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Non-State Actors and Human Rights

Edited by

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Academy of European Law

European University Institute
in collaboration with the Center for
Human Rights and Global Justice,
New York University School of Law

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This series brings together the Collected Courses of the Academy of European Law in Florence. The Academy's mission is to produce scholarly analyses which are at the cutting edge of the two fields in which it works: European Union law and human rights law. A 'general course' is given each year in each field, by a distinguished scholar and/or practitioner, who either examines the field as a whole through a particular thematic, conceptual or philosophical lens, or who looks at a particular theme in the context of the overall body of law in the field. The Academy also publishes each year a volume of collected essays with a specific theme in each of the two fields.

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Contents

Part One

Introduction

1

The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?

PHILIP ALSTON*

1. THE 'NOT-A-CAT' SYNDROME

When one of my daughters was eighteen months old she deftly transcended her linguistic limitations by describing a rabbit, a mouse, or a kangaroo as a 'not-a-cat'.[1] In the arenas of international law and human rights an almost identical technique is pervasive. Civil society actors are described as *non*-governmental organizations. Terrorist groups or others threatening the state's monopoly of power are delicately referred to as *non*-state actors. But so too are transnational corporations and multinational banks, despite their somewhat more benign influence. International institutions, including those which wield immense influence while disavowing all pretensions to exercise authority *per se*, such as the International Monetary Fund (IMF) and the World Bank, are classified either as *non*-state entities or as *non*-state actors.

Apart from its ability to obfuscate almost any debate, this insistence upon defining all actors in terms of what they are not combines impeccable purism in terms of traditional international legal analysis with an unparalleled capacity to marginalize a significant part of the international human rights regime from the most vital challenges confronting global governance at the dawn of the twenty-first century. In essence, these negative, euphemistic terms do not stem from language inadequacies but instead have been intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve. Accordingly, for the purposes of

* Thanks to Nehal Bhuta for his excellent research assistance in the preparation of this Chapter.

[1] This description of the not-a-cat syndrome draws on Philip Alston, 'The "Not-a-cat" Syndrome: Re-thinking Human Rights Law to Meet the Needs of the Twenty-first Century', in *Progressive Governance for the XXI Century* (Florence, European University Institute and New York University School of Law, 2000) 128.

international legal discourse—the language of human rights—those other entities can only be identified in terms of their relationship to the state. Just like my daughter's rabbit, anything that is not a state, whether it be me, IBM, the IMF, Shell, Sendero Luminoso, or Amnesty International, is conceptualized as a 'not-a-state'.

It is thus neither accidental, nor perhaps surprising, that the United Nations has an editorial rule which requires that the word 'State' should always be capitalized (i.e. that upper-case format be used).[2] Apart from recalling the insistence of religious publications that god must always be acknowledged as God, this usage merely encapsulates the assumptions of 1945. But the problem is that it also sets those assumptions in stone at a time when that particular stone is competing with quite a few others as the embodiment of power and even authority. It is revealing that no matter how subversive of the legitimacy of a given state it might be, every human rights document produced under the auspices of the United Nations requires its author(s) to genuflect in this way before the altar of 'State' sovereignty every time the word is mentioned. None of this is to suggest that the state is not important, let alone to endorse the more extreme versions of the 'state is dead' thesis. It is simply to underline the fact that the world is a much more poly-centric place than it was in 1945 and that she who sees the world essentially through the prism of the 'State' will be seeing a rather distorted image as we enter the twenty-first century.

The thrust of this Chapter is that such a uni-dimensional or monochromatic way of viewing the world is not only misleading, but also makes it much more difficult to adapt the human rights regime in order to take adequate account of the fundamental changes that have occurred in recent years. The challenge that it lays down is one of re-imagining, as the social scientists would put it, the nature of the human rights regime and the relationships among the different actors within it. Lawyers, not being noted for their willingness to depart from precedents, might prefer to see the task in terms of re-interpreting existing concepts and procedures rather than re-imagining. Either way, the nature of the challenges that lie ahead emerge clearly from this volume.

Notwithstanding the questionable utility of the terminology, non-state actors are looming ever larger on the horizons of international and human rights law. They are a recognized category of partners for the European Union in development and humanitarian activities,[3] they are the subject of a specialized law journal in the field

[2] Interestingly, the only UN document in which it is not capitalized is the UN Charter itself. That document pays linguistic homage to 'Members' rather than states *per se*.

[3] See Article 4 of the Cotonou Agreement of 2000 between the EU and the African, Caribbean, and Pacific states which recognizes 'the complementary role of and potential for contributions by non-State actors to the development process'. It then provides that 'non-State actors shall, where appropriate:

- be informed and involved in consultation on cooperation policies and strategies . . . and on the political dialogue;
- be provided with financial resources . . . to support local development processes;
- be involved in the implementation of cooperation project and programmes . . . ;
- be provided with capacity-building support in critical areas . . . '

of international law,[4] a separate book series has been dedicated to them,[5] and scholarly articles are emerging at a great rate.[6] Yet the membership of this group is difficult to define and virtually open-ended. The resulting grab-bag of miscellaneous players ranges from transnational corporations and small-time businesses and contractors, through religious and labour groups, organized epistemic communities, civil society more broadly, and international organizations, to terrorist bands and armed resistance groups.[7]

Not much more than a decade ago the category of non-state actors remained all but frozen out of the legal picture by international law doctrines and had received only passing recognition even from scholars. While the case-law of the regional human rights systems had begun to address some violations committed by private actors, the resulting jurisprudence was neither systematic nor especially coherent. At the international level, human rights groups, along with many governments, treated the category with the utmost caution because they were extremely wary of dignifying the nefarious activities of certain such actors by focusing specifically upon them or by seeking to give even a few among them a place at the international table. The result, somewhat ironically, was that groups classified by international law as non-state actors (human rights NGOs) were lobbying strongly against the recognition of other groups classified in the same way.

Today, however, at least a subset of non-state actors has suddenly become a force to be reckoned with and one which demands to be factored into the overall equation

http://europa.eu.int/comm/development/body/cotonou/agreement/agr05_en.htm. See also Communication from the Commission to the Council, the European Parliament, and the Economic and Social Committee of 7 November 2002: 'Participation of non-state actors in EC development policy' COM (2002) 598 final, at http://europa.eu.int/scadplus/leg/en/lvb/r12009.htm.

[4] *Non-State Actors and International Law*, published by Brill.

[5] See series entitled: Non-State Actors in International Law, Politics and Governance, published by Ashgate.

[6] See e.g. J. Oloka-Onyango 'Reinforcing Marginalized Rights in an Age of Globalization: International Mechanisms, Non-State Actors, and the Struggle for Peoples' Rights in Africa', 18 *Am. U. Int'l L. Rev.* (2003) 851; William A. Schabas, 'Theorical and International Framework: Punishment of Non-State Actors in Non-International Armed Conflict', 26 *Fordham Int'l L.J.* (2003) 907; Richard A. Rinkema, 'Environmental Agreements, Non-State Actors, and the Kyoto Protocol: A "Third Way" for International Climate Action?', 24 *U. Pa. J. Int'l Econ. L.* (2003) 729; Michael G. Heyman, 'Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence', 36 *U. Mich. J.L. Ref.* (2003) 767; Norman G. Printer, Jr., 'The Use of Force against Non-State Actors under International Law: An Analysis of the U.S. Predator Strike in Yemen', 8 *UCLA J. Int'l L. & For. Aff.* (2003) 331; Daniel Wilsher, 'Non-State Actors And The Definition Of A Refugee In The United Kingdom: Protection, Accountability Or Culpability?', 15 *Int'l J. Ref. L.* (2003) 68; Rachel Lord, 'The liability of non-state actors for torture in violation of international Humanitarian Law: an assessment of the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *Melbourne J. Int'l L.* (2003) 112.

[7] For three systematic and wide-ranging surveys of the issues see Andrew Clapham, *Human Rights in the Private Sphere* (Oxford, Oxford University Press, 1993); Steven Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility', 11 *Yale L.J.* (2001) 443; and International Council on Human Rights, *Beyond Voluntarism: Human Rights and the developing international legal obligations of companies* (2002).

in a far more explicit and direct way than has been the case to date. As a result, the international human rights regime's aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors. In practice, if not in theory, too many of them currently escape the net cast by international human rights norms and institutional arrangements.

For practical purposes, much of the focus of the international human rights regime in the years ahead will be on transnational corporations and other large-scale business entities, private voluntary groups such as churches, labour unions, and human rights groups, and on international organizations including the United Nations itself, the World Bank, the International Monetary Fund, and the World Trade Organization. The purposes of this Chapter, apart from surveying the issues raised by the various contributors to this volume, include putting the issue very briefly into some historical perspective, examining more closely the issue of definition, and identifying the key contexts in which non-state actors have risen to the fore in the past couple of decades. The Chapter then explores the nature of, and the reasons for, the reluctance of mainstream international law to accord a real place at the table to non-state actors.

2. THE RAPID EVOLUTION OF THE STATUS OF NON-STATE ACTORS

In the early 1980s I was asked by one of the United Nations' specialized agencies to write a consultancy study on legal aspects of the role of non-state actors in the field of human rights. I am ashamed to say that I was as keen to take on the job as I was perplexed about the real meaning or utility of the assignment. Several then recent developments seemed to suggest that my concern should be with armed opposition groups, national liberation movements, and perhaps transnational corporations, although the human rights dimensions of even those issues were, curiously in retrospect, not especially obvious. In relation to the first group, the 1977 Additional Protocol II to the Geneva Conventions had recently given status to certain types of non-state forces involved in an armed conflict within the territory of a state.[8] In relation to the second, the United Nations and other international organizations had been making an effort, under pressure from the non-aligned group of developing states, to take account in its own work of the role played by national liberation movements in a number of key conflict areas, such as in Namibia, South Africa, and Palestine.[9] In relation to the third, the United Nations had been engaged throughout

[8] For a critique see Antonio Cassese, *International Law* (Oxford, Oxford University Press, 2001), 346–48.

[9] See Malcolm Shaw, *International Law* (5th ed., Cambridge, Cambridge University Press, 2003) 220–23.

the late 1970s in drafting a code of conduct for transnational corporations.[10] But the bottom line was that the human rights framework remained somewhat distant from these important forays into unknown territory, and the issues were largely absent from the agendas of most international human rights groups. The reasons were not difficult to see: humanitarian and human rights norms were considered separate; national liberation movements were strong on the right to self-determination but not overly concerned with many other rights; and the focus on transnationals had more to do with the New International Economic Order and the sovereignty of host states than with the human rights of workers or anyone else.

But in the space of only a couple of decades, all this has changed. Human rights and humanitarian law have moved much closer together, as the statute of the International Criminal Court attests and the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and for Rwanda illustrate. National liberation movements have either gone into the business of government (as in Namibia, Zimbabwe, South Africa, and East Timor) or been pushed towards outlaw status as terrorist groups. The right to self-determination is now a struggle that is expected to be fought at the ballot box rather than through guerilla warfare in the jungles or urban areas.[11] And consumer movements and human rights groups have reignited international concern about the activities of transnational corporations by successfully focusing public opinion on labour, environmental, and human rights abuses in which those corporations are increasingly seen to be involved.

Perhaps most importantly, in the aftermath of the Cold War and the triumph of liberal economic systems, private actors are being asked to undertake a wide range of functions and responsibilities which it had previously been unimaginable to entrust to them.

3. SOME CASE STUDIES TO ILLUSTRATE THE REAL-WORLD CHALLENGES

Using a term such as non-state actors risks transforming the analysis of very concrete issues into a purely academic exercise, detached from the sometimes harsh realities and often very practical dilemmas that arise. In order to avoid such a sanitizing effect, it will be instructive if we bear in mind some case studies which illustrate the ways in which non-state actor-related issues have arisen in international human

[10] For the text of the draft code, work on which was effectively, but not formally, abandoned in 1983 under pressure from the Reagan Administration, see Draft United Nations Code of Conduct on Transnational Corporations, UN doc. E/1983/17/Rev.1 (1983). For a review of this process and its aftermath see Peter Muchlinski, 'Attempts To Extend the Accountability of Transnational Corporations: The Role of UNCTAD', in Menno T. Kamminga and Saman Zia-Zarifi (eds.), *Liability of Multinational Corporations under International Law* (2000) 97.

[11] See generally Philip Alston, 'Peoples' Rights: Their Rise and Fall' in P. Alston (ed.), *Peoples' Rights* (Oxford, Oxford University Press, 2001) 259, at 270–73.