« Les acteurs non étatiques dans la globalisation juridique »

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Table ronde organisée par

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Chaire M.A.D.P. séminaire de droit administratif comparé, européen et global :

The role of non-state diplomacy in normative global governance

I. Public/private power-sharing in foreign affairs

- Incremental change often occurs at an imperceptible pace which, when discovered, appears to be a new phenomenon (normative force of the factual, Jellinek)

- Empowerment of civil society (NGOs and Transnational Corporations, TNCs, as useful socialactors) as a driving force for (!) social justice is extending from domestic to global governance

- Beyond economic (TNCs) and social (NGOs) concerns, <u>civil society is developing political global governance capacities</u> via
  - Political willingness
  - Agency / responsibility
  - Organizational structures / capacity building

- To influence political processes,
- To provide public goods and
- To participate in collective problem-solving.

- This creates a <u>need for a more synergetic relationship between public and private global governance activities</u> reinforcing each other in
  - defining governance priorities
  - accommodating conflicting interests on the basis of mutual dependencies.
- In the end, governments must make policy decisions for the public good balancing competing demands (listening to the cacophony of claims but maintaining a holistic view and responsibility)

II. Spread of diplomatic procedures

- Civilizing, value added virtues of diplomacy: role of diplomatic instruments in global public order, <u>diplomatic culture</u> of civilized and civilizing activities
- Extended epistemic community <u>"thinking and acting diplomatically"</u>: <u>"Diplomatic point of view"/ diplomacy –as-civility</u> (diplomatic ability to defuse confrontation through policy-relevant commonalities) via the diplomatic skills of

  - Peaceful problem-solving
  - Engagement rather than exclusion
  - Mutual respect / reciprocal restraint (in order to win the collaboration of others and build institutions/trust that will serve us in the longer run)
  - Ethics
  - consensus / compromise for sustainable solutions (cooperative, added-value, win-win)

III. Issues of non-state diplomatic activities

- Corporations as political actors (part of res publica) / contributing to peacefully solving collective action problems and conflicts that call for the extension of public policy beyond the state (global governance) to foster the public interest; Private in form, public in purpose

- <u>Provision of common goods and social services</u>:

  - civil society as welfare provider / social engineer owning, operating and managing public functions (infrastructure, education, electricity, water, health, communication) and implementing social and environmental standards
  - In the absence / unwillingness of the state
  - Under limited and time-bound circumstances (state not abdicating its core responsibilities)
  - Social responsibility is shifting the nature of global governance to avoid power / regulatory vacuum

- <u>Enforcement of Human Rights</u>: to respect, protect and remedy

  -Binding force of Human Rights for non-state actors: "Human Rights binding all organs of society" (Preamble and Art. 28 UN Declaration on Human Rights 1948), Third-party effect ("Drittwirkung") of fundamental rights and via contractual relationships between government and private actors

- Public Diplomacy: strategic concern, international reputation in a multicultural world

- Peace and security (untapped potential of the business sector for a corporate conflict prevention agenda): to provide and guarantee an environment of political, economic, social stability for business (stability as peace dividend) via:

  - Business intelligence / networking
  - Risk / conflict impact assessment
  - Conflict handling, mediation, negotiation.

- These are new (21st century) empirical developments of diplomatic activities by non-state actors recognized and supported by the political agendas of international organizations in the following documents (UN / NGOs) in building coalitions for change:

- "Doing business in a multicultural world: Challenges and opportunities", a joint report by the United Nations Alliance of Civilizations and the United Nations Global Compact Office (7 April 2009)
- "Protect, Respect and Remedy: a Framework for Business and Human Rights", Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Human Rights Council, A/HRC/8/5 (7 April 2008)
- "Setting Boundaries: Clarifying the Scope and Content of the Corporate Responsibility to Respect Human Rights", submission by the Institute for Human Rights and Business (December 2009)
- "Enabling economies of peace: Public policy for conflict-sensitive business", commissioned by the UN Global Compact (April 2005)
- "Global Compact Business Guide for Conflict Impact Assessment and Risk Management" (2002)

IV. Reasons for non-state diplomatic engagement (rights and obligations)

- Social: Corporate Social Responsibility (CSR) as a proactive political response by business to social pressure and public demand in a new logic of appropriateness and rationality (to manage social risks to its business operations as a "business of values"). CSR transcends the pure economic dimension
- Reputational: green-wash, blue-wash (Global Compact), naming / shaming by NGOs), doing good, looking good is good for business, image loss today will be customer loss tomorrow
- Moral: altruistic conscience or conviction or moral duty (situational embeddedness of corporate ethics, not at the discretion of management)
- Economical: profit enhancement, firms can do well by doing good, steep profit-reputation connection
- Constitutional: Republican theory of extended public/private constitutionalism. Entrepreneurial freedom is granted under the legal proviso (concession theory) of a (limited) responsibility for making societal peace more stable (reconciling individual freedom with the unity of society in the context of distributive justice as fairness)
- Philosophical: axiom – where there is power, there must be responsibility; ownership entails social responsibility, its use should also serve the common good. Recognition of

- Political: delegated, initiated, supported or tolerated by state (sharing of state responsibility due to governance deficits = lack of governmental will or capacity))
- National variations in business behaviour at international level (rules-setting and execution of public functions) according to different levels of constitutional socialization (example: Art. 14 GG: Ownership entails responsibility): from national to transnational socialization of companies co-responsible for the global common good
- Limits: Threat of perceptions of an abuse of power (ius cogens)

- Own assessment by experience: political / diplomatic engagement driven by and responding to growing global public opinion, pressure and societal expectation (global public conscience) to participate in problem-solving requiring collective action at the international level – as manifested in UN/NGO documents -:

    - with the empirical shift of factual authority for decision-making in public affairs from the public to the private sector public law values and responsibilities for public order are extended to the private sector within a new system of coordination: Good Global Governance in Global Public Policy Networks (within the shadow of legal state authority / competence-competence / public second-order governing in the core governance functions)

    - No double-standard for dealing with public affairs whether managed by public or private actors, rather normative equality

    - Expansion / outsourcing of diplomatic functions should not undermine the public law values, rather: normative force of the factual.

V. Legitimacy, subsidiarity, expectancy

- Where is the legitimacy for this transformational change in International Community?

- Not: in formalised, theoretically disputed criteria, but in expectation, credibility and general acceptance by the global public replaces (out-put) legitimacy: the effect of world public opinion on the future direction of global public affairs will grow further in importance.

- Not only a fundamental role shift of government / civil society, but empirical reversal / inversion of principle of subsidiarity (in the shadow of public hierarchy):

    - Formerly: primacy of state, private initiative as secondary and complimentary

    - Today: primacy of civil society, state as fall-back authority (but with guidelines competences), public affairs become a common (governmental / civil society) space

- Expectancy of global public as (practical and normative) driving force for transformational change (revival of pragmatic realism)

VI. Normative impact of non-state actors on global governance

- Norm-entrepreneurship by corporate actors as part of a broader advocacy network

- Societal change in norm-making: no substitute for state regulation but a realistic surrogate

- Diplomatic engagement in problem-solving by civil society has also a normative impact

- New forms of private or mixed regulation (norm-creation, norm-control) had to be found for this political, economic and social empowerment leading to ("seat, voice, not necessarily vote") a multi-layered, normative pluralism beyond traditional domestic and international legal structures

   - International treaties (Ottawa Convention on the Ban of Landmines, Bio weapons Convention, ICC Statute, Kimberley Process (Blood Diamonds), Kyoto Protocol)
   - Regimes / codes of conduct
   - Soft law (normative power via persuasion/influence rather than legal coercion, vertical and horizontal extension)

- But within a constitutional framework (public law values as embodied in constitutional and international norms) of global governance: constitutional pluralism

- Global Governance rules (rule of law / norms, sustainability, efficiency, openness, accountability, solidarity etc.) together with the diplomatic principles

   - Peaceful problem-solving
   - Engagement rather than exclusion
   - Mutual respect / reciprocal restraint
   - Ethics
   - Consensus / compromise for sustainable solutions (cooperative, added-value, win-win)
   Constitute the normative structure / guidelines for the transnational engagement of non-state actors (means to serve ends, not ends in itself)

   - Normative impact of non-state diplomacy is still extendable – via transnational solidarity – to unsolved problems in the transnational public sphere, such as:
      -conflict prevention
      -inter-cultural / religious dialogue
      -Peace-keeping and –building
      -terrorism / security policy

- In the shifting sands of global politics, we are experiencing today a foreign policy privatization and procedural and substantive socialization of diplomatic functions.
- Remaining challenge: to reconcile the tension between citizen participation and system effectiveness embedded in a New Architecture for Global Governance (coordination of individual interests with general interests)

Bibliography

Auby, Jean-Bernard, La Globalisation, le droit et l'État, 2ème éd. 2010

Dickinson, Laura A., Public Law Values in a Privatized World, in: Yale Journal of International Law 2006, vol. 31, p. 383

Keck, Margaret / Sikkink, Kathryn, Activists beyond borders, advocacy networks in international politics, Cornell University Press 1998

Knill, Christoph / Lehmkuhl, Dirk, Private Actors and the State: Internationalization and Changing Patterns of Governance, in: Governance 2002, vol. 5, p. 1

Murty, B.S., The International Law of Diplomacy. The Diplomatic Instrument and World Public Order, New Haven Press 1989

Scherer / Palazzo / Baumann, Global rules and private actors – towards a new role of TNC in the Global Governance, in: Business Ethics Quarterly 2006, vol. 16, p. 505

Tully, Stephen, Corporations and International Lawmaking, Martinus Nijhoff Publishers 2007

Voina-Motoc, Iulia, Conceptions of Pluralism and International Law, in: Ruiz Fabri / Jouannet / Tombievitz (ed.), Select Proceedings of the European Society of International Law 2008, p. 401

Wenger / Möckli, Conflict prevention. The untapped potential of the business sector, Lynne Rienner Publishers 2003