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The Growing Impact of Non-State Actors on the International and European Legal System

ANGELA M. BANKS*

In 1995, the world witnessed the creation of the World Trade Organization, ("WTO").¹ This international organization would assume an important role in the regulation of international trade and would influence domestic economic and social policies. As an inter-governmental organization, states are the main decision makers within the WTO; however, in 1996 the organization recognized that non-governmental organizations can play an important role in educating the public about the WTO.² To facilitate this role and increase the organization's transparency, the WTO allows non-governmental organizations to attend Ministerial Conferences, participate in issue-specific symposia, and submit issue papers to the WTO Secretariat. Despite limited access to formal decision-making channels within the WTO, non-governmental organizations and other non-state actors have been involved in increasing public awareness about the effect WTO decisions have on the lives of individuals throughout the world. Facilitating transparency and building awareness are two of the many ways in which non-state actors are playing a progressively more important role in the development of international law and the regulation of international affairs. Participants at the 2003 Hague Joint Conference on Contemporary Issues of International Law had the opportunity to explore the details of this expanding role and its implications. The conference was organized around the theme "From Government to Governance? The Growing Impact of Non-State Actors on the International and European Legal System."³

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¹ The World Trade Organization was created by the Uruguay Round of trade negotiations that were concluded in 1994 and it was established 1 January 1995. See Marrakesh Agreement Establishing The World Trade Organization, Annex 1A, Legal Instruments-Results of the Uruguay Round vol. 1, 33 I.L.M. 1154 (1994); Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Legal Instruments-Results of the Uruguay Round vol. 1, 33 I.L.M. at 1125.

² World Trade Organization, *Guidelines for arrangements on relations with Non-Governmental Organizations*, WT/L/162 (23 July 1996), available at http://www.wto.org/english/forums_e/ngo_e/guide_e.htm (last visited 5 Aug. 2003) ("Members recognize the role NGOs can play to increase the awareness of the public in respect of WTO activities and agree in this regard to improve transparency and develop communication with NGOs.").

³ The conference took place 3-5 July 2003 in The Hague, Netherlands.

Three types of non-state actors were the focus of the conference: inter-governmental organizations ("IGOs"),⁴ non-governmental organizations ("NGOs"), and multinational corporations. The panel discussions were organized around three topics: the status and role of IGOs and NGOs in international lawmaking and implementation; the role of multinational corporations in the development of corporate governing principles; and responding to international terrorism at the international and European level. This paper provides an overview of conference events that focused on the first two themes, with a special emphasis on the importance of non-state actor accountability.

Rather than declaring the end of the nation-state as a significant entity in international affairs, conference participants examined the non-state actor phenomenon as one developing "parallel to the traditional state model" and noting that "states remain the primary subjects in the international and European legal systems."⁵ Despite the continued importance of states, a recurring point at the conference was that states are no longer the sole actors within the international and European legal systems.

The keynote addresses by Judge Pieter H. Kooijmans of the International Court of Justice ("ICJ"), expounded on the conference theme by explaining the ways in which the role of non-state actors is changing, and the significance of these changes. Judge Kooijmans remarked on the existence of non-state actors in traditional international law venues making specific reference to the role of human rights NGOs in *Certain Criminal Proceedings in France*,⁶ a case currently before the ICJ. On 5 December 2001, various human rights organizations filed a complaint in a French court alleging that the President of the Republic of the Congo, Mr. Denis Sassou Nguesso, the Minister of the Interior, General Pierre Oba, and other government officials committed crimes against humanity and torture in the Congo against individuals of Congolese nationality. An investigation was initiated in France and

⁴ While inter-governmental organizations are comprised of states, and could therefore be seen as state actors, such organizations have an independent existence and limited international personality. See "Wrap Up: Non-State Actors and Their Influence on International Law", 92 *ASIL Proc.* 380, 386 (1998) (remarks by Virginia Leary). These factors make it appropriate to consider international organizations as non-state actors.

⁵ Hague Joint Conference on Contemporary Issues of International Law 2003 – From Government to Governance: The Growing Impact of Non-State Actors on the International and European Legal Systems Program at 2, available at <http://www.asil.org/HagueJCfinal.pdf> (last visited 12 Aug. 2003).

⁶ *Certain Criminal Proceedings in France (Rep. of the Congo v. Fr.)*, available at <http://www.icj-cij.org/icjwww/idocket/icof/icofframe.htm> (last visited 8 Aug. 2003).

the Congo has requested the ICJ to annul the investigations and prosecution measures taken by French judicial authorities. While the ICJ will not address the merits of the crimes against humanity and torture allegations, it is faced with determining the appropriate limits of a state's criminal jurisdiction for acts committed outside of the state's territory. The fact that this issue is currently before the ICJ is due in large part to the actions of human rights NGOs, which exemplifies one way in which non-state actors can be relevant in the creation of international law.

International organizations also generate soft law that often hardens. Judge Charles N. Brower of the Iran-United States Claims Tribunal detailed the ways in which international organizations have developed international commercial legal principles that are utilized by parties, courts, and arbitrators. The United Nations Commission on International Law has created model laws on topics such as international commercial arbitration, cross-border insolvency, and international commercial conciliation, and has drafted numerous treaties. Judge Brower also discussed the work of the International Institute for the Unification of Private Law and the development of the Principles of International Commercial Contract, which are "concrete, accessible and pragmatic" principles that are utilized in commercial litigation and arbitration.⁷

Not only are non-state actors instrumental in generating soft law, but they can also be influential in accelerating the political process to motivate states to create hard law, as noted by Judge Shi Jiuyong, President of the ICJ, in his closing remarks. This can be done through lobbying efforts, informational campaigns, and coordinating action among various organizations and segments of society.⁸ International organizations also make it easier to conclude multilateral agreements. Professor José A. Alvarez, Professor of Law at Columbia University, stated that international organizations increase the options for initiating treaties, which creates an alternative to the state-initiated and state-coordinated conference system. This alternative requires states to invest less diplomatic and other resources, expands the diversity of actors involved, and increases the amount of information available to treaty initiators.⁹

⁷ Charles N. Brower, "The Interaction of International Organizations and Arbitral Tribunals in the Development of Transnational Commercial Law", Address before the Hague Joint Conference on Contemporary Issues of International Law 2003 (3 July 2003) (on file with author).

⁸ Cf. Harold Hongju Koh, "A World Drowning in Guns", 71 *Fordham L. Rev.* 2333, 2342-2343 (2003).

⁹ See also Jose E. Alvarez, "The New Treaty Makers", 25 *B.C. Int'l & Comp. L. Rev.* 213, 223-232 (2002).

In addition to presentations about the role of non-state actors in generating soft law and facilitating the creation of hard law, conference participants also discussed non-state actors' participation in international negotiations. While such negotiations are generally conducted by states, non-state actors are playing a variety of influential roles. Pieter-Jan Kuijper, from the Legal Service of the European Commission ("Commission"), discussed the role of the Commission in the negotiations for the World Health Organization Framework Convention on Tobacco Control. This framework establishes international rules on smoking prevention and treatment, advertising, labeling, illicit trade, taxation, and product regulation.¹⁰ The Commission was responsible for conducting negotiations in the areas that are within the European Community's competence and the Presidency coordinated member-state positions for issues within national sovereignty. To execute these duties, Mr. Kuijper explained that the Commission had observer status and negotiated "in the margins" by, for example, lobbying other states, coordinating member-state activity, and advising the Presidency to state the Commission's position. NGOs were also active in the negotiations for the Rome Treaty creating the International Criminal Court, although in a different manner. Rolf Einar Fife, who served as Chairman of the Working Group on the First Year Budget in the United Nations Preparatory Commission for the International Criminal Court, noted that states played the key role in the Rome negotiations, but explained that NGOs as representatives of civil society worked to hold states accountable. This was done by providing states with information, asking the hard questions, and facilitating transparency. States made the ultimate decisions, but once those decisions were made NGOs disseminated information, which prompted discussions thus continuing the information cycle between states and international civil society.

One of the main reasons non-state actors are significant is because they often represent interests different than those of state actors and they are primarily accountable to different people, a point made by Judge Kooijmans. The representation of different interests can be an important factor in reducing the perceived democratic deficit operating in the development of international law and regulation of international affairs; however, it is not the only factor.¹¹ Just as states, which are responsible for representing the national interests, are subject to capture, so too are non-state actors. As Professor Alvarez noted, international organizations face

¹⁰ See World Health Organization, "Twenty-eight countries and the European Community sign tobacco treaty at first opportunity" (16 June 2003), available at <http://www.who.int/mediacentre/releases/2003/pr49/en> (last visited 12 Aug. 2003).

¹¹ See "The FP Interview: Lori's War", *Foreign Policy*, Spring 2000, at 36-37.

this threat from hegemonic states. He noted that international organizations replicate patriarchy and fail to promote women's issues or gender equality, have been enablers of the "Washington Consensus," and favour economic rights over social values. While non-state actors have called for increased state accountability in matters relating to international affairs, it is also important that non-state actors adopt methods of good governance, particularly as related to accountability.¹²

Non-state actors often do not have accountability mechanisms within their own organizations similar to those they require of states. One member of the audience at the panel entitled "Review of application of principle of good governance by international organizations in practice" highlighted this hypocrisy in the context of United Nations Interim Administrations, which was the subject of presentations by Christa Meindersma, Political Officer for Security Issues with the United Nations Mission for Support in East Timor, and Ralph Wilde, Lecturer in Law at University College London. As the United Nations ("UN") undertakes the administration of territories that, for a variety of reasons, face an administrative vacuum, the organization is facing increasing criticism regarding its accountability to the inhabitants of the areas it governs. The interim administrations are given absolute powers to govern the relevant territory. The executive, legislative, and judicial functions are consolidated in one entity, causing the UN interim administrations to govern in an autocratic manner.¹³ Both Ms. Meindersma and Mr. Wilde acknowledged this problem in discussing the limited or nonexistent means for local inhabitants to register complaints against UN interim administration officials.¹⁴ The paradox noted by the speakers is that when a UN interim administration is preparing a territory for self-rule, like East Timor, it provides a model that would be deemed unacceptable by the international community if adopted by the independent state.

¹² See, e.g., Joseph S. Nye, Jr., "Globalization's Democratic Deficit: How to Make International Institutions More Accountable", *Foreign Affairs*, July-Aug. 2001, at 2 (2001) (stating that increased transparency is essential in establishing better accountability for international organizations, that NGOs play an important role in creating transparency, and that transparency is equally important for NGOs).

¹³ See Ralph Wilde, "Accountability and International Actors in Bosnia and Herzegovina, Kosovo and East Timor", 7 *ILSA J. Int'l & Comp. L* 455, 458 (2001) (quoting Sergio Vierra de Mello, *How Not to Run a Country: Lessons from Kosovo and East Timor* (2000)).

¹⁴ In 2000, an Ombudsman position was created with the power to investigate complaints regarding the abuse of authority by the interim administration or any emerging local or central institutions. A proposal for a similar position in East Timor was drafted but never adopted. See Wilde, 7 *ILSA J. Int'l & Comp. L* at 456.

Another area of accountability addressed at the conference was corporate liability for human rights violations, including aiding and abetting and conspiracy liability. Pieter H.F. Bekker, Counsel in the arbitration group at White and Case, argued that "aiding and abetting or conspiracy liability of private companies has not been universally accepted as a discrete violation of international law and is, therefore, not part of the contemporary body of general international law."¹⁵ This thesis was vigorously contested by Harold Koh, Professor of International Law at Yale Law School, who concluded his remarks by encouraging the audience not to "bend it like Bekker" – a play on the title of a popular film. Professor Koh stated that private corporations can be liable for human rights violations under international law. Despite Dr. Bekker's distinction between legal liability and moral responsibility, Professor Koh argued that it is a myth that domestic litigation is a bad way to inspire better behavior. While treaties are another means of addressing corporate liability for human rights abuses, that is not the only way to deal with the issue. André Nollkaemper, Professor of Public International Law and Director of the Amsterdam Center for International Law at the University of Amsterdam, echoed Professor Koh's point, stating that it was unlikely that adequate treaty commitments could be obtained. He suggested that the creation of international non-binding norms was the way forward.

The 2003 Hague Joint Conference on Contemporary Issues of International Law was a forum in which the specific ways in which non-state actors are operating within international law and international affairs was discussed in addition to the related benefits and challenges. One of the most salient challenges is the accountability of non-state actors because of the growing concern about a democracy deficit in international decision making. Conference participants tackled this issue providing information on best practices and ideas for future efforts. Not only should non-state actors be concerned about accountability within their organizations, but they should also focus on accountability to their stakeholders – those whose interests are directly effected by the organization's actions.¹⁶ This point was highlighted

¹⁵ Pieter H.F. Bekker, "Corporate Aiding & Abetting and Conspiracy Liability Under International Law", Address before the Hague Joint Conference on Contemporary Issues of International Law 2003 (3 July 2003) (on file with author).

¹⁶ See, e.g., G. Richard Shell, "Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization", 44 *Duke L.J.* 829 (1995) (advocating a trade stakeholder model for WTO participation that includes those with a stake in international trade policy. Not just states and those representing commercial interests, but also those advancing noncommercial interests related to, for example, the poor, environmentalists, consumers, and labour).

during the discussion on UN interim administrations. As the world becomes increasingly integrated, international organizations that previously focused on narrow technical issues now find their decisions affecting a wider range of technical issues and broader social issues. As a result of this widening sphere of influence, it is critical that stakeholders have access to the relevant non-state actors and the means to hold them accountable.