

International NGOs: A Law Unto Themselves¹

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I come from a very mixed background, as somebody who has been both an international tax lawyer and business law person as well as somebody that has spent a lot of time in the human rights movement. As you can imagine, I am someone who is unusual in the human rights movement for being a Republican and a conservative. And that, I think, has led me to want to focus a lot of my academic work, a lot of my research work on the human rights movement and, more broadly, on international NGOs, the international NGO movement precisely because I think that it is so important in all the ways that have been raised earlier today.

Many of these issues come to the fore in times of war, in times of conflict, in times of international stress, as we see now. I think that we need to take the time to understand the role that international nongovernmental organizations play in this in particular.

In many respects, what we are seeing now in international relations is a movement away from the traditional argument between realists and idealists. Away from an argument between those people that tend to treat things as a matter of power and power relations and what had been the kind of idealist move to want to see the world in some way of law-governed and rule-bound. That is becoming less the debate, and instead, what is arising is fundamentally a debate between two different kinds of idealisms themselves.

On the one hand, you have what we could loosely describe as liberal internationalism, some sense that there has to be an international legal order, which ultimately becomes over time the supreme federal law for the planet. If not precisely moving toward a sort of one-worldism, then something in which the rule of law covers the whole globe.

That is contrasted with the other idealism that is now becoming much more ascendant, certainly in this country, an idealism that I would describe as democratic sovereignty. This is the reassertion, after a long time as an idealistic point of view, that democratic sovereigns are not only the force in the world, not only the repository of power, but that they are morally, ethically, and politically that which ought to be the center of the international system.

Now, the reason I raise this is because nongovernmental organizations and other kinds of transnational actors - it includes corporations and international NGOs - these organizations are having to locate themselves within the context of this argument between two different forms of idealism. What should the world system look like? Should it be something which is fundamentally about the sovereignty of democratic states in which the legitimacy of that system rests on the fact that they are democratically responsive to their constituents or, on the other hand, should it be seen as something in which the ascendant ideal is one of liberal internationalism in which gradually the

¹ This is an edited version of a luncheon address and questions to the conference.

sovereign states are losing their attributes of sovereignty and merging it into some larger planetary structure?

Transnational organizations of all kinds have to locate themselves in relation to that debate, and NGOs are no different. The international NGOs have to decide where they stand in relation to that. It is very significant that, largely, the transnational NGOs have settled in favor of some form of liberal internationalism. Strikingly, many have bet on an international system that is federal in nature, even, in some respects, at the expense of their own substantive agendas.

The human rights movement is a case in point. There are instances in the human rights movement where there are things that you think might criticize, but to do so you would have to align yourself with United States foreign policy. This may not be congenial to your larger agenda of supporting internationalism for its own sake.

A very good example of this would be in the laws of war. For example, the Additional Protocol 1 of 1977 looked to restate and extend parts of the Geneva Conventions in various ways. One of the features of the 1977 Protocol 1 treaty is a feature that winds up granting very special status to guerrilla fighters. It says in effect that guerrilla fighters are allowed to carry their arms concealed and not reveal themselves as combatants until shortly before the moment at which an attack is launched. That is Article 44 of Additional Protocol 1. This is a measure which enormously empowers guerrilla combatants at the expense of civilians, simply because the nature is that if you were allowed to attack from within a civilian group, then you are going to endanger those civilians because you will have people shooting around them.

That represents a step backwards for what has been the traditional law of war. Strikingly, however, it is a measure that is part of a treaty, which has been overwhelmingly supported by human rights organizations around the world as they have looked at human rights, and laws of war treaties. I think that the only fair explanation for why the support to that is given is a belief that it is more important to have an internationalized system in some way than to have something which in every respect substantively winds up protecting the folks who are at the center of international laws of war, the civilians themselves.

I give that as an example of a way in which international NGOs, as they look to locate themselves in relation to this debate over liberal internationalism versus democratic sovereignty, find that under certain circumstances, if they are forced to choose, then they actually prefer to lash themselves to the mast of liberal internationalism.

I want to turn and discuss this in relation to the other area that arose this morning, and that is the question of NGOs and democracy, of international NGOs and democracy. International NGOs have a very difficult relationship with democracy. The fundamental reason, and for many different kinds of agendas, some of which may be heroic and noble, is the desire to go around democratic processes. In this process, the NGOs themselves wind up having to answer the question, what about democracy in all of this? The answer from the NGOs is typically, well, we have another set of values here which are at least, if not more, important than the value of democracy. It is human rights. There is a list of

human rights values that are seen by the NGO community as being above democracy. That is appealed to as being, in effect, an alternative source of legitimacy both for the NGOs, but even more strikingly, for the international organizations through which they try to work.

The net effect of this is to wind up producing an international system in which we have a set of international organizations - the UN system and various kinds of creatures attached to it - which is itself looking for legitimacy. It does not have legitimacy for a basic reason, it does not have democracy attached to it. It is looking for international legitimacy in some way for an ever-increasing range of tasks that various people would like to assign to it or call upon it to do, and it finds that it lacks legitimacy in order to go forward on that.

In the process, the UN seeks an alternative source of legitimacy. It asks, 'if you can't look to democracy what can we find to back up the moral authority of our actions?' The answer winds up being, to look to international NGOs and their values of human rights as being, in effect, a substitute for democracy that we international organizations are not going to be able to acquire easily, if ever.

This accurately captures the relationship, the very special, burgeoning relationship between public international organizations on the one hand and the international NGO community on the other. They are in effect locked in a sort of romantic embrace. Each is looking to the other to provide a certain kind of legitimacy that the other lacks. The international NGOs want access. They want the legitimacy of being the players with whom the international organizations work, the folks that they look to for approval. For the international organizations' part, they are in desperate need of some form of legitimacy that they do not have because they are not democratic institutions and they are not likely ever to become democratic institutions. In that process, they turn to a plausible substitute for democratic institutions, and the international NGOs will wave their hands in the air answer and say, 'we can do it for you.'

This is laid out in the series of speeches that Kofi Annan has given, since the late 1990s, particularly the Millennium Summit of NGO groups, where Annan said to the assembled groups, 'you are the peoples of the world. You are the people, you are the representatives of the people.' You could not get closer to a substitution for saying, 'I am going to use you as a stand-in for the democratic populace of the world which I cannot actually go out and ask to vote on anything.'

There is this rhetorical move which is being made to look at the NGOs and say, even if we cannot have a raise of hands across the planet in a democratic fashion, we can come up with a plausible set of representatives of the world, and guess what, you guys are it. From the standpoint of the international NGOs, I can tell you as somebody that has worked as part of these things, who used to do a huge amount of work with NGOs, we are very happy to take on that responsibility. We are very happy to raise our hands and say, yes, we will be happy to represent the peoples of the planet.

I find this very troubling, to elevate the status of NGOs beyond being advocacy groups, and to move them into another whole category. How does this come about? In order to

understand this, I want to move into the question of the laws of war once again. I want to go back in particular to the history of the landmines campaign, the Ottawa Convention on landmines. I am in substantive agreement with the landmines campaign and with the move to ban landmines. I do think that they are an indiscriminate weapon.

The landmines campaign takes off in the mid 1980s when the surgeons of the International Committee of the Red Cross revolt against their own lawyers and say, 'We're getting tired of doing amputations for landmine victims in places like Cambodia, Afghanistan, lots of other conflicts, and we think that this is getting out of control.' The ICRC then begins to conduct its own campaign. It is, with all due respect to the ICRC, one of the least persuasive campaigns ever launched by an NGO. It is not persuasive, it does not get to people, it simply does not go anywhere.

A coalition of NGOs comes together around this issue. It is quite striking that there are large debates among these NGOs about whether their mandates would actually cover the issue. One of the striking things is the elasticity of mandates within NGOs when they see an issue they want to grab onto, the ways in which you turn the lawyers loose on it and reinterpret your mandates in order to bring the issue within whatever it is you are working on. That mobilization of NGOs was fantastically successful. The question is, in what way? If you go to the literature about the success of the landmines campaign, it will generally tell you that it was a coalition of international NGOs working with like-minded states that produced this treaty, which galvanized ratifications of the treaty.

That is not actually quite right. The reason it is not right is a very important one for understanding the role and the success of NGOs in all of this. The NGOs initially went out to their own country governments. In the first place, the success of the NGO campaign around landmines was fundamentally about getting your government to ban landmines - to ban their use or their stockpiling. The movement within the United States was actually remarkably successfully in getting that to happen. There had been in effect a sort of de facto ban on the use of landmines and more production of landmines defined in various kinds of ways in the United States, which gradually crept across Europe and various places as well.

The success of this movement actually rested in the first place on the ability of NGOs within a particular country to mobilize their own governments around that issue. They persuaded their own governments, and largely persuaded their own populations, or at least elites within that population, of the importance of this issue. Only then did it become a broader international question. At that point, it became a question of an international campaign.

I emphasize that because that is not how one would perceive it reading the histories. The histories have been, largely, written by the Canadians and they tend to glorify the role of the Canadian foreign ministry in bringing this about. Which was an enormous role, but it actually came late in a campaign that had already convinced national governments. Transnational NGOs found themselves most successful when they built on the work of advocacy NGOs inside democracies.

The campaign takes off and becomes a combination of public international organizations, UN organizations, working together with sympathetic governments to ban landmines. What ultimately did this massive campaign accomplish? Quite a lot. The trade in landmines in the world is a minuscule fraction of what it was in 1990. The use of landmines is a minuscule fraction of what it was in 1985 or 1990. There has been a stigmatization of this weapon, which would not otherwise have taken place.

At the same time, however, we see the contours of what sympathetic governments and NGOs are able to accomplish in this kind of effort, which is that fundamentally, by a refusal to countenance any compromise whatsoever over minefields between the two Koreas, it was guaranteed that the US could not come on board, could not even contemplate coming on board. A strategic decision taken by the campaign not to try and find a way in which the US would de facto come on board without actually signing it, but instead saying, 'We're going to brand the United States as a rogue government, no better than any of the other folks that won't sign, it's no better than Sudan,' pretty much guaranteed that, not within the course of the next decade is there any possibility that the US is going to see movement on this particular issue.

A refusal to compromise in any way whatsoever with what one could accurately describe as the obligations of the superpower led to the United States both not being involved in the final treaty and being pushed aside rhetorically into the category of sort of rogue status. At the same time, many countries have ratified. They include Costa Rica, they include Canada. They do not include any country at all, which seriously contemplates having to fight a war, with the possible exception of Britain. In other words, the final breakdown of who is on and who is off reflects, very naturally, those countries which seriously contemplate having to fight wars, for good reasons or bad reasons - India, Pakistan, China, Russia, the United States. In other words, the list of countries that contemplate fighting wars have not signed and the countries which do not imagine that they will ever really have to fight anything other than send some peacekeepers someplace are all on board.

This campaign had the effect of elevating the status of international NGOs into the idea that we represent the peoples of the world. In fact, this campaign raised this issue. Within intellectual circles, it has now become largely solidified. There is a new book out by the political scientist John Keane in London, called 'Global Civil Society.' Oxford University Press produces a very interesting yearbook called 'Global Civil Society.' It comes out every year reviewing the activities of global civil society. Central to that is this claim, which arose out of this history of the landmines campaign, that these organizations represent the world. You have to listen to them because they are the substitute for democracy.

This conference has been sceptical of those claims, but it is enormously important to understand the reach they have, the impact they have. It means that international and trans-national NGOs no longer claim a voice because we are the people that do the work on the ground, feeding the refugees here, running the camp there. Alternatively, we are the experts, we know about this area, we have the expertise in this particular thing. Those are the traditional bases on which international NGOs would go to governments, international organizations and kind of approach these things. All of a sudden, things

have been ratcheted up enormously. It is not a question of whether you do all this and it is not a question of whether you are the experts, it is simply a question of whether you represent the peoples of the world. Since you are defined to represent the peoples of the world, then we have to be listened to. Tremendously antidemocratic in its implications.

Advice to the Bush Administration

I want to turn and talk about two further issues. One is the attitude of the Bush administration in dealing with international NGOs. This could be improved if it better understood the dynamic. I want to close by talking a little about the new campaign in the context of wartime to raise these kinds of questions again.

Bush administration, even before September 11th 2001, tended to have an attitude towards NGOs, which is natural in some ways, to say, international NGOs, they are like national NGOs, like domestic NGOs. We like domestic NGOs, we think they are the voluntary sector, the voluntary sector is good, so the international voluntary sector is good. We will disagree with them about particular issues, we will fight with them over the International Criminal Court, but fundamentally we will look at them as the kind of people that we should be off-loading the responsibilities of feeding people and doing things that the NGOs can do better.

Generally, there has been an attitude, at least in areas that are not ideologically riven, of reaching out and working with NGOs. While you have to have international NGOs around, the question is whether you wind up blessing this extra claim about being international, global, civil society, the representatives of the people. The question is whether you can have the functions that NGOs provide, while sort of cutting them off from this ideological claim about who they are.

What the Bush administration as well as other administrations needs to recognize is that this is a culture. This is a culture of people who live and work and make their careers - not just make their careers, but inter-marry, produce children. It is a culture, a people that spend their lives as part of a shifting transnational elite. My closest friends are in London and Hong Kong, they are not here in Washington. I know many people who are in that position, people for whom their fundamental frame of reference is to a much more horizontally based group of elites that tends to be global and transnational in its outlook. None of that is a bad thing until this group says to itself, 'we must be the representatives of the peoples of the world,' the international global civil society claim.

The elite includes folks who work for transnational corporations and people that work for NGOs. There are the rich elites and the poor elites, the ones that make a lot of money working for certain kinds corporations and other organizations and the folks that work for the little NGOs that work cross-border. But it is a culture. It is a culture that wants to constrain the United States in many, many different kinds of ways, including in the war on terror, including in lots of other things - things that are not congenial to the agenda of this administration and more broadly are not congenial to the agenda of the United States.

The question is, how do you wind up influencing that. The answer is one that has been largely missed by the Bush administration, is you have to understand it as a culture. If

you are going to understand the NGO culture as a culture, then you have to understand that you cannot work with that culture by saying we will look at the short-term issues and try to find common ground with the NGOs on this thing or that thing. Because we want to work with NGOs, and we do not want to get them mad at us, and we do not want to have nasty things in *The New York Times* said about us, so we will try to find some way to find some common ground, paper over differences, and constantly move forward on that basis.

That leads to a big mess, and that mess is encapsulated in the ICC disaster. What the ICC disaster came down to was an endless amount of flirtation by the United States with this treaty. It played the tease and it is no surprise that the European proponents at the ICC wanted to sue for loss of affection. Because that is more or less what happened. The United States flirted and flirted, made many, many demands, yet at the same time it should have been possible at the beginning of that process to have looked down the road and to have said there is no possible way we are going where this is going, and it is better not to start flirting now than to wind up flirting and then breaking everybody's hearts.

That is what happens when you have administrations successively that want to be in the position of forever finding a compromise, forever papering over the difference, and then at the end of the day having to break hearts because they cannot go where everybody thought they were going to go. Better not to go there in the first place, and better to say so up front. You can only do that if you are willing to change a culture in which the NGOs, which are the engines of this process internationally - if you are willing to draw clear lines procedurally about what you are willing to do with NGOs and what you are not. You are willing to give them money and say go engage in that humanitarian activity over there, but we are not having you at the table negotiating the treaty - as, for example, I did with the landmines treaty. I did a great job, a spectacularly good job! But I should not have been there. I should not have in something that should have been a meeting of governments.

The US has got to be much more straightforward about drawing those procedural lines and in being tough on symbolic issues about the culture of NGOs. It must do this precisely in order to change that culture, and to shift that culture in the long term rather than saying we will avoid any fight over a symbolic issue in order to try to find common ground, and to save our ammunition for the ones that matter. It is more important over the long term to change the culture, to shift it in a direction that says democratic sovereignty is what matters.

Let me close by saying one thing about where this is going. Following 9/11 there was a move by various parties, including the Swiss government that began as saying, we are actually very sympathetic to the problems the United States is finding in combating terrorism. One of the things that seems difficult is that the current laws of war do not seem to accurately reflect, for one thing, what it means to be a terrorist, what kinds of activities are engaged in. We should have a meeting and discuss possible revisions to these laws of war in order to find ways that, at the beginning of this process, were discussed as being accommodative to the United States in combating terror.

The US government was approached in various ways, and in some respects gave some positive feelers. Meetings have taken place. What is interesting is that I now have four meetings on my agenda, one that I attended and another couple coming up in the next couple of weeks, in which the people who are putting together those meetings have said we have momentum going. I said, 'momentum for what?' Well, to revise the laws of war in order to wind up giving narrower definitions of terrorism in order to effectively constrain the United States, what it would intend to do and how it would intend to fight. We think that we could cook up a treaty and get going an international NGO campaign that would be ... I am hearing the landmines and ICC going off in the back of my head.

The question that I have for the Bush administration is, is it sending the right signals here. I cannot see any possible way in which it would ever be in the United States' interest to go after a treaty shaped by NGOs and shaped by the countries of the rest of the world that would not wind up constraining the US's ability to fight from what exists in the law as it stands. I cannot see any way in which a treaty like this would not amount, at least in some circumstances, to a get-out-of-jail-free card for terrorists. I cannot see the US going there.

The question I have is why is it not possible to announce, 'we are not in favor of this and we are not going where you are going.' We will be happy to send people to these meetings and tell you that. We are not going to sit down and discuss compromises, we are not going to discuss various arrangements in this.

Why is it not possible to take a hand in looking to shift the culture of NGOs and the culture of sort of international law making in this way? In the context of the war on terror that is an enormously important message to send, at least in the context of international terror, a vacuum in international security, that the nation state is back and the democratic sovereign is back not only as a sort of locus of power, but as the ideal to which ordinary people ordinarily aspire, and that is the thing which ought to be supported.

Questions

Question: There is a set of multilateral environmental treaties, among which is the Basel Treaty, which effectively is making it very difficult to have transshipments in scrap copper. Chile signed that, a major dealer in international copper. However, of course Chile did not sign it, it was the health ministry. That signature took place off-stage in an area that the trade ministry and the mining ministry did not even know about. Then they signed it and a few years later, the implementation came through.

To what extent are the NGO movements able to pick off nation states by working with sub-elements within the nation state to create coalitions against the national interest, but we do not know it until it is signed and delivered? Why do not nations back out in that case?

Professor Anderson: I guess I would say that there are differences in how this happens with different kinds of areas. If you are talking about security, national security/defence kinds of issues, there tends to be more coherence, even within the bureaucratic structures. The environmental area is the one that is most prone to fragmentation among

bureaucratic areas, partly because of the technicality of it both on the legal side and oftentimes on the technical, scientific, and engineering side.

There are not a large number of NGOs, which are sophisticated enough to engage in the kind of strategy that you are talking about. You are talking about the ones that have large budgets with the ability to have experts and people that are specialized and able to carry through the process of monitoring. I would say that environmental NGOs are the only groups that are able really to engage in it.

Question: Two points. One, you set up a kind of coalition of a combination between international organizations on the one hand and NGOs on the other and made the point that they need each other for legitimacy. It seems to me that there is a third force moving to which they are both increasingly turning, and that is the role of public international law. If you take the WTO, for instance, the key decision, the shrimp-turtle decision of the mid-1990s, was based on their reading of public international law, and they cited specifically the Rio agreement and other agreements. I think there is a third force, to which both are looking for legitimacy.

What about something like the World Trade Organization, where the situation is much more ambiguous? We are in it, its goals are free trade, which are goals of the United States. Yet, increasingly we see two things happening. NGOs will be increasingly an influential, and secondly, as you had with the new WTO legal system, you are beginning to get decisions that increasingly encroach upon democratic sovereignty.

Professor Anderson: I think the conservatives have a problem of consistency when it comes to trade and international organizations and these kinds of structures. You are quite right to raise public international law as being a third force of legitimacy to which people are reaching.

I think that there is a problem for conservatives with free trade. Just as liberal internationalists are willing to reach a set of issues that are seen as being too important for democracy, there is a tendency on the part of conservatives to sometimes privilege free trade above the democratic legitimacy of a particular nation state.

I think that is a question of consistency of principle for conservatives. Are conservatives willing to apply the same kind of standard to trade as properly they demand on, say, something like the Convention on the Rights of the Child, with its statements that say, the child has to be able to express itself. It is leading precisely in the direction that by having made trade a special case, we have signed on to an agenda that will erode sovereignty unless checked in some fashion. I think that signing on to mechanisms that commit us to adjudication processes that look as though they were purely private in nature, we have to recognize that they oftentimes have large public results.

Question: The Fukuyama thesis, that we have reached the end of history, the only legitimacy is liberal democracy, but this transnational progressive ideology is really something quite different from liberal democracy, therefore in a sense Fukuyama is wrong. Would you comment on these things?

Professor Anderson: I think that if I could answer that by complicating the picture that I presented of two idealisms in competition with each other. We have a range of idealistic positions that run from pure sovereignty for its own sake, to something like democratic sovereignty of nation states; to a soft multilateralism which is compatible with nation-state sovereignty but is also comfortable with anything more multilateral; to varieties of liberal internationalism, which range from having to have international permission for the use of force, but not for some of other things; until finally you have on the other end, a world government.

What is interesting about the debate between these positions is that the positions that I have described are the two interior positions; democracy and democratic sovereignty versus a form of liberal internationalism and there is still something to address as between the two. What is striking is the way that the war in Iraq has reshaped the discussion over sovereignty as its own value. Before the war in Iraq, the purest example of somebody who was willing to assert sovereignty for its own sake, independent of democracy as its own value, would have been Jeremy Rabkin. Nevertheless, people willing to argue in the course that one could not fight this war have eclipsed Jeremy on the left. So there has been a sharp, sudden movement on the left towards embracing the value of sovereignty purely for its own sake.

I think that the problem with liberal internationalism is fundamentally a deep one but ultimately still practical. It is that you cannot have democracy on a planetary level. The problem with democracy is that it is something, which works best with smaller numbers of people. What we call democracy in the United States actually represents a deep historic compromise between the efficiencies and the blessings of an ever-expanding common market, and democracy, which cannot be infinitely scaled up.

Question: The elites among the NGOs are anti-corporate, in many cases anti-technology, anti-trade, and in many cases, those are the very things that can bring about developing countries merging into the future, economic growth, development. Since NGOs from the north, from developed countries are mainly putting money in developing NGOs in the southern countries, how is there ever going to be a voice developed that will represent the poor people of the world, the non-elites of the world who are going to be hurt by these policies?

Professor Anderson: The question of NGOs in the poor countries in the south is fundamentally a cultural one. If you are someone who works for, say, an environmental NGO in Peru, you are either the bourgeoisie of Peru or are aspiring to become that. That desire to become part of NGOs in the south is usually by people who have some kind of abiding interest in whatever the issue is. It is also a question of personal identity about whom it is that they are identifying with culturally and socially. They stand in this very difficult position, mediating between the people below and their desire to be bourgeois actors within the larger world. They want to be respectable among people like you and me. They want to go to international conferences, they want to have visitors come from abroad and meet them to talk about this and that and human rights here and how many were massacred there. It is fundamentally a question of wanting to be this sort of point between these sorts of large numbers of often, usually, very poor people at the bottom and intermediating with this world outside.

You are also asking the question how can you teach these people in large part enough economics to know that when the people who are coming in that hand them a set of policies that are as crazy as what the NGOs handed to Sandanista in Nicaragua, that they will take it and say, 'You've got to be kidding.' There is no good answer to that, because these folks connection to the north is through these organizations. You have to give them training in universities that are going to teach them Economics 101.

Question: In your schemata, you delineated ideological differences in relation to whether people favor sovereignty or whether people favor liberal internationalism. My perception is, people are willing to promote sovereignty as a goal even though perhaps those same people might have been promoting liberal internationalism in another context. I have seen that in other areas. Actually, the shrimp-turtle case is a classic example of that. In that case, the environmentalists in the US were trying to impose a domestic environmental law, Section 601 of the Endangered Species Act, on a number of Southeast Asian countries and trying to foster that, regardless of the democratic sovereignty of those countries, in the context of an international rule in WTO. Their justification for much of that was the sovereignty of the US in being able to impose restrictions on imports from those countries.

Professor Anderson: Environmental organizations are driven more by ultimate aims than almost any of the other sort of NGO in this sector. Many of the other ones are much more conflicted about that question. I was taken by surprise in the war in Iraq by the willingness of people to suddenly reach to the sacred sovereignty of Iraq in ways that took me by surprise. I think in particular in the environmental organizations, I think that there is a tendency to be driven by ultimate aims.