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BOOK REVIEW ESSAY

DEFYING THE THEORETICAL CONSTRAINTS OF STATE-CENTRIC APPROACHES: A REVIEW OF *NON-STATE ACTORS IN INTERNATIONAL LAW*

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This review of Non-State Actors in International Law*, edited by Math Noortmann, August Reinisch and Cedric Ryngaert (Hart Publishing, 2015), focuses on the constraints of state-centric approaches in accurately depicting the role and status of non-state actors in the international arena. As the book presents a comprehensive examination of the influence of diverse entities in a variety of fields, such limitations are evidenced and inevitably lead to the reassessment of novel theoretical standpoints, as well as to the recognition that a multidisciplinary approach is much needed in order to advance further studies on the issue.*

Keywords: non-state actors, international law theory, international relations

1. INTRODUCTION

The growing intervention of non-state actors (NSAs) in the international arena involves structural changes that defy the predominant state-centric conception of the international legal system.[1] For a long time, NSAs have been excluded from systematic examinations and discourses on international law.[2]

In recent times, however, the role and status of NSAs in the international arena has emerged as a significant area of study in both international law and international relations. A substantial amount of literature has accomplished the already difficult goal of placing the focus of attention, at least to some degree, on NSAs.[3] In this context, Math Noortmann, August Reinisch and Cedric

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[1] On the state-centric conception of the international legal system, see Jan Klabbers, '(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors' in Jarna Petman and Jan Klabbers (eds), *Nordic Cosmopolitanism: Essays in International Law for Martti Koskenniemi* (Martinus Nijhoff 2003) 351, 354–57; and Barbara K Woodward, *Global Civil Society in International Lawmaking and Global Governance* (Martinus Nijhoff 2010) 2.

[2] Math Noortmann, 'Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or Bringing the Participants Back In?' in Math Noortmann and Cedric Ryngaert (eds), *Non-State Actor Dynamics in International Law: From Law-Takers to Law-Makers* (Ashgate 2010) 153, 154.

[3] See, among many others, Philip Alston (ed), *Non-State Actors and Human Rights* (Oxford University Press 2005); David Armstrong and others (eds), *Civil Society and International Governance: The Role of Non-State Actors in Global and Regional Regulatory Frameworks* (Routledge 2011); Bas Arts, Math Noortmann and Bob Reinalda (eds), *Non-State Actors in International Relations* (Ashgate 2001); Andrea Bianchi (ed), *Non-State Actors and International Law* (Ashgate 2009); Jean d'Aspremont (ed), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011); Rainer Hofmann and Nils Geissler (eds), *Non-State Actors as New Subjects of International Law: International Law – From the Traditional State Order towards the Law of the Global Community: Proceedings of an International Symposium of the Kiel-Walter Schucking* (Duncker & Humblot 1999); Klabbers (n 1); Terry

Ryngaert have undertaken the great challenge of reflecting and engaging the various positions and opinions on the subject, providing a general overview of the discourses on NSAs in international law.

Non-State Actors in International Law[4] not only reviews the main theoretical frameworks that currently relate to NSAs from a legal standpoint (Part I), but also examines the most relevant areas of international law that allow an understanding of the intervention by NSAs in international dynamics (Part II), as well as the main actors in that category (Part III). In addition, it highlights the value of adopting a multidisciplinary approach, incorporating the perspectives provided by the theory of international relations (Part IV).

The main difficulties of undertaking this task are recognised by the editors in the introduction to the volume:[5] (i) in studying NSAs, ontological and epistemological confusion may arise as a result of the centrality of international legal personality in the development and understanding of international law; and (ii) the diversity of existing NSAs limits their definitional bond to the fact that they are not states, yet somehow still participate in the international system. These obstacles seem to shape most of the practical complexities and theoretical challenges that should be overcome in order to adequately incorporate NSAs into a theory of international law. Throughout the book they are dealt with, in one way or another, by all the contributors.

In this review, I will trace the elements of each chapter that reveal concrete examples of the first obstacle. In the next section, I will address Parts II and III of the book, contrasting them with the views of other scholars and identifying how state-centrism has given rise to theoretical and practical complexities concerning different branches of international law and with regard to a myriad of NSAs. In Section 3, I will comment on the theoretical alternatives presented in Parts I and IV of the volume, examining the extent to which each of them may help in overcoming the said difficulties. A general assessment of the volume is provided in the final remarks.

2. Diverse Actors, Different Spheres: Similar Constraints

While Part II of the book deals with the law on the use of force, international humanitarian law (IHL), international human rights law (IHRL) and state responsibility, Part III focuses on investors, multinational corporations (MNCs), international governmental organisations (IGOs), non-governmental organisations (NGOs) and armed groups. Although various approaches are adopted by the contributors, when analysed as a whole all chapters accurately reflect how NSAs are transversally relevant in most areas of international law.[6] In addition, they are rich

Macdonald, *Global Stakeholder Democracy: Power and Representation Beyond Liberal States* (Oxford University Press 2008); Noortmann and Ryngaert (n 2); Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2004); Gunther Teubner (ed), *Global Law Without a State* (Dartmouth 1997).

[4] Math Noortmann, August Reinisch and Cedric Ryngaert (eds), *Non-State Actors in International Law* (Hart 2015).

[5] Math Noortmann, Cedric Ryngaert and August Reinisch, 'Introduction' in Noortmann, Reinisch and Ryngaert, ibid 1, 2.

[6] The chapters not only depict the diversity of actors but also the fragmented scenery of international law – that is, the proliferation of autonomous or self-contained regimes which frequently have rules of their own. See generally

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in examples of the participation of NSAs in the international realm, examining international dynamics from novel standpoints and questioning reductionist perspectives.

Christian Henderson (Chapter 5) focuses on the law on the use of force by states against NSAs, especially when they are perceived as terrorists and located outside the territory of the state that intends to use force. In an effort to adapt the rules apparently conceived to deal with interstate situations, he suggests that the aforementioned scenarios should be framed within the legal structure provided by the prohibition established by Article 2(4) of the UN Charter[7] and customary international law, as well as its accepted exceptions.[8] In this vein, he explains that states have predominantly taken in their hands the use of force in response to terrorism as a matter of self-defence, a position that is possibly supported by the lack of reference in Article 51 of the UN Charter to states as authors of the armed attack – as noted by the separate opinion of Judge Higgins in the International Court of Justice (ICJ) *Wall* advisory opinion – and by state practice since 9/11.[9] This view is defended with fervour by Jordan Paust (Chapter 13), who holds that self-defence against NSAs is permissible under both the UN Charter and customary international law, even if there is no consent by the host state, no attribution of the NSA's actions to that state or a situation that amounts to an international or non-international armed conflict taking place, as long as necessity and proportionality are respected.[10] However, these stances are extremely controversial, as highly qualified publicists[11] and seminal

Martti Koskenniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group of the International Law Commission (13 April 2006), UN Doc A/CN.4/L.682. This may also account for the diverse theoretical approaches used by the contributors, which may vary according to the specific actor being examined and/or depending on the area of law under analysis, as well as for some minor overlapping between different chapters.

[7] Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI (UN Charter).

[8] Christian Henderson, 'Non-State Actors and the Use of Force' in Noortmann, Reinisch and Ryngaert (n 4) 77, 80–81.

[9] ibid 83–84. This position is also explained by Maurice Kamto, *L'agression en droit international* (Pedone 2010) 215; John D Becker, 'The Continuing Relevance of Article 2(4): A Consideration of the Status of the UN Charter's Limitations on the Use of Force' (2004) 32 *Denver Journal of International Law & Policy* 583; Rein Müllerson, 'Jus ad bellum: plus ça change (le monde), plus c'est la même chose (le droit)? (2002) 7(2) *Journal of Conflict and Security Law* 175; Nicholas Tsagourias, 'Non-State Actors in International Peace and Security: Non-State Actors and the Use of Force' in d'Aspremont (n 3) 326, 329–33. See also UNSC Res 1368 (12 September 2001), UN Doc S/RES/1368; UNSC Res 1373 (28 September 2001), UN Doc S/RES/1373; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion [2004] ICJ Rep 136 (*Wall* Advisory Opinion), separate opinion of Judge Higgins [33]; *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)*, Judgment [2005] ICJ Rep 168, separate opinion of Judge Kooijmans [25]–[31], and separate opinion of Judge Simma [8]–[13]; North Atlantic Treaty Organization, 'Statement by the North Atlantic Council', Press Release (2001) 124, 12 September 2001, http://www.nato.int/cps/en/natolive/news_18553.htm?selectedLocale=en; Organization of American States, 'Ataques terroristas contra Estados Unidos son ataques contra todos los países americanos, afirman cancilleres', C-194/01, 21 September 2001, http://www.oas.org/OASpage/press2002/sp/a%C3%B1o99/a%C3%B1o2001/sept01/194.htm (in Spanish).

[10] Jordan Paust, 'Armed Opposition Groups' in Noortmann, Reinisch and Ryngaert (n 4) 273, 291–92.

[11] Müllerson (n 9) 177; Thomas M Franck, 'Who Killed Article 2(4)? Or Changing Norms Governing the Use of Force by States' (1970) 64 *American Journal of International Law* 809, 811–20; Thomas M Franck, 'When, If Ever, May States Deploy Military Force Without Prior Security Council Authorization' (2000) 4 *Singapore Journal of International and Comparative Law* 367, 371; W Michael Reisman, 'Article 2(4): The Use of Force in Contemporary International Law' (1984) 78 *American Journal of International Law* 79. See also Zakaria

case law[12] seem to point in a different direction. To some extent, Higgins' view that Articles 2(4) and 51 of the UN Charter remain open to multiple interpretations[13] still appears to be true.

Even if one concedes that 'there is now a right of self-defence against non-state actors regardless of any state involvement',[14] Henderson is conscious that the most problematic issues stem from their location within the territory of another state and from considerations of necessity and proportionality.[15] Hence, the modular part of the chapter analyses whether and how the sovereignty barrier might be overcome in this regard. The argument is based upon the shift of state practice towards accepting forcible responses limited to targeting NSAs and their bases.[16] Consequently, while proportionality seems to be covered, in principle, by the fact that the actions will be directed only to the NSAs concerned, necessity would require the state either to request the host state to take the appropriate measures or request consent to do so itself.[17]

To a certain degree, the author seems willing to dismiss state-centric approaches even if that involves accepting that international law is not appropriately prepared to deal with contemporary forms of terrorism.[18] Thus, his position reflects the idea that the UN Charter must be interpreted in the contemporary context[19] as a living instrument that is continuously shaped by and adapted to the interests of the parties.[20] However, Henderson is cautious in that he explains that his perspective, rather than a weakening of the rules, is a recognition of what necessity and proportionality mean nowadays, which prevents NSAs from acting with impunity while still allowing the use of force regime to be 'seen through the prism of state sovereignty'.[21]

Within the framework provided by IHL, Hans-Joachim Heintze and Charlotte Lülf (Chapter 6) deal with humanitarian aid organisations devoted to mitigating the consequences of war. It should be noted that although the rights and obligations of NSAs under IHL have been especially studied, focus has been placed mainly upon armed groups[22] while the status and role of NGOs in

Daboné, *Le Droit International Public Relative aux Groups Armés Non Etatiques* (Schulthess/University of Geneva/LGDJ 2012) 304–05.

[12] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)*, Merits, Judgment [1986] ICJ Rep 14 [195]; *Wall* Advisory Opinion (n 9) [139]; *Armed Activities on the Territory of the Congo* (n 9) [143]–[47]. However, Henderson argues that in the ICJ's decisions in the *Nicaragua* and *Armed Activities* cases, 'far from ruling that self-defence can only occur against a state or state-controlled armed attack, the Court was instead silent as to the possibilities for self-defence if the action taken was restricted to the non-state actors': Henderson (n 8) 91.

[13] Rosalyn Higgins, 'International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law' (1991) 230 *Recueil des cours de l'Academie de droit international de la Haye* [*Hague Academy of International Law*] 307.

[14] Henderson (n 8) 90–91.

[15] ibid 87–88.

[16] ibid 91–94.

[17] ibid 96.

[18] Lauri Mälksoo, 'Contemporary Russian Perspectives on Non-State Actors: Fear of the Loss of State Sovereignty' in d'Aspremont (n 3) 126, 136.

[19] Müllerson (n 9) 177.

[20] Oscar Schachter, *International Law in Theory and Practice* (Martinus Nijhoff 1991) 118–19.

[21] Henderson (n 8) 96.

[22] See, eg, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2005) 271–312; Jean-Marie Henckaerts, 'Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law' (2003) 27 *Collegium* 123–38; Marco Sassòli, 'Taking Armed Groups Seriously: Ways to

this area of international law has hardly been addressed.[23] Therefore, this is a very welcome contribution to the study of NSAs in this field.

After distinguishing the unique status of the International Committee of the Red Cross (ICRC) from other components of the Red Cross and Red Crescent movements, IGOs and NGOs,[24] the authors highlight that national societies of the Red Cross and Red Crescent may sometimes play roles in the context of non-international armed conflicts, although they need the consent of the state party and, in practice, also of the NSA involved in the conflict.[25] They also examine the situation of humanitarian NGOs at large, pointing out that their activities have similarly fuelled debate on the issue of sovereignty and state consent in order for humanitarian aid to be carried out.[26] In addition, they note that protection by IHL 'is to a great extent denied'[27] and that, although the legal framework has adapted to the growing practice of humanitarian assistance and relief by various actors, there are still claims to revise and promote a more flexible understanding of neutrality and impartiality.[28] In that respect, they highlight that in IHL these organisations are 'merely mentioned in comparison to the ICRC, and are only given a limited task and protection by concrete provisions'.[29]

The difficulties mentioned by Heintze and Lülf can be framed within the observations made by the former President of the ICRC, Jakob Kellenberger, who has emphasised that the 'reinforcement of international law rules and mechanisms lies in the hands of States'.[30] In fact, even if customary IHL has progressively included specific rules of protection for any humanitarian organisation,[31] its respect is still predominantly dependent on the favourable disposition of states and, to some extent, on the willingness of armed groups.

This brings us back to the contribution of Jordan Paust (Chapter 13), who explains that armed groups can perform different activities, some of them with a degree of formal recognition in international law. He describes how nations, peoples, tribes, belligerent groups and insurgent groups

Improve their Compliance with International Humanitarian Law' (2010) 1 *Journal of International Humanitarian Legal Studies* 5–51; Cedric Ryngaert, 'Non-State Actors in International Humanitarian Law' in d'Aspremont (n 3) 284; Liesbeth Zegveld, *Accountability of Armed Opposition Groups in International Law* (Cambridge University Press 2002).

[23] A few exceptions are Clapham (n 22) 310–12; Claudie Barrat, *Status of NGOs in International Humanitarian Law* (Brill/Nijhoff 2014); and Pascal Bongard and Jonathan Somer, 'Monitoring Armed Non-State Actor Compliance with Humanitarian Norms: A Look at International Mechanisms and the Geneva Call Deed of Commitment' (2011) 883 *International Review of the Red Cross* 673–706.

[24] Hans-Joachim Heintze and Charlotte Lülf, 'Non-State Actors under International Humanitarian Law' in Noortmann, Reinisch and Ryngaert (n 4) 97, 99.

[25] ibid 106.

[26] ibid 108.

[27] ibid 106.

[28] ibid 107.

[29] ibid 111.

[30] Jakob Kellenberger, 'Ensuring Respect for International Humanitarian Law in a Changing Environment and the Role of the United Nations', 60th Anniversary of the Geneva Conventions – Ministerial Working Session, 26 September 2009, https://www.icrc.org/eng/resources/documents/statement/geneva-conventions-statement-260909.htm.

[31] Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I: Rules* (Cambridge University Press/International Committee of the Red Cross 2005, revised 2009) 105–09, r 31.

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engaging in violence against a state or other NSA throughout history have been granted some kind of formal participatory status,[32] as can be observed in the application of customary law with regard to such belligerents[33] and insurgent groups.[34] He argues that some specific ways of waging war – such as through terrorism, piracy, and the use of mercenaries, brigands and bandits, as well as organised criminal activities – have been specifically outlawed.[35] In this respect, it should be noted that the performance of prohibited acts does not necessarily exclude the application of IHL or consideration of the entities that carry out the acts as armed groups, provided that the legal requirements for the situation to amount to an armed conflict are met.[36]

In addition, Paust holds the view that any armed conflict can be internationalised if its territorial component exceeds the jurisdiction of any one state, or if there is any outside intervention in the fighting by armed forces of another state, nation or people, regardless of who they support.[37] Despite being a fair attempt to extend greater levels of protection by IHL in a significant number of situations, it should be noted that this position is difficult to reconcile with either the text of Common Article 2 to the 1949 Geneva Conventions[38] and of Article 1(3) and (4) of Additional Protocol I of 1977,[39] or with the ICRC's authoritative interpretation of their content.[40]

In any case, this contribution provides a grasp of the importance of armed groups in the context of IHL, as they increasingly tend to play leading roles in a world where non-international armed conflicts prevail in number over those of an international character.[41] As noted by Paust

[32] Paust (n 10) 274.
[33] ibid 279–80.
[34] ibid 280–83.
[35] ibid 286–91.
[36] Pierre Hauck and Sven Peterke, 'Organized Crime and Gang Violence in National and International Law' (2010) 878 *International Review of the Red Cross* 407, 429–34; Jennifer Hazen, 'Understanding Gangs as Armed Groups' (2010) 878 *International Review of the Red Cross* 369–86.
[37] Paust (n 10) 284–85.
[38] 'In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance …': Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (entered into force 21 October 1950) 75 UNTS 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (entered into force 21 October 1950) 75 UNTS 85; Geneva Convention (III) relative to the Treatment of Prisoners of War (entered into force 21 October 1950) 75 UNTS 135; and Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287.
[39] '3. This Protocol, which supplements the Geneva Conventions of 12 August 1949 for the protection of war victims, shall apply in the situations referred to in Article 2 common to those Conventions. 4. The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations': Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I) (entered into force 7 December 1978) 1125 UNTS 3.
[40] International Committee of the Red Cross (ICRC), 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?', *ICRC Opinion Paper*, March 2008, https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf.
[41] See data available from the Uppsala Conflict Data Program, http://www.pcr.uu.se/research/ucdp.

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in terms of 'formal recognition', IHL directly addresses armed groups, imposing specific obligations upon them.[42] However, one of the unresolved challenges of this field is how to achieve greater levels of respect for the law by such entities,[43] especially taking into account that international rules are agreed by states.[44] In this regard, in an attempt to overcome the difficulties of dealing with a state-centric framework and to achieve a higher degree of effectiveness in the application of IHL rules by NSAs, some arguments and strategies have been put forward concerning the possible participation of armed groups in the creation of international law through different mechanisms.[45]

The difficulties of relying on state consent reappear in the sphere of IHRL. Manfred Nowak and Karolina Miriam Januszewski (Chapter 7) point out that by focusing on the state's role as guardian of human rights and relying on their enforcement at the national level, '[e]fforts to establish explicit horizontal international human rights obligations for non-state actors have until now failed'.[46] After adopting the view that current international dynamics have caused 'the state-centric construction of international human rights law to totter',[47] the authors refute the idea that there are theoretical constraints that prevent the consideration of NSAs as subjects of international law bearing international obligations and, building on Rosalyn Higgins' arguments, they consider it an issue of state interest and political will leading to an international consensus, but not of immutable conceptual barriers.[48]

In that vein, although the predominant perspective places human rights violations within a vertical (states vis-à-vis citizens) and static system, the authors hold that the existence of horizontal relationships is conceptually dependent on the understanding one adopts of the meaning and purpose of human rights.[49] Hence, one of the core ideas of the chapter is that the equal entitlement of every individual to live a life in dignity means – as it has been recognised by modern moral and political theory – that the 'effective realisation of human rights thus logically implies a broad conception of claims against all actors able to affect the dignity of a human person'.[50] This type of approach has been advanced in recent literature by prestigious authors in the

[42] Yves Sandoz, Christophe Swinarski and Bruno Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC 1987) para 4529, fn 18; Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge University Press 2002) 65–67.
[43] See, eg, ICRC, 'Improving Compliance with International Humanitarian Law', ICRC Expert Seminars, October 2003, https://www.icrc.org/eng/assets/files/other/improving_compliance_with_international_humanitarian_law.pdf.
[44] Henckaerts (n 22) 126–27; Moir (n 42) 54–55.
[45] eg, Ezequiel Heffes and Marcos Kotlik, 'Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime' (2014) 895/896 *International Review of the Red Cross* 1195–224; Jann Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups' (2011) 882 *International Review of the Red Cross* 443–61; Bongard and Somer (n 23) 673–706; Sassòli (n 22) 13; Jonathan Somer, 'Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict' (2007) 867 *International Review of the Red Cross* 661–62.
[46] Manfred Nowak and Karolina Miriam Januszewski, 'Non-State Actors and Human Rights' in Noortmann, Reinisch and Ryngaert (n 4) 113, 151.
[47] ibid 115.
[48] ibid 118–23.
[49] Ibid 124–25.
[50] ibid 127.

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field,[51] and Nowak and Januszewski even identify the idea of 'an "all-round" effect of human rights' with the widely accepted understanding that they are a means to challenge and tame power, which can be traced back to social contract theories.[52]

The position presented by Nowak and Januszewski challenges the liberal distinction between public and private spheres, recognising that it does not reflect current international dynamics, that it leaves outside the scope of human rights very relevant issues such as family violence, gender-based violence and domestic workers' rights, and that it prevents the acceptance of private actors as bearers of human rights obligations.[53] In fact, when confronted with the reality of significant power shifts towards multiple NSAs, the legitimacy of the state-centric paradigm of IHRL is questioned, especially if one attempts to understand this legal regime as centred on the empowerment of the rights holder.[54] In this line, Philip Alston has warned[55] that:

> [IHRL's] aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors.

Of course, the authors recognise that there have been some attempts to modify the exclusively vertical understanding of human rights. This can be observed in the African human rights law instruments, in the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict, and in the development of international criminal law. In addition, a series of 'soft law' instruments deal with human rights obligations of transnational corporations, IGOs and NGOs, mainly as a result of demands regarding their accountability and transparency, although they only set general guidelines which do not cover the whole myriad of human rights, and they lack monitoring mechanisms.[56] Despite the fact that these experiences lead them to conclude that 'the existent vertical human rights regime is not that easily transposable to the horizontal level',[57] Nowak and Januszewski emphasise that it is indisputable that NSAs have a negative obligation to respect human rights and, when they take over governmental functions and exert a degree of control, also positive obligations. In this sense, regardless of how their accountability is achieved, the centre of any analysis should still be the right of the victim to obtain adequate reparation for the harm suffered.[58]

[51] eg, Andrea Bianchi, 'Globalization of Human Rights: The Role of Non-state Actors' in Teubner (n 3) 179; Clapham (n 22).
[52] Nowak and Januszewski (n 46) 129–32.
[53] ibid 132–35.
[54] ibid 135–37. On different aspects concerning legitimacy challenges faced by IHRL, see Johan Karlsson Schaffer, Andreas Føllesdal and Geir Ulfstein, 'International Human Rights and the Challenge of Legitimacy' in Andreas Føllesdal, Johan Karlsson Schaffer and Geir Ulfstein (eds), *The Legitimacy of International Human Rights Regimes* (Cambridge University Press 2013) 1.
[55] Philip Alston, 'The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?' in Alston (n 3) 3, 6.
[56] Nowak and Januszewski (n 46) 151–54.
[57] ibid 159.
[58] ibid 159–61.

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Beyond the realms of IHL, IHRL and the law relating to the use of force, the roles and status of multiple NSAs in international law have been the object of growing attention from numerous scholars, both from a legal perspective[59] and within international relations theory.[60] In this context, the chapter by Math Noortmann (Chapter 10) and the contribution by Jan Wouters and Anna-Luise Chané (Chapter 11), focusing respectively on NGOs and MNCs, are good examples of the progressive expansion of a variety of NSAs that play influential roles in international dynamics affecting numerous branches of law.

Noortmann begins by pointing out that the limitations of international legal personality demand a pragmatic engagement with NGOs, while also recognising that the construction of the category as a negation of government entails difficulties for its analytical understanding.[61] Hence, he proposes a functional approach and argues that the rights and responsibilities of NGOs are interconnected and co-determined by their activities,[62] which are admittedly increasing day by day.[63]

The author considers that it is not possible to hold a clear analytical and conceptual distinction 'between social, political and legal spaces, between non-permeable private and public spaces, or between national, international, transnational and global levels of participation'.[64] He highlights that these distinctions do not exclude the examination of some of the activities of NGOs in law enforcement and dispute settlement, but they do appear as a barrier to considering their role in lawmaking.[65] In addition, he points out[66] that despite the predominant and biased discourse on accountability:

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[59] eg, Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford University Press 2007) 46–52; Hofmann and Geissler (n 3); Klabbers (n 1); Teubner (n 3).

[60] eg Armstrong and others (n 3); Arts, Noortmann and Reinalda (n 3); Macdonald (n 3); Slaughter (n 3).

[61] This has also been noted by Dianne Otto, who considers that it reveals the defensive position of states towards NGOs: Dianne Otto, 'Non-Governmental Organizations in the United Nations System: The Emerging Role of International Civil Society' (1996) 18 *Human Rights Quarterly* 107, 110. Moreover, Peter Willetts has signalled that the definition of NGOs has been highly controversial and necessarily entails, explicitly or implicitly, the adoption of a political position: Peter Willetts, *Non-Governmental Organizations in World Politics: The Construction of Global Governance* (Routledge 2011) 6.

[62] Math Noortmann, 'Non-Governmental Organisations: Recognition, Roles, Rights and Responsibilities' in Noortmann, Reinisch and Ryngaert (n 4) 205, 205–06.

[63] Nehal Bhuta, 'The Role International Actors other than States Can Play in the New World Order' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 61, 67; Karsten Nowrot, 'Legal Consequences of Globalization: The Status of Non-Governmental Organizations under International Law' (1999) 6(2) *Indiana Journal of Global Legal Studies* 579, 589–90.

[64] Noortmann (n 62) 212.

[65] ibid 213–16. Such activities have been thoroughly analysed by Steve Charnovitz, 'Nongovernmental Organizations and International Law' (2006) 100 *American Journal of International Law* 348; Steve Charnovitz, 'Two Centuries of Participation: NGOs and International Governance' (1996–97) 18 *Michigan Journal of International Law* 183–286. See also Ingrid Rossi, *Legal Status of Non-Governmental Organizations in International Law* (Intersentia 2010) 10–24, and Robert McCorquodale, 'The Individual and the International Legal System' in Malcolm Evans (ed), *International Law* (2nd edn, Oxford University Press 2006) 312, 324–26.

[66] Noortmann (n 62) 221. On the international rights and obligations of NGOs, see Anna-Karin Lindblom, *Non-Governmental Organisations in International Law* (Cambridge University Press 2005); on the accountability of NGOs, see Erik Bluemel, 'Overcoming NGO Accountability Concerns in International Governance' (2005) 31(1) *Brooklyn Journal of International Law* 139–206; Marek Havrda and Petr Kutílek, 'Accountability 2.0 – In

> There is no reason to assume that NGOs are incapable of violating primary rules that are established by the international community … [nor] to assume that no accountability and dispute resolution mechanisms involving NGOs can be agreed upon and established at the global level.

In sum, given the diversity and variety of the roles and activities conducted by NGOs at the global level, there are still constraints that prevent them from acquiring a legal status:[67]

> Understanding the legal status of internationally operating NGOs in the traditional terms of international legal personality or subjects of international law obfuscates the need for an inclusive legal system that entitles and obliges states, governments and non-governmental organisations equally.

In fact, NGOs are sometimes straightforwardly denied any kind of international legal status[68] or are simply ignored in seminal pieces on the subjects of international law,[69] as their role is perceived as a matter of extralegal influence.[70] Those who consider that NGOs may possess international legal personality are clearly in the minority.[71]

As an alternative, Noortmann suggests that the behaviour of these entities must be assessed according to rules of international and transnational law, while disputes between them and other actors should be settled through transnationally agreed procedures.[72] In the following section, the same author's view on transnational law will be discussed further.

In the case of MNCs, Wouters and Chané also acknowledge the complexities of the current discussion of their international legal personality and choose to focus on the rules that apply to them.[73] To that end, they highlight how the inadequacy of national legislation to deal with the multiple functions performed by the private sector has shifted attention towards international law, not only as a means of recognising rights for MNCs under international investment law

Search for a New Approach to International Non-Governmental Organisations' Accountability' in Jens Steffek and Kristina Hahn (eds), *Evaluating Transnational NGOs: Legitimacy, Accountability, Representation* (Palgrave Macmillan 2010) 157.

[67] Noortmann (n 62) 224.

[68] eg, Michael Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge University Press 1999) 86.

[69] eg, Ian Brownlie, *Principles of Public International Law* (6th edn, Oxford University Press 2003) 57–67. This phenomenon has also been noted by Fergus Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality' (2008) 9 *Melbourne Journal of International Law* 47.

[70] Rephael Harel Ben-Ari, *The Normative Position of International Non-Governmental Organizations under International Law* (Martinus Nijhoff 2012) 9; Jean d'Aspremont, 'International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?' in Noortmann and Ryngaert (n 2) 171, 178; Lindblom (n 66) 85; Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev'd edn, Routledge 1997) 97; Nowrot (n 63) 594–95.

[71] eg, Stephan Hobe, 'Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations' (1997) 5 *Indiana Journal of Global Legal Studies* 191, 209; Lindblom (n 66) 62–63; Malcolm N Shaw *International Law* (7th edn, Cambridge University Press 2014) 191.

[72] Noortmann (n 62) 223.

[73] Jan Wouters and Anna-Luise Chané, 'Multinational Corporations in International Law' in Noortmann, Reinisch and Ryngaert (n 4) 225, 228–30.

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and IHRL but also to hold them accountable for violations of human rights, environmental and criminal law.[74]

Albeit noting that the prevailing view recognises no direct obligations for MNCs under international law, the authors stress that there is a growing body of 'soft law' regulating their conduct in those three fields. In this vein, they explain that in the context of human rights this type of development has emerged both in IGOs (such as the United Nations, the Organisation for Economic Co-operation and Development and the International Labour Organization) and as self-regulation initiatives, although facing an ever-present resistance at the political, legal and business levels.[75] Moreover, criminal law initiatives are limited to liability clauses included in some international treaties regarding the protection of the environment and the fight against corruption, terrorism and organised crime.[76] However, they do observe a greater level of development in international environmental law, through the establishment of civil liability rules for private actors (although they rely on domestic implementation) and the proliferation of self-regulation initiatives.[77]

Although it was observed two decades ago that the regulation of corporations remained a function of national law,[78] the setting described by Wouters and Chané shows how MNCs have acquired rights at the international level, which contrasts with the persistent lack of international obligations. As another commentator has pointed out, '[w]hile there appears to be a great deal of recognition of the enhanced power of transnational corporations, it is unaccompanied by effective efforts to regulate them. In many matters, international law is silent'.[79] Considering the growing involvement of these entities in human rights abuses and environmental harm, the authors hold that 'the calls for stronger obligations of MNCs under international law persist'.[80]

The depiction of the role of the private sector in international law is completed by August Reinisch (Chapter 12), who examines how corporate and individual investors have become 'driving forces of the development of international law'.[81] To that end, he explains how dispute settlement in the realm of investment law has shifted from the exercise of diplomatic protection to investor-state ad hoc international arbitration, firstly contract based and now predominantly treaty based.[82]

This phenomenon, in conjunction with the question about the existence of direct rights of investors, has not only fostered debates about the possibility of endowing investors with some

[74] ibid 225–26.
[75] ibid 237–39.
[76] ibid 249–50.
[77] ibid 248–49.
[78] eg, Fleur Johns, 'The Invisibility of the Transnational Corporation: An Analysis of International Law and Theory' (1994) 19 *Melbourne University Law Review* 893.
[79] Claire Cutler, 'Critical Reflections on the Westphalian Assumptions of International Law and Organization: A Crisis of Legitimacy' (2001) 27 *Review of International Studies* 133, 146.
[80] Wouters and Chané (n 73) 251.
[81] August Reinisch, 'Investors' in Noortmann, Reinisch and Ryngaert (n 4) 253, 253.
[82] ibid 254–58. See also Cutler (n 79) 143–44.

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degree of international legal personality,[83] but has also allowed them to contribute directly to the development of international law and, particularly, of international investment law. In the adjudicatory process, the submissions and argumentation of investors can be accepted or dismissed by tribunals in shaping international standards.[84] In fact, it can be quite difficult to resist international claims presented by corporations which frequently have greater economic power than many states.[85] However, Reinisch notes that this situation has created a backlash, as states have started to modify international agreements which were beneficial for investors and to question the legitimacy and usefulness of investor-state dispute settlement.[86]

Once again, the chief resistance to the development of international law based upon the activities of NSAs appears to be directly linked to (the absence of) state consent. However, in this field such resistance may frequently be accompanied by disinterest on the part of private actors, who may not desire a status that would entail more obligations[87] but are nevertheless 'increasingly functioning as participants in the direct creation, application and enforcement of international law'.[88]

It is precisely the observation of current dynamics which leads Ramses Wessel (Chapter 9) to examine whether IGOs could be viewed as NSAs.[89] His core argument[90] is that:

> international organisations cannot be equated to groups of states but are separate international legal entities which are increasingly involved in international law-making and which – in the exercise of their managerial tasks – have become bureaucracies [… which] increasingly rely on international and external experts to deal with the complex (increasingly technical) questions that formed the reason for their creation in the first place.

Hence, he notes that the capacities of any entity reveal its independent position and he recognises that the ICJ doctrine of implicit legal personality, as presented in the *Reparation for Injuries* case,[91] can actually be helpful in understanding the separate position of IGOs in international law.[92] However, Klabbers has criticised this decision for apparently accommodating considerations of necessity but actually tying them to the intents and wishes of member states.[93]

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[83] Reinisch (n 81) 260–62.
[84] ibid 262–68.
[85] Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 *Leiden Journal of International Law* 477, 491.
[86] Reinisch (n 81) 270–71.
[87] Cutler (n 79) 143.
[88] ibid 144.
[89] Ramses Wessel, 'International Governmental Organisations as Non-State Actors' in Noortmann, Reinisch and Ryngaert (n 4) 185, 185.
[90] ibid 201.
[91] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion [1949] ICJ Rep 174.
[92] Wessel (n 89) 187–91. However, it should also be noted that this decision has been criticised in this regard, as it is not clear if the capacity to bear international rights and obligations is a precondition or a consequence of international legal personality: see, eg, Green (n 69) 55; Rossi (n 65) 31–32.
[93] Klabbers (n 1) 366.

In any case, in Wessel's view, the normative activity carried out by IGOs seems to highlight the increasing autonomy of many of them and can be seen as their 'non-state dimension'.[94] In particular, he claims that while international legal personality frames the question as a dichotomy, autonomy is a matter of degree which allows observation of the internal structure of IGOs and identification of the organs that make decisions on a daily basis. This produces a corporate will that is different from the wills of member states, thus implying a distinction between them and the international entity.[95] In this context, it is also possible to better understand how IGOs have progressively enabled the intervention of multiple NSAs, eventually opening up to cooperation and competition between governmental and non-governmental participants.[96]

Finally, Cedric Ryngaert (Chapter 8) examines how the rules on the international responsibility of states are insufficient in terms of accountability when international law is confronted with the activities of NSAs. In the first place, the author notes that the Articles on the Responsibility of States for International Wrongful Acts[97] may provide solutions in some cases where there is a sufficiently strong link between the state and the conduct of NSAs, in accordance with Articles 5, 8, 9, 10 and 11.[98] However, he highlights that Articles 5 and 9 include requirements which establish a threshold that 'may well result in non-attribution of non-state actor conduct to the state, even if the non-state actor is exercising elements of governmental authority'.[99] In addition, the strictness of the effective control standard, as applied by the ICJ with regard to Article 8, limits the chances of attributing the conduct of NSAs to states.[100] In turn, Article 10 is relevant only in the case of insurrectional movements which are successful in overthrowing the government and forming a new one, or in seceding from the state with which they are fighting. The acts of defeated movements and of those included in national reconciliation governments at the outset of the conflict fall outside the scope of this provision.[101]

A second alternative is to hold states directly responsible for their failure to prevent wrongful NSA conduct (due diligence failure).[102] In this case, state responsibility no longer derives from secondary rules of international law (as in the other situations) but from primary rules which are

[94] Wessel (n 89) 195.
[95] ibid 196–97.
[96] See Charnovitz (2006) (n 65) 362–63; Eisuke Suzuki, 'Non-State Actors in International Law in Policy Perspective' in Noortmann, Reinisch and Ryngaert (n 4) 33, 34. In this respect it has also been argued that a growing convergence of interests has fostered cooperation between IGOs and NGOs, the latter even defining the scope of their activities in accordance with policies advanced by the former: Emanuele Rebasti, 'Beyond Consultative Status: Which Legal Framework for Enhanced Interaction between NGOs and Intergovernmental Organizations?' in Pierre-Marie Dupuy and Luisa Vierucci (eds), *NGOs in International Law: Efficiency in Flexibility?* (Edward Elgar 2008) 21, 21–22; Cedric Ryngaert, 'Imposing International Duties on Non-State Actors and the Legitimacy of International Law' in Noortmann and Ryngaert (n 2) 69, 80–81.
[97] International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001), UN Doc A/56/10.
[98] Cedric Ryngaert, 'State Responsibility and Non-State Actors' in Noortmann, Reinisch and Ryngaert (n 4) 163, 164.
[99] ibid 167–68.
[100] ibid 168–73.
[101] ibid 174–76.
[102] ibid 164.

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present mainly in the law of immunity, international environmental law and IHRL.[103] However, given the difficulties in broadening the capacity of states to exercise due diligence over the acts of NSAs and to lower the threshold of attribution, Ryngaert claims that '[i]f non-state actors are exercising real international power and cause harm to third parties, it is only logical that they are held to account on the basis of a separate, tailor-made responsibility regime'.[104]

An overview of Parts II and III of the book has shown how different branches of international law suffer from similar constraints derived from state-centric conceptions, which may be observed in the prevalence of the notions of international legal personality and state consent. As a result of inconsistencies between theory and practice, the role and status of diverse NSAs in the international realm are the subject of lengthy debates that seem to be far from ending.

3. THEORETICAL ALTERNATIVES: NARROWING THE GAP BETWEEN THEORY AND PRACTICE

The progressive incorporation of the term 'actors' in international law has not prevented most theoretical approaches from being driven mainly by the notion of international legal personality[105] and, consequently, subject to the constraints that were examined in the previous section. The editors of the volume evidently are conscious of the separation between contemporary international dynamics – and, particularly, the role played by NSAs – and the predominant theoretical explanations provided by legal scholarship. This can clearly be noticed in Part I of the volume, which presents three perspectives devised to deal with NSAs in international law.

Despite their substantial differences, the three chapters build on earlier theories and recognise the need to adapt our current standpoint in order to appreciate NSAs' 'presence in the international realm'.[106] While Jean d'Aspremont (Chapter 2)[107] argues within the positivist paradigm, Eisuke Suzuki (Chapter 3)[108] promotes a significant theoretical shift through the adoption of the policy perspective, and Math Noortmann (Chapter 4)[109] advocates that the most adequate framework to give account of such practices rather than international law is transnational law – understood as an autonomous and differentiated system.

The legal approaches of Part I are complemented interestingly by a series of contributions from international relations scholars, presented in Part IV. In this sense, Markus Kornprobst

[103] ibid 177–79.
[104] ibid 182. For an overview of issues and debates related to the responsibility of NSAs, see Noemi Gal-Or, Cedric Ryngaert and Math Noortmann (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place: Theoretical Considerations and Empirical Findings* (Brill/Nijhoff 2015).
[105] Andrea Bianchi, 'Introduction: Relativizing the Subjects or Subjectivizing the Actors: Is That the Question?' in Bianchi (n 3) xi, xii.
[106] Noortmann, Ryngaert and Reinisch (n 5) 3.
[107] Jean d'Aspremont, 'Non-State Actors and the Social Practice of International Law' in Noortmann, Reinisch and Ryngaert (n 4) 11.
[108] Suzuki (n 96).
[109] Math Noortmann, 'Transnational Law: Philip Jessup's Legacy and Beyond' in Noortmann, Reinisch and Ryngaert (n 4) 57.

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(Chapter 14)[110] provides a comprehensive overview of the literature on the subject and advocates in favour of interdisciplinary research; Alan Chong (Chapter 15)[111] explores how the activities of NSAs can be understood in terms of soft power, and Barrie Axford (Chapter 16)[112] examines them through the lens of global governance.

D'Aspremont argues that a modern interpretation of the positivist paradigm recognises that the social practice that involves NSAs grants them a role which pertains to the design of the secondary rules of international law concerning the sources of international law – that is, the modes of cognition of the international legal order as a whole.[113] This requires distinguishing between NSA engagement with content determination and with law ascertainment, despite the fact that both activities frequently take place simultaneously in legal reasoning.[114]

The author claims that a pluralistic positivist view broadens the scope of the actors taken into account[115] when analysing the communitarian semantics that inform the content of the doctrine of sources of international law.[116] However, he also admits that such inclusion remains an open question which encompasses a political dimension and the risk of leading to a hegemonic approach, as international lawyers are faced with decisions as to what types of NSA behaviour 'are allowed to feed into the social practice'.[117]

D'Aspremont's view is of great value, as it accepts the need to re-evaluate some of the basic theoretical underpinnings of positivism. However, it could also be understood, once again, to leave everything in the hands of states, who seem to be entitled to grant or deny NSAs access into the field of communitarian semantics. Even if NSAs are admitted, it is exclusively into the field of law ascertainment, while law creation remains strictly out of their reach. Moreover, it should be further considered whether this theoretical approach could be employed to explain the broad range of activities carried out by NSAs within the various fields of international law, as discussed in the previous section.

Suzuki's starting point is the New Haven school's well-known criticism of the subject/object dichotomy, which he links to the 'gatekeeper' role that governments and IGOs play with regard

[110] Markus Kornprobst, 'Non-State Actors in International Relations: Actors, Processes, and an Agenda for Multifaceted Dialogue' in Noortmann, Reinisch and Ryngaert (n 4) 295.
[111] Alan Chong, 'Non-State Actors and Soft Power' in Noortmann, Reinisch and Ryngaert (n 4) 323.
[112] Barrie Axford, 'Non-State Actors and Globalisation: A Paradigm for a Decentred World?' in Noortmann, Reinisch and Ryngaert (n 4) 345.
[113] d'Aspremont (n 107) 12.
[114] ibid 14–16. This aspect of the author's position is further developed in earlier pieces, in which he argues that NSAs do not possess a formally recognised law-creating capacity: d'Aspremont (n 70) 124; and Jean d'Aspremont, 'Non-State Actors from the Perspective of Legal Positivism: The Communitarian Semantics for the Secondary Rules of International Law' in d'Aspremont (n 3) 23, 25. In the same line, the author has also claimed that the proliferation of actors involved in diverse activities can be understood as an informalisation of the exercise of public authority that is not framed within the traditional processes of normative creation: Jean d'Aspremont, 'Introduction: Non-State Actors in International Law: Oscillating between Concepts and Dynamics' in d'Aspremont (n 3) 1, 4.
[115] d'Aspremont (n 107) 18–20.
[116] ibid 20–21. This reasoning is explicitly built by revisiting the concept of 'law-applying authority' developed by HLA Hart, *The Concept of Law* (2nd edn, Clarendon Press 1994) 144–50.
[117] d'Aspremont (n 107) 30.

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to organised arenas of formal lawmaking.[118] In contrast, the notion of 'participants' enables the consideration of all groups and communities that intervene in global decision processes within a theoretical framework intended to describe with precision any social process.[119] In that vein, the activities of NSAs can be understood by reference to major value processes[120] and to the performance of different decision functions.[121] Hence, the perspectives and operations of human beings are the basic empirical foundation of pluralism and diversity, while IHRL may be construed as its basis for authority. In this sense, Suzuki concludes that the range of participants should be as comprehensive as feasible, although achieving effectiveness requires considerations of economy, transparency and accountability.[122]

In sum, the author proposes as an appropriate alternative the description of 'the world's different community decision processes in terms of the interpenetration of multiple processes of authoritative decisions of varying territorial compass'.[123] However, he considers that NSAs still need to stimulate demands and expectations about authority for themselves as effective participants in the global constitutive process, as well as capitalise on the will and capability of local and national institutions in order to transnationalise the internal decision processes and integrate them globally.[124]

The added value of the New Haven theory seems to be the lack of a priori limitations as to the consideration of which actors are relevant for each aspect of social practice. In addition, it openly proposes a world order of human dignity as its ultimate goal,[125] which seems to be in line with the preeminent place of IHRL within the international legal system.[126] However, Shaw has noted

[118] Suzuki (n 96) 33.
[119] ibid 35–37.
[120] ibid 40–44. 'Values are preferred events – what people cherish … defined succinctly: Respect: freedom of choice, equality, and recognition; Power: making and influencing community decisions; Enlightenment: gathering, processing, and disseminating information and knowledge; Well-being: safety, health, and comfort; Wealth: production, distribution, and consumption of goods and services; control of resources; Skill: acquisition and exercise of capabilities in vocations, professions, and the arts; Affection: intimacy, friendship, loyalty, positive sentiments; Rectitude: participation in forming and applying norms of responsible conduct. The aggregate of all these values may be described as *security*': Lung-chu Chen, *An Introduction to Contemporary International Law: A Policy-Oriented Perspective* (3rd edn, Oxford University Pres 2015) 16.
[121] Suzuki (n 96) 46–53. 'In brief, these seven decision functions may be defined as follows: Intelligence: gathering, processing, and disseminating information essential to decision making; Promotion: advocacy of general policies and the urging of proposals; Prescription: projecting authoritative community policies about the shaping and sharing of values; Invocation: provisional characterization of events in terms of community prescriptions; Application: final characterization and execution of prescriptions in concrete situations; Termination: ending a prescription or arrangement within the scope of a prescription; Appraisal: evaluating performance in decision process in terms of community goals': Chen (n 120) 17–18.
[122] Suzuki (n 96) 44–45.
[123] ibid 47.
[124] ibid 55–56.
[125] eg, W Michael Reisman, Siegfried Wiessner and Andrew R Willard, 'The New Haven School: A Brief Introduction' (2007) 32 *Yale Journal of International Law* 576; Myres S McDougal and Siegfried Wiessner, 'Law and Peace in a Changing World' (1992) 22 *Cumberland Law Review* 683.
[126] Myres S McDougal, W Michael Reisman and Andrew R Willard, 'The World Community: A Planetary Social Process' (1988) 21 *University of California, Davis Law Review* 837; Myres S McDougal, Harold D Lasswell and Lung-chu Chen, 'The Social Setting of Human Rights: The Process of Deprivation and Non-Fulfillment of Values' (1977) 46 *Revista Jurídica de la Universidad de Puerto Rico* 477.

that such an objective is difficult to reconcile with many state actions, and he has also warned that this framework may eventually lead to support any practice carried out by the dominant powers.[127] Moreover, Portmann has contested that actual practice and its normative significance are as closely linked as this position suggests, arguing that it is theoretically inconsistent to hold that there can be direct normative implications drawn from effective behaviour or power.[128]

In turn, Noortmann presents his view of transnational law as 'an independent legal realm, separated from, but partially overlapping with national law, public international law, and private international law'.[129] In this vein, what distinguishes transnational law from other legal systems is that 'all transnational actors, state or non-state, are potential constituents of and participants in transnational law'.[130] Thus, it shares with *lex mercatoria* the deconstruction of the national–international and the private–public dichotomies, but it is not restricted to the commercial realm.[131]

In this context, NSAs possess transnational lawmaking capacity, although this is not understood as an absolute status (as in the case of states in international law) but with a temporal/special functionality.[132] After explaining some basic elements of a possible theory of sources of transnational law and of dispute resolution,[133] Noortmann proposes[134] that:

> [t]he law that is neither 'national' nor 'international' must properly be called 'transnational', based on its own sources and subjected to its own rules of identification, which … are not wholly different in character from the sources of other legal systems.

The qualification of any given forum as national, international or transnational will depend on its constitutional context: that is, 'who has access, which rules will be applied and what is the relevance of the authoritative outcome'.[135]

The greatest virtue of this approach seems to be its flexibility, as it recognises the normative value that may be found in multiple interactions between diverse actors. However, it can also be observed that it is not presented as a solution within international law, but outside its boundaries. Consequently, it could entail problems regarding the delimitation of each legal system and, eventually, concerning the relations between them.

Although the three contributions included in Part I propose divergent interpretations, they seem to agree on the need to take into account the social practice of multiple actors, albeit understood in narrower or broader terms. This clearly sets the ground for the adoption of a multidisciplinary approach which may benefit from conceptual tools capable of presenting a better

[127] Shaw (n 71) 43.
[128] Roland Portmann, *Legal Personality in International Law* (Cambridge University Press 2010) 268.
[129] Noortmann (n 109) 68.
[130] ibid 68.
[131] ibid 68–69.
[132] ibid 64.
[133] ibid 70–73.
[134] ibid 74.
[135] ibid 74.

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depiction of international dynamics. In this sense, Part IV of the book introduces interesting elements that should be taken into account and further developed in future studies on the role and status of NSAs in international law.

It is precisely the proposal of an interdisciplinary agenda for research that is the objective of Kornprobst's contribution.[136] By exploring the sub-fields of international security and international political economy, as well as the arguments on the role of NSAs in the reconstitution of the global polity, the author presents three contentions. First, there is a proliferation of different kinds of NSA, which goes beyond the examples analysed throughout the volume. Second, the relationship between NSAs and states, or exclusively between states, can be understood in terms of three causal processes: coercion, incentives and persuasion. Finally, the dynamics that link actors and processes are typically explained using metaphors such as governance, network, regime, complex and bloc, but this type of description cannot avoid privileging certain actors and certain causal processes.[137] In this regard, he concludes that 'more research would be warranted that aims for a more holistic scrutiny of global political processes',[138] a goal that could be advanced by a multifaceted dialogue between international relations and international law.[139]

'Soft power' is the specific theoretical tool employed by Chong in order to examine some activities of contemporary NSAs. He begins by pointing out that these entities may strategically choose between exerting soft or hard power, but also argues that the majority has leaned towards the former.[140] After analysing the use of new technologies, the implementation of campaigns to publicise unethical practices, strategic litigation and the work of grassroots NGOs, he concludes that, as opposed to physical violence, '[n]on-state soft power is inherently linked to projecting community. It is ideally a community showcasing the best of humanity'.[141]

In turn, Axford suggests that globalisation theory can be employed as a general framework to examine the role of NSAs in international affairs, within complex governance networks.[142] In particular, he stresses that the idea of a global public domain is transformative, secular and inclusive, as it encompasses 'an increasingly institutionalised transnational realm of "discourse, contestation and action" on the part of private and public actors to produce global public goods'.[143]

Regardless of the path that international legal scholars may choose, it seems that an accurate appraisal of the NSA dimension requires a theoretical shift. As a minimum, international law cannot be studied exclusively as a set of static rules, and the consideration of social practice appears to be unavoidable. Ideally, the interaction with other disciplines in order to broaden the conceptual possibilities of international law will no longer be the exception but the rule.

[136] Kornprobst (n 110) 295.
[137] ibid 297, 320–21.
[138] ibid 321.
[139] ibid 321–22.
[140] Chong (n 111) 327–30.
[141] ibid 342.
[142] Axford (n 112) 345–46.
[143] ibid 367.

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4. FINAL REMARKS

For a long time, state-centric approaches to international law have precluded the advancement of theorisation about the role and status of NSAs within the discipline, leaving aside contemporary phenomena of great relevance.[144] It is only thanks to the progressive broadening of inquiries in the fields of international relations and political science that it has become possible to begin to theorise on the multiplicity of entities interacting at the international level, and foster a growing dialogue between disciplines.[145]

Part I of the book not only evidences the rising importance of theoretical perspectives concerned with NSAs within international legal literature, but also the need to incorporate tools from other disciplines in order to give proper account of the social practice of current international dynamics. In this vein, Part IV introduces a series of frameworks to deal with the issue from the standpoint of international relations, thus encouraging further research based precisely upon the adoption of multidisciplinary perspectives.

Throughout Parts II and III, the volume evidences the presence of diverse NSAs within different areas of international law and the multiplicity of issues that should be reassessed in the light of a more complete picture of international dynamics. The theoretical constraints of state-centric views are not limited to debates on international legal personality, but have a direct impact on discussions concerning lawmaking, on the determination of international rights and obligations of NSAs, on the need to update international monitoring tools and to adopt new mechanisms aimed at achieving greater levels of transparency and accountability. Moreover, acknowledging diversity in the international realm entails the difficult task of revaluating the various categories of actors encompassed under the NSA label which, as noted by the editors in their concluding observations, is characterised negatively by reference to states.[146]

If one is willing to accept that international law is a political device, its preferred terms and concepts must be analysed in context, recognising its strategic use by states and NSAs. In this vein, international legal scholars play an essential role in shedding light on power struggles taking place and devising theoretical frameworks capable of explaining them. While some are already attempting to draw attention to the bigger picture, taking into account the complex dynamics that involve NSAs, many still advocate in favour of avoiding the conferral of any international legal status for NSAs.

Non-State Actors in International Law provides a complete overview of major positions on the issues currently being discussed with regard to NSAs in the international legal arena, setting the ground for a reinforced research agenda. It is useful not only for those already versed with the topics of the volume, but also for those wishing to study them for the first time. In sum, the book is a fundamental piece that should occupy an important spot on the bookshelves of international law students, scholars and practitioners.

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[144] Woodward (n 1) 390.
[145] Ben-Ari (n 70) 3–5.
[146] Cedric Ryngaert, Math Noortmann and August Reinisch, 'Concluding Observations' in Noortmann, Reinisch and Ryngaert (n 4) 369, 369.

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