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States vs. non-state actors – a public international law perspective

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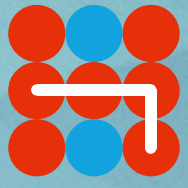

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States vs. non-state actors – a public international law perspective

As non-state actors increasingly interact with states, either of their own free will or not, new legal instruments are needed to regulate the status, role, and responsibilities of non-state actors at the international level. – writes Agata Kleczkowska, Assistant Professor, Institute of Law Studies of the Polish Academy of Sciences.

The term 'non-state actor' (NSA) covers a wide range of diversified entities with one particular trait in common – **while often playing a significant role in international relations, they are independent of states.** This broad term covers, *inter alia*, individuals, corporations, non-governmental organizations, armed non-state actors, de facto regimes, trade associations, and many more. Even though international law as a legal system is becoming increasingly sensitive to NSAs, it still primarily regulates relations between states and intergovernmental organizations, and **does not touch upon the status, role, and responsibilities of NSAs at the international level.** Nevertheless, in the current security environment, where hybrid threats are an integral element, this does not mean that NSAs do not interact with states. On the contrary, they often do since states may (ab)use the undetermined legal status of NSAs to challenge their adversaries, while NSAs themselves may seek to influence a state's policies.

At present, it is states that decide when and under what circumstances a given NSA may be embraced by international law, depending on their interests and the potential benefits. States are interested in retaining the current status of NSAs since, on the one hand, regulating the status of NSAs under international law could upgrade their role in international relations and weaken the position of states while, on the other hand, states could lose a very useful tool for exerting an impact on international policy thanks to the stealthy activities of NSAs, which are hardly subject to international law.

In light of the above, it is in the interests of the whole international community to legally regulate the status of NSAs.

The lack of regulation concerning the international legal status of NSAs is most visible with regard to those actors that are most clearly involved in relations with states, namely **individuals, corporations, international non-governmental organizations (NGOs), and armed non-state actors (ANSAs)**.

Individuals were initially denied a status under international law, and their position was upgraded only with the development of human rights law. **Today it is undisputed that international law confers some substantive rights on individuals, and not only in the field of human rights** (see e.g. the protection given to specific groups of individuals under international humanitarian law). In addition, international law grants individuals some procedural rights, such as the right to file a complaint before international bodies (e.g. in the complaint system based on the European Convention on Human Rights). Individuals also have obligations under international law, and may be held directly responsible on the grounds of international law for committing international crimes such as genocide, war crimes or crimes against humanity. Even though individuals are usually tried for these violations of international law before domestic courts, under some circumstances they may be tried before international courts as well (see e.g. Article 17 of the Rome Statute of the International Criminal Court, which states that a case is admissible before the court if a state 'is unwilling or unable

to genuinely carry out the investigation or prosecution'). Given this situation, scholars today are in general agreement that individuals possess some degree of limited legal personality in international law. However, two observations are significant in this regard: Firstly, the rights and obligations of individuals under international law are created with regard to their specific situation in relation to states, which implies that individuals cannot exercise the competences of a state; for example, they cannot conclude a treaty, cannot dispatch diplomatic representatives, and so forth. Secondly, individuals' competences under public international law are restricted to those given to them by states. They themselves do not determine the scope of their international legal rights and obligations since it is states (or international intergovernmental organizations) that conclude human rights treaties for example, decide upon the scope of jurisdiction of international courts, and so on. Therefore, **even though the position of individuals under international law has changed significantly over the last century, and they were given some rights and obligations under international law, it is still states that control their status.** This means that states could restrict the rights of individuals under international law and burden them with additional obligations. An example could entail a state withdrawing from a treaty establishing an international court, in order to deprive its nationals of additional protection by an international organ and the right to file complaints against the state, resulting in the absence of an independent watchdog to supervise the state's actions. Even though this scenario seems highly unlikely in the contemporary state of relations, where the protection of individuals occupies an important place, it used to be the case that for the sake of security issues, for example, states deprived individuals of some rights.

Secondly, **the status of corporations** under international law is often discussed due to the fact that such actors may possess powers and assets comparable to those at the disposal of states (or even more than some states), and may also significantly affect the lives of individuals, politics, the economy, the environment, and many public spheres. On the one hand, the most important field where the responsibility of international corporations should be determined is human rights law. The efforts to establish a legally binding framework for corporate responsibility with regard to human rights has thus far ended in failure. Among the instruments created within the UN, the *Guiding Principles on Business and Human Rights*, as well as *Draft norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights* should be mentioned, and several other documents could also be enumerated. However, none are binding. On the other hand, it should also be observed that international corporations have certain rights under international law. These rights are derived not only from human rights law (see Art. 34 of the European Convention on Human Rights, which provides that the European Court of Human Rights may receive applications from any 'non-governmental organization', which includes corporations), but primarily from international investment law. Moreover, disputes between a state and a foreign investor (also including an international corporation) may be resolved through investment arbitration, and not before domestic courts, which guarantees investors a more unbiased procedure than under national law, conducted by an independent body. At the same time, one should highlight that in order to commence an investment arbitration, the host state must first consent to such a procedure. Thus, **the discussion on the status of corporations under international law is not aimed at equalising their position with that of states, but rather at providing protection for states' interests against possible abuses committed by corporations, as well as safeguarding the interests of companies against excessive and unjustified interference on the part of states**. For example, if an international corporation was regarded by a state's regime as hostile, the government could adopt legislation aimed at financially destroying the corporation. On the other hand, an international corporation may be powerful enough to corrupt the government and quietly control the whole state apparatus. The international regulation of the status of corporations could help to avoid such situations.

Next, since intergovernmental organizations are created and composed by states (e.g. the United Nations, NATO, the EU, the African Union, and the Organization of American States, among others), they are not covered by the definition of an NSA introduced at the beginning of this analysis. However, **international non-governmental organizations** have a different status – **they are independent from states, and are usually established precisely to monitor the actions of states in various areas.** Examples of the most important NGOs today that have a say in international fora include the International Committee of the Red Cross (ICRC), Amnesty International, Geneva Call, *Médecins Sans Frontières*, Human Rights Watch, and Greenpeace. These NGOs often supplement or even substitute the functions of states in terms of human rights advocacy, international humanitarian law (IHL), health issues, or the environment**. This is why they are vested with certain privileges that are inherent to states, such as participation in international conferences, monitoring mechanisms, dispute settlement mechanisms, and so forth. Indeed, NGOs may often be more effective than states in some fields. For example, they may be a valuable intermediary between states and other NSAs that may not necessarily trust the states' organs, but may be willing to co-operate with an organization independent of a state.** For instance, the ICRC and Geneva Call educate ANSAs with regard to the rules of IHL and encourage them to sign declarations of compliance with IHL and human rights, which may be far more effective than prosecuting and punishing ANSAs for breaches of basic humanitarian standards. Likewise, NGOs may also demand that their practices be taken into account in international law-making with respect to important standards for states' actions, and may also wish to play a consultative role during the drafting process of legal acts. The role of NGOs has been included in some legal acts, including the UN Charter (Art. 71) or the Geneva Conventions (Art. 10 of the First, Second and Third Geneva Conventions, Art. 11 of the Fourth Geneva Convention). There have also been attempts to regulate the status of NGOs in a more comprehensive manner. Worthy of note here is the European Convention on Recognition of the Legal Personality of International Non-Governmental Organisations, although these attempts have not yet met with a great deal of success. Interestingly, despite much international recognition, it is hard to determine what kind of international obligations NGOs have. Most NGO duties stem from agreements concluded voluntarily between NGOs with intergovernmental organizations and states, which establish the cooperation between these actors. The unregulated status of NGOs may easily be abused by states, which may use the NGO format to fight with adversaries in a less detectable way, for example. That is why, for the sake of the international rule of law and to safeguard the positive actions undertaken by many NGOs, their international legal status should be comprehensively regulated.

Finally, one needs to mention **armed non-state actors**, a category that encompasses **those NSAs that conduct armed combat, namely terrorist organizations, rebels, insurgents, and many more**. **Many scholars claim that ANSAs possess an international legal personality, but they cannot agree on the scope and source of this personality. Nor have they managed to establish a legal definition of ANSAs, which seems indispensable for regulating their status under public international law.** The doubts in this field concern not only the scope of their rights and obligations, but also their law-making capacity and responsibility. When it comes to the former, it is sometimes claimed that ANSAs, by their actions, can contribute to the creation of customary international law, either by creating a separate category of quasi-custom or by participating in the making of customs binding upon states. **The issue of their responsibility is equally complicated. The most widespread form of responsibility borne by ANSAs today is indirect responsibility, meaning the responsibility of individuals and states when it is possible to attribute acts committed by ANSAs to them. On the other hand, a model of direct responsibility borne by ANSAs, which would take into account their activities as collective entities, has not yet been established.** Most importantly, however, in addition to all of these theoretical and practical problems, one needs to highlight that the proposals

made in the doctrine of law that ANSAs possess some degree of international legal capacity do not accord with the position of states, which are reluctant to specify the status of ANSAs since to do so would amount to upgrading their status and standing in international law. For instance, if a state agreed to render an international legal personality to ANSAs and allowed them to become full-fledged parties to a treaty, it might mean that an ANSA could subsequently oversee the implementation of a treaty by a state and, on these grounds, make claims against a state.

To sum up, even though the contemporary international stage is awash with different actors that contribute to the shape of international relations, and although states are no longer the only parties that have a say in many domains, including the creation of law, human rights, IHL and so forth, states nonetheless still play the leading role on the international stage. Moreover, they are not only the most important actors but also gatekeepers, in the sense that they determine the scope of the rights and obligations of all other entities that interact with them. Even though there is a vast scholarship that strives to have NSAs included in international law, their claims remain for the most part proposals *de lege ferenda* or intellectual exercises, since **it is not scholars but states that create international law and decide who can be allowed to share the privileges granted by international law.** Nevertheless, the lack of comprehensive legal regulation regarding the status of NSAs may be a source of serious abuses by both states and NSAs themselves.

Author

Agata Kleczkowska is Assistant Professor at the Institute of Law Studies of the Polish Academy of Sciences. She holds a PhD in public international law, having defended her thesis on the 'Use of Force by States under Customary International Law' in 2018. Her research interests include, but are not limited to, the use of force, armed non-state actors, hybrid threats, recognition and statehood. In 2018, she continued her research on armed non-state actors with a fellowship from the Max Planck Institute for Comparative Public Law and International Law. She is also a Rapporteur at the Oxford International Organizations. Since 2019, Agata has served as a legal expert at the UP Centre for International Humanitarian and Operational Law. She is also a participant in Hybrid CoE's Pool of Legal Experts.

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