploring new areas.

At first, but increasingly contested, a conceptual distinction between the realm of the state and intergovernmental organizations on the one

hand and the realm of non-state actors and NGOs is that of the public/private divide. Any attempt to understand and explain non-state actors/NGOs from an exclusive "private" perspective requires one to tackle the difference between the form and the purpose of organizations and engage the problematic of hybrid actors such as public–private partnerships; it involves a discourse on the very public–private divide.

In addition to the conceptual labeling and dichotomy approaches, many scholars adopt a more empirical approach, which labels and categorizes non-state participants according to what they "are" or what they "do." The habitually socio-political oriented denomination often neglects the legal quality of many of these actors in our understandings and explanations thereof, for example, the differences between limited and unlimited companies, associations and foundations, or the legal hybridism of public–private partnerships.

Presenting the multitude of non-state actors in bigger or smaller categories does little to serve our analytical purpose. Whether we concentrate on broader categories such as NGOs *strictu sensu*, multinational enterprises and armed opposition groups or we break those down into ever smaller agency-bearing categories such as civil society organizations, grass-roots organizations, environmental or human rights organizations, political parties, labour unions, terrorist organizations, criminal organizations, advocacy networks, religious communities, indigenous peoples, judicial networks, epistemic communities or liberation movements, we are generally unable to avoid overlap and conceptual confusion.

The latter problematic becomes clear if, for example, we want to classify each and every NGO listed under the consultative status arrangement of Article 71 of the UN Charter, which only constitutes the tip of the proverbial iceberg. In our efforts to further differentiate between them, we would start by labeling those NGOs according to their activities, focus or character as humanitarian, environmental, human rights, developmental, professional, agricultural, cultural, women, academic, sports etc. We would also seek to distinguish between the "real" NGOs, which have a philanthropic, public good and non-for-profit orientation, and all those others that we would (dis)qualify by labeling them as "quasi (autonomous)," "donor-oriented," "government-oriented," "business," "transnational" and "international" and thereby creating a rich language of acronyms, which have become part of our discourses: QUANGOs, DONGOs, GONGOs, BINGOs, TRANGOs and INGOs.

However, there seem to be a couple of societal issues that all of these participants have in common or have triggered since they have risen in numbers and importance, and those issues are precisely why an increasing community of international legal scholarship has gradually gained an interest in those non-state participants. The most significant legal issues are: responsibility and legitimacy, which are often embedded in more general discourses on the role and position of these actors in the formative processes

of international law. What *is* their legal status within international governmental organizations? What *is* the extent and content of their legal personality? What *is* the legal character of agreements they enter into with states? In other words: What *is* their position under international law and within the international legal system?

While one could technically find an inter-subjectively agreeable answer to that question with respect to specific individual participants such as the ICRC, Greenpeace, the PLO, Amnesty International, the Holy See and others, it will not satisfy the theoretical and conceptual questions involved. These require, rather than bestowing single participants with international legal significance, a reconsideration of the legal assumptions that underlie our current international legal system. This is what this volume is trying to achieve, thereby contributing to filling an important gap in the literature and consolidating the inherently connected discourses in international law and international relations.

Math Noortmann

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Charters

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