

INTERNATIONAL LAW ASSOCIATION
RIO DE JANEIRO CONFERENCE (2008)

NON-STATE ACTORS

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Preliminary issues for the the ILA Conference in Rio de Janeiro, August 2008

In this brief report, the tentative mandate of the newly established ILA Committee on non-State actors is set out. As it was initially agreed to focus on international security, a definition of security, both a narrow and a broad one, is given (Section 1). Section 2 attempts to identify the relevant non-State actors. Section 3 lists the general issues which the Committee might want to address, and Section 4 gives a timeline of the Committee's activities between August 2008 (ILA conference in Rio) and the publication of an edited volume on the status of non-State actors in late 2010.

1. Definition of security

The Committee will restrict itself to studying the international legal status of non-State actors in the field of international security. It remains then to be seen, obviously, what meaning is to be given to the term 'security'. Both a narrow and a broad definition could be given. It is proposed to have this issue, which relates to the mandate of the Committee, decided by the Committee, and not merely by the Co-rapporteurs, at the Rio conference.

1.a. Narrow definition

Under a narrow definition of security, attention will mainly be devoted to the military aspects of security, and to the legal position of non-State actors in armed conflicts, situations of civil unrest (riots), and post-conflict situations.

It will be analyzed how the qualification of a situation affects the legal position of non-State actors. For instance, the position of non-State actors involved in international armed conflicts may well differ from the position of non-State actors involved in non-international armed conflicts. Also, the position of non-State actors in relation to various stages of the conflict and its solution will be examined. The analysis may thus exceed the stage of the armed conflict *stricto sensu*, and may encompass conflict-prevention and post-conflict reconstruction and governance (e.g. Kosovo, East Timor ...).

Relevant actors might include:

- mercenaries
- private military companies
- non-governmental organizations (relief; humanitarian)
- armed opposition groups/insurgents/terrorists (transnational/regional)/non-aligned individuals (insurgents/terrorists as unprivileged belligerents)
- transnational corporations doing business in conflict zones
- individuals (even as members of a State's armed forces)
- private arms dealers and manufacturers (Security Council sanctions; national codes; European regulations...)

1.b. Broad definition

Using a broad definition of security, the Committee's gaze may turn toward issues of 'human security' in the broad sense. The analysis may include safety issues, e.g. in relation to navigation (in particular the role which ngo's and business coalition, in cooperation with the International Maritime Organization, could play in this respect), water issues (e.g. legal position of non-State actors in relation to the building of dams/reservoirs; a link with security in the narrow sense could readily be drawn, e.g. in relation to the situation in the Middle East), and environmental issues. An outline of the international legal position of civil society in the field of environmental law/security is annexed.

2. Definition of non-State actors

Non-State actors could easily negatively be defined as all actors who are not States. It is relatively straightforward that such actors as ngo's (civil society) and transnational corporations will be within the purview of the Committee. It remains to be decided, however, whether non-allied or non-organized individuals or communities, e.g. minorities or indigenous peoples, ought to be included as well.

Other controversial categories are:

- intergovernmental organizations (these are non-State actors of which the members are States in the final analysis)
- mixed actors (membership including governments and non-State actors, e.g. IUCN)
- special types: Holy See, ICRC, religious organizations, ...
- frameworks, fora, processes, and any other unstructured or loosely structured processes (Global Compact, diaspora's...)

3. General issues

Many issues could be touched upon within the mandate of this Committee, even if its purview were limited to security in the narrow sense. This Section presents a non-exhaustive list of relevant issues.

3.1. Self-regulation v. mixed regulation v. State command

Some non-State actors may currently escape regulation and accountability, e.g. transnational corporations and private military companies. The question arises which form of regulation is best suited for these actors. Does 'voluntary' self-regulation suffice? What incentives should States or the international community give in order for this form of regulation to be successful? Should certain activities of certain non-State actors be outlawed?

2. Privatization of public services and State tasks

The rise of non-State actors at the international level is linked, in part, to the increased privatization of public services. Corporations and non-governmental organizations may now be fulfilling tasks that were previously fulfilled by the government. The question arises whether those non-State actors can be held directly responsible under international law for certain transgressions.

3. Private/public contracts and partnerships: international public values and legal status

Many States and international organizations now enter into contracts with non-State actors. These agreements are often of a private law nature, yet they may include the promotion of international public

values, e.g. human rights and environmental law. The question arises to what extent contracts could be appropriate mechanisms of promotion of international legal norms. It might for example be argued that enshrining such norms into contracts improves the chances of international law enforcement through (national) litigation.

The question also arises what the exact legal status of such agreements is: are they merely governed by national law, or also by international law? An agreement between a State and an armed opposition group does, for instance, not readily qualify as a municipal law agreement, but, in case there is some international supervision (e.g. by the UN), may well qualify as an international convention.

4. Soft law commitments v. hard law

Many non-State actors, e.g. corporations and armed opposition groups, commit themselves to upholding international law. However, they tend to do so as a matter of policy/soft law than as a matter of hard law. In so doing, they may avoid legal accountability. There may nevertheless be doctrines and principles that could be used to harden these soft commitments into hard law (duty of care/negligence/corporate organization/legitimate expectations/good faith/unilateral act ...).

5. From international law to transnational law

In order for the binding force of international law to be palatable to non-State actors as (possible) subjects of international law, international law norms need to be made through an inclusive process, with the participation of all relevant stakeholders. This requires a fundamental rethinking of international law formation, which is traditionally centered on States. It may require giving non-State actors the right to participate in treaty negotiation and adoption, and giving the practice of non-State actors some weight in the determination of norms of customary international law. Law may then become transnational rather than international.

6. Influence and representation of non-State actors in international fora

In a number of intergovernmental organizations, non-State actors, such as ngo's and national liberation movements, have limited legal personality, in that they can act as observers, e.g. at the United Nations. The question arises whether this system is satisfactory, and whether it should be extended to other organizations.

7. Responsibility of State actors for the conduct of non-State actors

Under current international law, non-State actors may not be considered as duty-bearers. This means that, *jus cogens* and international crimes apart, such non-State actors as corporations and armed opposition groups cannot violate international law (e.g. human rights law). The acts of non-State actors could, however, under certain circumstances, be attributed to the State on the basis of the rules of State responsibility (ILC Draft Articles on State Responsibility). It may be analyzed whether these rules could sufficiently deal with the challenges posed in international security law.

8. Self-defence against non-State actors

One of the issues in respect of non-State actors in the field of international security law that has proved very controversial over the last few years is the use of self-defence by States against attacks by non-State actors, such as terrorist groupings. The question arises whether States can rely on Article 51 of the UN Charter, or comparable customary international law for that matter, to support their claims of self-defence against non-State actors, or whether the attacks of non-State actors ought to be attributed to a State (e.g. on the basis of effective control, instructions, or the exercise of governmental functions by the non-State actors) before self-defence could legitimately be exercised.

9. Desirability of enhanced legal position of non-State actors

Ultimately, it will be ascertained whether a system of enhanced rights and obligations under international law for non-State actors is desirable. Policy arguments may play a prominent role here.

4. Timeline 2008-2010: publication of edited volume

August 2008 (Rio):

- identification of issues
- allocation of work (members of committee)

February 2009 (2 day-meeting - Leuven?):

- committee meeting convened by the chair, with prior consultations on suggested topics and preferences
- on invitation: limited to people who want to contribute to an edited volume

November 2009:

- discussion of outlines of contributions

August 2010 (ILA The Hague):

- final essay drafts
- time for revision August-end of November

End product 2010: edited volume (publisher to be decided, initial preferences for Martinus Nijhoff or Intersentia)

Annex

A note for the International Law Association Committee on Non-State Actors on the participation of Non-State Actors in Environmental matters (outline)

This note will briefly describe the participation civil society in the environmental law/ environmental justice. The focus will be in particular on:

- the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters;
 - ❖ its Non-Compliance Procedure;
 - The Courts of Human Rights and the participation of civil society and *quasi* judicial bodies, such as the Human Rights Committee; and
 - North American Agreement on Environmental Cooperation

1. The 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (entered into force 30 October 2001).

The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation and access to justice. The Aarhus Convention is a new generation of environmental agreement. It links environmental rights and human rights.

It establishes that sustainable development can be achieved only through the involvement of all stakeholders. United Nations Secretary-General Kofi Annan has said, "Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizens' participation in environmental issues and for access to information on the environment held by public authorities. As such it is the most ambitious venture in the area of environmental democracy so far undertaken under the auspices of the United Nations."

The Convention requires the parties to "ensure" that members of the public have access to information, are allowed to participate and have access to judicial review. The objective and structure of the Aarhus Convention are rights-oriented. It is intended to provide for participatory, informational and procedural rights in environmental matters.

The Convention defines:

(a) "the public "

"The public" means one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups (Article 2(4) and;

(b) "the public concerned";

"The public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purpose of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest" (Article 2 (5).

The parties to the Convention are also required to generally provide for the recognition of and support to environmental NGOs (Article 3(4). The Aarhus Convention prohibits discrimination with respect to the person's citizenship, nationality, domicile and in the case of a legal person, the place of its registered seat or effective centre (Article 3(9). This applies to access to information, participation in decision-making, and access to justice.

1.1. Access to environmental information

The obligations related to environmental information in the Aarhus Convention consist of two parts: ensuring public access, and establishing certain means for collection and dissemination. Taken jointly, the two parts go further than previous treaties in requiring systems and structures for information

dissemination and in specifying the obligation of states. Yet the Aarhus Convention fails to establish a firm basis for an “environmental right-to-know”.

The Convention sets out a general right of access to “environmental information” held by public authorities for individuals and NGOs without their having to show a particular interest in the case.

1.2. Public Participation

Public participation is provided for in the Convention for the following procedures: (i) specific activities, (ii) plans, programmes and policies, and (iii) executive regulations and generally applicable rules (Article 6). The public participation requires timely and effective notification of the public concerned; reasonable time frames for participation; a right for the public concerned to inspect information which is relevant to the decision-making free of charge; and obligation on the decision-making body to take account of the outcome of the public participation; and prompt notification of the decision, with the text of the decision and the reasons and considerations on which it is based being made publicly accessible.

1.3. Access to Justice.

Access to justice, according to the Aarhus Convention, is a means of having erroneous administrative decisions on environmental issues corrected by a court or another independent and impartial body established by law. The category of entities who can bring the claim are the following: any person who considers that his or her request for environmental information has been ignored, refused or not dealt with in accordance with the Convention must be ensured access to a review procedure before a court or another independent and impartial body (Article 9(1) and; any member of the public having a sufficient interest or maintaining impairment of a right must be ensured access to a review procedure before a court of law or another independent and impartial body, to challenge the substantive and procedural legality of any decision, act or omission concerning specific activities, which may affect the environment (Article 9(2). In addition, the parties are required ensure access to justice in cases concerning other relevant provisions of the Convention (e.g. decisions on plans and programmes) “where so provided for under national law” (Article 9(2).

Sufficient interest and an impairment of a right should be defined in a manner consistent with the objective of the Convention, namely to give the public concerned “wide access to justice” (Article 9(2). It states as well as that the determination of what constitutes a sufficient interest and impairment of a right to give standing, must be consistent with the objective of giving the public concerned wide access to justice within the scope of the Convention (Article 9.(2).

1.4 Aarhus Convention Non-Compliance Procedure

Article 15 of the Aarhus Convention on review of compliance, requires the Meeting of the Parties to establish arrangements for reviewing compliance with the Convention. Following this obligation, the Meeting of the Signatories established a Working Group to prepare such a mechanism. At their first meeting in October 2002 the Parties adopted the decision I/7 on review of compliance and elected the first Compliance Committee. This non-compliance procedure has an unusual feature, corresponding with the character of the Convention, which is based on a wide participation of the civil society, i.e. one of the ways to trigger off the non-compliance mechanism are the communications from the public, which is according to the Convention “any natural or legal person” (the other three being (1) a Party may make a submission about compliance by another Party; (2) a Party may make a submission concerning its own compliance; (3) the secretariat may make a referral to the Committee). Another unusual feature of this Non-Compliance Procedure is that Environmental NGOs has the right to nominate along with the States-parties to the Convention candidates for election to the Non-Compliance Committee (Article 1(4) of the Structure and Functions of the Compliance Committee and Procedures for the Review of Compliance).

There is also a representative of the NGOs during the meetings of the Compliance Committee and is invited to present specific points at the meetings of the Committee. Compliance Committee members should make themselves accessible to present compliance mechanisms at NGOs conferences and other meetings.

Thus far there around 19 communications from the public (mostly Environmental NGOs and only one from a State Party regarding non-compliance of States with the provisions of the Aarhus Convention.

2. Human Rights Courts, Environmental Justice and Non-State Actors (selected bodies)

2.1. General

Human Rights courts and *quasi*-judicial bodies such as the Human Rights Committee accept complaints and individual communications from non-state actors (individuals, NGOs and indigenous peoples).

2.2. The Inter -American Human Rights System

This system recognises the rights of indigenous peoples regarding their rights to environmental and natural resources. There are several cases decided by the Inter-American Court of Human Rights, such as 2001 *Awas Tingani Mayagna (Sumo) Indigenous Community v. Nicaragua*. This case was filed by the Awas Tingani at the Inter-American Human Rights Commission, alleging that the government breached their rights to cultural integrity, religion, equal protection and participation in the government. The Commission found in 1998 that the government violated the human rights of the Awas Tingani and brought the case before the Court. The Court found out, *inter alia*, that Nicaragua violated the Convention's right to judicial protection and the right to property.

2.3. 1991 African Charter on Human and People's Rights (the African Commission of Human and Peoples' Rights)

Under the African system of human rights, non-state actors have the standing to bring environmental cases before the Commission. This Convention contains the direct right a clean environment (Article 24). A very famous petition filed before the Commission in 2002 by two NGOs on behalf of the Ogoni people against Nigeria (in particular Nigerian National Petroleum development Company in consortium with the Shell Petroleum Development Corporation), *inter alia* on the basis of the alleged violation of Article 24. The case concerned the destruction of the Ogoniland and its natural resources. The Commission decided in favour of the Petitioners.

2.3. The 1950 European Convention of Human Rights and Political Freedoms (the European Court of Human Rights).

Under the ECHR apart from States also individuals, groups of individuals or non-governmental organisations can bring cases before the Court. The ECHR does not have a direct right to a clean environment. However, in the recent years, were there several cases filed by individuals who claimed the violation certain environmental entitlements. They were filed on basis of several Articles of the Convention, such as: 2 (such as 2008 *Case of Budayeva v. Russia*); 8 -which is the most commonly used in such cases (there is large body of cases brought before the Court of this basis: such as 1995 *Case of Lopez -Ostra v. Spain*; 2001 and 2003 *Hatton cases versus the United Kingdom*) and 10 (1998 *Guerra v. Italy*).

3. The Human Rights Committee

This is a monitoring body of the 1966 International Covenant on Civil and Political Rights. It allows the right of an individual petition. Article 27 of the Covenant was used by the members of indigenous peoples to file numerous complaints against governments (such as Communication No. 511/1992, *Imari Lansman at al v. Finland*; Communication No. 167/1984, *Bernard Ominyak and the Lubicon Band v. Canada*; Communication No. 547/1992, *Aspirana Mahuika et al v. New Zealand*).

4. 1993 North American Agreement on Environmental Cooperation (NEEAC)

This is also known as the NAFTA side agreement, concluded between the United States, Canada and Mexico. It contains broad provisions on the public participation. This agreement allows individuals, environmental organisations and business entities to file complaints on the State's Parties failure to enforce its environmental law, including these derived from international obligations. The organ established by this Agreement -Commission for Environmental Cooperation, is composed of following bodies: the Council; the Secretariat; and the Joint Advisory Committee. The third of these bodies

consists of 15 members from the public (five from each of the State Parties) and advises the Council as well as provides technical, scientific or other information to the Secretariat.