INTERNATIONAL LAW ASSOCIATION

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NON STATE ACTORS

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FINAL REPORT

I. WORK OF THE COMMITTEE AND THE FINAL REPORT

1. This is the fourth and final Report of the ILA Committee on Non-State Actors (NSAs). The first section of the Report briefly summarizes the history of the Committee and introduces the structure and purposes of this Final Report.

A) Background of the Final Report

2. The establishment of a Committee on Non-State Actors was discussed at the ILA Conference in Toronto in 2006 and inaugurated in 2008 after the Committee held its first meeting during the ILA conference in Rio de Janeiro in August 2008.[1] At its creation, the Committee had 17 members coming predominantly from Europe and East Asia. In the next years, the membership was expanded up to 35 members from four continents. The Chair of the Committee is Professor Math Noortmann from the British Branch. Professor Cedric Ryngaert was the Committee's principal Rapporteur in 2008-2014. He worked closely with Professor Malgosia Fitzmaurice (2008-2010), and Professor Jean d'Aspremont (2012-2014) as co-rapporteurs with drafting assistance from Dr Barbara K. Woodward. Assoc. Professor Veronika Bílková (2015-2016), a Committee member since the beginning, drafted this Final Report. The Committee adopted three reports during the ILA conferences held in the Hague (2010),[2] Sofia (2012)[3] and Washington (2014).[4]

[1] See *Preliminary issues for the the ILA Conference in Rio de Janeiro,* 2008 (hereafter Rio Document 2008).
[2] ILA Committee on Non-State Actors, *Non-State Actors In International Law: Aims, Approach And Scope of Project And Legal Issues,* The Hague, 2010 (hereafter The Hague Report 2010).
[3] ILA Committee on Non-State Actors, *Non-State Actors In International Law: Law-Making and Participation Rights,* Sofia, 2012 (hereafter Sofia report 2012).
[4] ILA Committee on Non-State Actors, *3rd Report,* Washington, 2014 (hereafter Washington Report 2014).

3. The 2010 report had a general focus and sought to identify the aims of the Committee, the scope of its mandate and the approach to be taken. The original intent of the Committee to focus on international security by way of a case study, expressed in the 2008 preliminary document,[5] was abandoned in the aftermath of the first meeting of the Committee, as it was too narrow. The Committee then defined its general purpose more broadly as that of *"examining the position of NSAs in international law in terms of their rights and obligations"*.[6] More specifically, it set itself the following tasks: (1) to map the scope of the field; (2) to determine the actual practice of NSAs and its effects on the functioning of the international legal system; (3) to identify NSA rights and obligations; and finally (4) to synthesize and draw conclusions on how NSAs conceptually fit within international law.

4. The Committee undertook to reproduce these conclusions in a set of general principles in its final report;[7] however, following seven years of deliberations, the Committee has determined that the complexity brought about by the different types of NSA means a set of considerations is more fruitful than principles, and these considerations are provided at the end of the report.

5. The 2012 report analysed the roles NSAs play in actual law-making and their participation in law-making processes. The 2014 report discussed obligations NSAs have under international law and whether they can be held responsible for violations of these obligations or held liable in other circumstances.

6. In addition to the formal Committee meetings at the ILA conferences, Committee members and 'Friends of the Committee' participated in a number of seminars on NSA-related issues. From 2009-2012 these meetings were supported by Professor Ryngaert's Non-State Actors in International Law project and facilitated by the Leuven Centre for Global Governance Studies at Leuven University (Belgium) established by Professor Jan Wouters. In 2011, the Committee held a seminar on NSAs and human security organized by Oxford Brookes University (UK). In 2013, it held a conference on theoretical and empirical issues relating to the responsibilities of NSAs organized by the Institute for Transborder Studies at Kwantlen Polytechnic University in Vancouver (Canada). In 2015, the Committee held a working meeting addressing the scope and content of the final report; the meeting was hosted by the Institute of International Relations in Prague (Czech Republic).

7. The meetings in Leuven, Oxford and Vancouver resulted in a number of publications on NSAs, including several books, such as *Global Civil Society in International Lawmaking and Global Governance*: *Theory and Practice* (2010),[8] *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law* (2011),[9] *Human Security and International Law: the Challenge of Non-State Actors* (2013),[10] *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings* (2015),[11] or *Non-State Actors in International Law* (2015).[12]

B) Context for and Structure of the Final Report

8. International law has traditionally been construed as inter-State law.[13] When Bentham coined the term in 1789, he defined international law as a body of legal rules, norms and standards that apply between

[5] Rio Document 2008, p. 1.
[6] The Hague Report 2010, pp. 1-2.
[7] See The Hague Report 2010, p. 2.
[8] WOODWARD, Barbara K., *Global Civil Society in International Lawmaking and Global Governance: Theory and Practice*, Martinus Nijhoff, 2010.
[9] D´ASPREMONT, Jean (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law*, London: Routledge, 2011.
[10] RYNGAERT, Cedric, NOORTMANN, Math (eds), *Human Security and International Law: the Challenge of Non-State Actors*, Intersentia, 2013.
[11] GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMANN, Math (eds), *Responsibilities of the Non-State Actor in Armed Conflict and the Market Place. Theoretical Considerations and Empirical Findings*, Brill, 2015.
[12] NOORTMANN, Math, REINISCH, August, RYNGAERT, Cedric (eds), *Non-State Actors in International Law*, Oxford and Portland: Hart, 2015.
[13] For an alternative view, see D´ASPREMONT, Jean, Cognitive Conflicts and the Making of International Law: From Empirical Concord to Conceptual Discord in Legal Scholarship, *Vanderbilt Journal of Transnational Law*, Vol. 46, 2013, pp. 1119-1147. The author shows that that the system of international law has always been plural and that the Westphalian/State-centric account is to a large extent a construction.

sovereign States.[14] Two hundred years later, in 1998 Schachter described international law in a similar way, as *"a system of discrete autonomous entities based on their defined territories, each exercising plenary authority over persons and things in that territory".*[15] This system was formal[16] and rather homogeneous in that all its constitutive units were virtually identical and they operated under uniform rules on norm-creation, monitoring compliance and law enforcement. The extent of their capacities was not specified or was considered as unlimited. That also allowed for a rather clear separation between international law on the one hand and national law(s) on the other.

9. The international legal system has never been a closed regime in terms of its participants. It has always recognised such *sui generis* entities as the Holy See and the Sovereign Order of Malta. Gradually, it also opened up to accommodate other "non-state" actors such as international organizations (IGOs) (e.g., UN), certain civil society organizations (e.g., the ICRC), armed opposition groups (AOGs) (e.g., PLO) and individuals (mostly in the areas of international human rights law and international criminal law). The increasing pluralization *ratione personae* on the international scene has disrupted the original unity and homogeneity of the State centric system and upset the borders between international, national and arguably transnational law.

10. The globalization process has further weakened the factual power of the State. Internally, large scale privatization has occurred, and States have transferred many of their fundamental competences to NSAs. Externally, NSAs are no longer confined within the territory of a single State but actively operate across national borders. This applies both to the actors of "civil society" (non-governmental organizations, transnational corporations, etc.) and of "uncivil society" (terrorist groups, mafias, organized crimes groups, etc.) as well as to those in between the two categories (AOGs). As a result, States now have less control, let alone a monopoly, over developments both within their own territory and at the international level.

11. It is generally considered that the ascension of NSAs is not yet adequately reflected in international law nor led to another wave of pluralization *ratione personae* of this law. Although, as Math Noortmann puts it, *"the process of globalization and the proliferation of actors on the global scene makes the differentiation between states and other non-state actors obscure and obsolete",*[17] this erosion of the borders between the two types of actors does not seem to have had a transformative and visible impact on the way we conceptualize international law. Thus, though factually interconnected, States and NSAs remain normatively separated at the international level.

12. Taking this traditional account as the starting point, this report first verifies whether it is factually correct and then discusses some alternative approaches.

13. Section II proposes a working definition of NSAs, ponders whether it is appropriate to use this term and provides several typologies of NSAs.

14. Section III sums up the conclusions of the mapping exercise and of the empirical/ comparative studies, which were presented in the previous reports of the Committee. It also analyses how international law responds to these changes and discusses to what extent this law addresses the gap between international practice and the doctrine of international law, if such a gap exists at all.

15. Section III applies the traditional State-centric approach to international law. This approach, albeit dominant in the doctrine, is not the only one that can be applied with respect to NSAs. Section IV maps alternative approaches which portray the role of NSAs within the system of international law differently. Furthermore, it considers whether the ascension of non-state actors could bring about more radical changes of international law and if so, what implications these changes would have both for NSAs and for the existing international legal order as such.

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[14] For more details, see JANIS, M. W., Jeremy Bentham and the Fashioning of "International Law", *American Journal of International Law*, Vol. 78, 1984, pp. 405-418.

[15] SCHACHTER, Oscar, The Decline of the Nation-State and its Implications for International Law, *Columbia Journal of Transnational Law*, Vol. 36, 1998, p. 7.

[1616] KENNEDY, David, The Disenchantment of the Logically Formal Legal Rationality, *Hastings Law Journal*, Vol. 55, 2004, pp. 1031-1076.

[17] NOORTMAN, Math: Globalization, Global Governance and Non-State Actors: Researching beyond the State, *International Law Forum*, Vol. 4, 2002, p. 38.

II. CONCEPT OF NON-STATE ACTORS

16. This section of the Final Report introduces a working definition of the term NSAs. It also discusses the appropriateness of the use of the term and outlines the most common classifications of these actors encountered in scholarly literature

A) Who Are Non-State Actors?

17. In 2008, the Committee opted for a negative definition of NSAs that encompassed *"all actors who are not State".*[18]

18. In the 2010 Report, the Committee adopted a more elaborate working definition of NSAs based on three elements.

    a) First, NSAs are not *"bodies comprised of and governed or controlled by States or groups of States".*[19] This excludes not only IGOs and less formal groups of states (G7), but also federal components of States and territorial entities such as Kosovo and East Timor while under international administration.
    b) Secondly, NSAs are actors that *"actually perform functions in the international arena that have real or potential effects on international law".*[20] The range of such functions is not predetermined, because different NSAs accomplish different functions at the international level.
    c) Thirdly, NSAs are legally recognized and organised entities. The legal recognition can take place in national or international law. This excludes individuals and some entities lacking organization and/or legal recognition such as terrorist organizations and mafias.

19. For the purposes of this report, NSAs are therefore defined as *legally recognized and organised entities that are not comprised of nor governed or controlled by States nor groups of States and that actually perform functions in the international arena that have real or potential effects on international law.* It is a working, operational definition which might not, and which does not aspire to, be shared by all scholars.
20. The 2010 Report lists actors expressly excluded from and expressly included in the working definition.

    a) Actors excluded are IGOs comprised solely of State members, federal components of a State, pseudo-States, individuals, illegal and illegitimate organized bodies (mafia), and illegal groups not organized in any recognized manner (Al-Qaeda, pirate groups).
    b) Actors included are non-governmental organizations (NGOs) with some form of recognized international status; multinational enterprises (MNEs); organized AOGs; *sui generis* entities (e.g., ICRC, the Holy See); and organized indigenous peoples´ groups.

21. There is no generally accepted definition of the term "NSAs" in international law. The term is not even (yet) a legal term of art. Since international law has been conceptualized as a system of rules regulating relationships between States, NSAs in the broadest understanding of the term – that is all entities that are not States – have for a long time had no formal place in it. Those NSAs which have gradually managed to challenge the State-centric orientation of international law have done so as specific entities (IOGs, etc.), not as members of a larger group of non-state actors. Thus, while several international treaties address and sometimes define particular rights and obligations of specific NSAs to participate within their realms,[21] there is no international instrument addressing rights and obligations of NSAs generally.

22. Recently, however, references to NSAs have appeared in certain acts adopted at the international level, and some of these have sought to define NSAs.

23. An example of this is UN Security Council Resolution 1540 (2004),[22] on *Non-Proliferation of Weapons of Mass Destruction.* The Resolution expresses grave concern at *"the threat of terrorism and the risk that non-*

[18] Rio Document 2008, p. 2.
[19] The Hague Report 2010, p. 6.
[20] *Ibid.*
[21] For instance, the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations states that an international organization *"means an intergovernmental organization"* (Article 2(i)). The definition solely apples for the purpose of the Convention.
[22] UN Doc. S/RES/1540 (2004), *Non-Proliferation of Weapons of Mass Destruction*, 28 April 2004.

State actors /.../ may acquire, develop, traffic in or use nuclear, chemical and biological weapons and their means of delivery" (par. 8, Preamble) and imposes on States the obligation to refrain from providing any form of support to NSAs that attempt to acquire or use such weapons and to prohibit NSAs from acquiring or using such weapons in their national law. The resolution contains a footnote defining NSA as an *"individual or entity, not acting under the lawful authority of any State in conducting activities which come within the scope of this resolution".*

24. Similarly, the European Commission (EC) uses the concept of NSAs in its framework of international cooperation and development. It defines the term by means of four elements: NSAs gather the main structures of organised society outside government and public administration; are independent of the State; often are the result of grass-roots initiatives seeking to bring social changes; and are active in different fields (poverty reduction, emergency, human rights, environment, etc.).[23]

25. In another document on development policy, the EC defines NSAs as *"a range of organisations that bring together the principal, existing or emerging, structures of the society outside the government and public administration. NSAs are created voluntarily by citizens, their aim being to promote an issue or an interest, either general or specific. They are independent of the state and can be profit or non-profit-making organisations. The following are examples of NSAs: Non-Governmental Organisations/Community Based Organisations (NGO/CBO) and their representative platforms in different sectors, social partners (trade unions, employers associations), private sector associations and business organisations, associations of churches and confessional movements, universities, cultural associations, media".*[24]

26. The official definitions are meant to apply in a specific context and do not aspire to be used for more general purposes.

27. Some scholars have proposed more general definitions of NSAs. In recent decades, the number of books and articles discussing NSAs by international lawyers[25] and experts from other disciplines (international relations, political science, security studies)[26] has increased sharply, and a legal journal devoted to NSAs emerged.[27] It is interesting to note that many authors speak about NSAs without offering any definition of the term or just enumerating the types of entities that, in their view, fall under this category.[28] Other authors simply use the negative definition of NSAs.[29]

28. A minority of commentators suggests a definition of the term. Pearlman and Cunningham define a NSA as *"an organized political actor not directly connected to the state but pursuing aims that affect vital state interests".*[30] Arts refers to *"all those actors that are not (representatives) of state, yet that operate at the international level and are potentially relevant to international relations".*[31] Josselin and Wallace, while

[23] EC, International Cooperation and Development – https://ec.europa.eu/europeaid/civil-society_en (7 November 2015).
[24] Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee, *Participation of Non-State Actors in EC Development Policy* (Brussels, 07.11.2002, COM(2002) 598 final), p. 5.
[25] See ALSTON, Philippe (ed.), *Non-State Actors and Human Rights*, Oxford University Press, 2005; CLAPHAM, Andrew, *Human Rights Obligations of Non-State Actors*, Oxford University Press, 2006; D´ASPREMONT, Jean (ed.), *Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law*, London: Routledge, 2011; NOORTMANN, Math, REINISCH, August, RYNGAERT, Cedric (eds), *Non-State Actors in International Law*, Oxford and Portland: Hart, 2015.
[26] See, for instance, ARTS, Bas, NOORTMANN, Math, REINALDA, Bob (eds), *Non-State Actors in International Relations*, Ashgate, 2001.
[27] *Non-State Actors and International Law* (Brill) (From 2006, now merged with *International Law FORUM du droit international* to form a new journal, *International Community Law Review*)
[28] See HIGGOT, Richard A., UNDERHILL, Geoffrey, R. D., BIELER, Andreas (eds), *Non-State Actors and Authority in the Global System*, London and New York: Routledge, 2000. See also OLIVIER, Michèle, Exploring Approaches to Accommodating Non-State Actors within Traditional International Law, *Human Rights and International Legal Discourse*, Vol. 4, No. 1, 2010, pp. 15-31
[29] See SANDS, Philippe, Le droit international, le praticien et les acteurs non étatiques, in GHERARI, Habib, SZUREK, Sandra (eds), *L'émergence de la société civile internationale: vers la privatisation du droit international ?*, Pedone, 2003, p. 87.
[30] PEARLMAN, Wendy, CUNNINGHAM Kathleen Galagher, Nonstate Actors, Fragmentation, and Conflict Processes, *Journal of Conflict Resolution*, Vol. 56, No. 1, 2012, p. 3.
[31] ARTS, Bas, Non-State Actors in Global Governance: Three Faces of Power, Max Planck Project Group on Common Goods, Bonn, *Working Paper No. 4*, 2003, p. 5.

acknowledging that *"the universe of non-state actors is /.../ necessarily diverse",*[32] identify three characteristic features of NSAs: large or entire autonomy from central government funding or control; operation as or participation in networks which extend across the boundaries of two or more States; and acting in ways which affect political outcomes.[33]

29. The various definitions, though similar to a certain extent, are not identical. In fact, the only elements that remain constant are an independence from States and the relevance, operation or impact at the international level. Thus, in the broadest understanding, NSAs are defined as entities other than States that operate at the international level. Other elements – relating e.g. to the internal organization or the membership criterion – are present only in some definitions. The definition used in this report, as we saw above, adds three additional elements, namely the organized character, legal recognition in national or international law and the fact that a NSA is not comprised of and governed or controlled by States. As such, the definition is rather narrow.

B) The Term "Non-State Actor"

30. The very term "non-state actor" betrays the bias that exists within international law and international relations. The category is construed by its opposition to, and difference from, the State. Not being a State is the crucial unifying feature of the identity of all non-state entities, strong enough to prevail over any potential differences among them.

31. Alston has explained that, *"these negative euphemistic terms /.../ have been intentionally adopted in order to reinforce the assumption that the state is not only the central actor, but also the indispensable and pivotal one around which all other entities revolve"*.[34] Similarly, Sébastien Jodoin has stressed that *"international law remains a law for states made by them and made for them. It remains so through its focus on the interiority of the state at the expense of the exteriority of the Other".*[35]
32. Adhering to the NSAs label thus means implicitly embracing and endorsing the vision of international relations and international law in which the State *"remains the starting point and the frame of reference".*[36] At the same time, abandoning the label prematurely could produce confusion, as it is long-established in the doctrine. Consequently, the Committee has decided to retain the term with the caveats that it presumes and pre-structures a particular reality and that *"it is not a legal term but a descriptive concept seeking to reflect as closely as possible the contours of the reality".*[37]

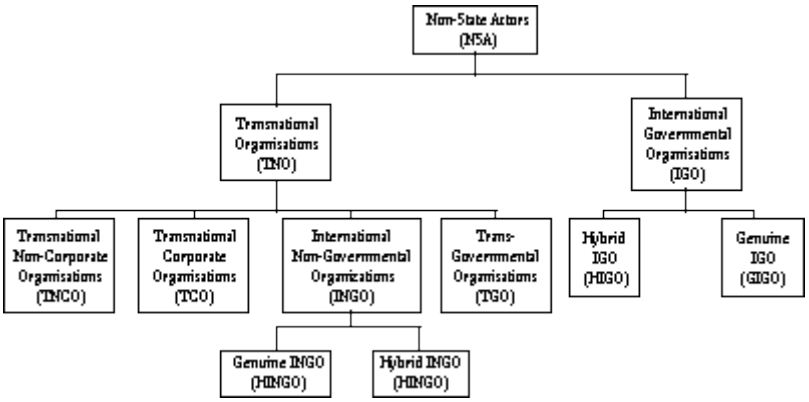
C) Need to Classify Non-State Actors?

33. NSAs are a very heterogeneous group, particularly in the broadest understanding of the term. Some scholars have thus proposed classifying NSAs into various categories.

34. Most proposals concentrate on the type of the NSA and its relationship to States. For instance, Gustaaf Geeraerts has noted that *"an initial classification of non-state actors distinguishes between two major types of international organizations: international governmental organizations (IGOs) and international non-governmental organizations (INGOs)".*[38] He views this classification as simplistic and outdated and suggests replacing the second category with that of transnational organizations (TNOs). This would include *"those networks, associations or interactions which cut across national societies, creating linkages between individuals, groups, organizations and communities within different nation-states".*[39] Thus, TNOs include international NGOs (e.g. Amnesty International), transgovernmental organizations (e.g. International Union of Local Authorities), transnational corporate organizations (e.g. General Motors) and transnational non-

[32] JOSSELIN, Daphné, WALLACE, William (eds), *Non-State Actors in World Politics*, Palgrave, 2001, p. 2.
[33] *Ibid.*, pp. 1-20.
[34] ALSTON, Philip, *op. cit.*, p. 3.
[35] JODOIN, Sébastien, International Law and Alterity: The State and the Other, *Leiden Journal of International Law*, Vol. 21, 2008, pp. 1-28.
[36] *Ibid.*, p. 2.
[37] KOLB, Robert, L'application du droit international**,** notamment humanitaire**,** dans les conflits auxquels prennent part des entités non-étatiques, in: *Commentaire article part article de de la Résolution de l´Institut de droit international,* Paris: Pedone, 2003, p. 18 (the quote relates to the term non-state entity as used in the Resolution of the IDI, yet it can easily be applied to the term NSAs more generally).
[38] GEERAERTS, Gustaaf, Analyzing Non-State Actors in World Politics, *Pole Paper Series,* Vol. 1, No. 4, 1995, online at http://poli.vub.ac.be/publi/pole-papers/pole0104.htm (3 June 2015).
[39] *Ibid.*

cooperate organizations (e.g. churches or transnational terrorist networks). Geeraerts´ classification appears as Figure 3, *Typology of Non-State Actors in World Politics*.[40]



35. Although the type is the most common criterion of classification, occasionally other criteria are used. For instance, some authors focus on the predominant means NSAs use in their activities to achieve their goals. The most basic classification based on this criterion is that between violent and other, non-violent NSAs. Violent NSAs include either all organized entities that resort to violent means (military force, criminal methods etc.) or, more narrowly, organizations that *"use illegal violence (i.e. force not officially approved of by the state)".*[41] They typically encompass entities such as terrorist groups, militias, paramilitary forces, criminal groups and, occasionally, insurgents (AOGs).[42]

36. The classification based on means corresponds to a large extent to that between "good" and "bad" (or legitimate and illegitimate) NSAs that is often, albeit implicitly, present in scholarly literature. Commentators frequently qualify violent NSAs as *"illegitimate vis-à-vis the classical state system in part because the essence of being a state is having a monopoly on the legitimate use of violence".*[43] Yet, the category of "bad" NSAs sometimes includes non-violent actors as well, for instance corporations.[44] Typical "good" NSAs are most NGOs, churches or transnational public interest networks.[45] This classification, inspired by the positive reputation that various NSAs have in the areas of human rights and humanitarian aid activities, fails to reflect the plurality of roles that most NSAs play. It is also subjective and arbitrary, and it would be difficult to rely on it.

37. Finally, NSAs are often classified – or rather grouped together – based upon the function they have in international relations and/or upon the substantive area of international law where they have the largest impact. Thus, for instance, authors writing about the law of the sea would have a particular interest in pirate groups, while those researching international humanitarian law would focus on AOGs or the ICRC and other humanitarian NGOs. Of course, many NSAs are not exclusively active in one field only; so the groups have large overlaps. Yet, with the increasing fragmentation of international law and the growing specialization of international lawyers, the division of actors along functional lines has gained increasing relevance.

38. Similarly, as with the definition of non-state actors and the very term used to denote them, the classification also serves as a template which not only helps describe the complex reality but also, in a certain way, forms and re-forms this reality. Characterizing some NSAs as good and others as bad conventionally suggests the need for a differentiated treatment of such entities under international law. Ranking some NSAs among the violent ones usually entails questioning their legitimacy. For these reasons, the current report does not

[40] *Ibid.*
[41] CHAUDHRY, Ranjeev, Violent Non-State Actors: Contours, Challenges and Consequences, *CLAWS Journal,* 2013, p. 167.
[42] See also WILLIAMS, Phil, Violent Non-State Actors and International and National Security, *International Relations and Security Network,* Zurich, 2008.
[43] *Ibid.,* p. 6.
[44] See, e.g., HOLMES, Leslie, Good Guys, Bad Guys**:** Transnational Corporations**,** Rational Choice Theory and Power Crime, *Crime, Law and Social Change,* Vol. 51, 2009, pp. 387-397.
[45] See, e.g., MURDIE, Amanda, STAPLEY, Craig S., Why Target the "Good Guys"? The Determinants of Terrorism Against NGOs, *International Interactions,* Vol. 40, No. 1, 2013, pp. 79-102.

embrace any of the classifications described above. Nor does it seek to propose a new classification of NSAs.

III. NON-STATE ACTORS AND INTERNATIONAL LAW

39. This section of the Final Report describes the role NSAs have acquired at the international level over the past decades. It draws largely on the mapping exercise and empirical/ comparative studies presented in the previous reports of the Committee.[46] The section first considers the activities of NSAs in the spheres of norm-creation at the international level. Secondly, it examines the roles NSAs have played in monitoring compliance with international law and in dispute-settlement. Finally, it reviews the scope of rights and duties NSAs now have under international law. Prefacing this overview is a brief discussion of the origins of the evolving changes in the factual and legal status of NSAs at the international level. The overview is followed by an outline of two ways that international law has used in its attempt to accommodate NSAs. Finally, the section considers whether further conceptual changes are needed to address the gap between international practice and the traditional State-centric approach to international law.

A) The Rise of Non-State Actors Internationally

40. NSAs are far from a new phenomenon on the international scene. They have always been present, influencing the course of international relations as well as the formation and application of international law. With globalization and increasing privatisation of key government domains, the role of NSAs has become even more prominent in recent decades. It is thus time to consider whether the status these actors have traditionally had (or rather have not had) under international law remains appropriate.

41. Andrew Clapham has identified four forces, or phenomena, which help to explain the rise of NSAs in the international legal arena and which, in his view, are important for understanding why discussing obligations of NSAs and their legal status in increasingly relevant.[47] Although the analysis relates to the sphere of human rights, it can be used more broadly. The four forces are:
    a) Globalization of the world economy which has *"highlighted the power of large corporations and their limited accountability in law for human rights abuses"*;[48]
    b) Privatization of sectors that in the past were controlled and administered exclusively by States, such as health, education, prisons or communications. Privatization has strengthened the roles of NSAs in spheres that States have vacated, giving rise to questions relating to the legal status of NSAs and the possibility that States could free themselves from legal obligations by simply withdrawing from particular spheres of activities;
    c) Fragmentation of States which means internal contestation of their power and monopoly over violence by NSAs, for instance AOGs fighting against the central government in non-international armed conflicts;
    d) Feminization of international law and international relations, which questions and disrupts the classical barrier between the private and public (internal and external) spheres both within societies and States and among them.

42. Amplifying how NSAs have acquired international legal obligations, Raffaa Ben Achour and Salim Laghmani have identified six different roles NSAs have played in modern international relations.[49] They are beneficiaries of the decisions by States and international organizations, partners in the realization of certain projects, advisors with respect to policy decisions, lobby groups that influence these decisions, watchdogs monitoring what States do, and, occasionally, enemies of States.

43. Nevertheless, the two authors remain sceptical about how this factual role of NSAs has translated into legal norms. On the one hand, they admit that NSAs have contributed to the formulation of new legal norms and to the implementation of existing ones (monitoring of the compliance, naming and shaming etc.). On the other, they stress that *"non-state actors have an influence but, from the strictly legal point of view, they are*

[46] See The Hague Report 2010, Sofia Report 2012 and Washington Report 2014.
[47] CLAPHAM, Andrew, *Human Rights Obligations, op. cit.*, pp. 3-19.
[48] *Ibid.*, p. 3.
[49] BEN ACHOUR, Rafaâ, LAGHMANI, Salim (eds), *Acteurs non étatiques et droit international: VIIe Rencontre internationale de la Faculté des sciences juridiques, politiques et sociales de Tunis*, Pedone: Paris, 2007.

never decisive. Their influence is certain from the perspective of political science but uncertain from the perspective of law".[50]

44. The following subsections verify whether this quotation correctly reflects the international practice relating to norm-creation, monitoring of compliance with international law, dispute-settlement, and to the scope of substantive rights and duties.

B) Non-State Actors and International Norm-Creation

45. As the 2010 Report reveals in some detail,[51] today NSAs are actively involved in various processes that result in the creation of hard or soft international legal norms by other actors. Moreover, as documented at length in the 2012 Report,[52] NSAs themselves engage in norm-creation.

46. Article 38(1) of the Statute of the International Court of Justice (ICJ) contains the list of sources of public international law which has traditionally been considered as exhaustive. These sources are divided into primary sources (treaties, international custom and, arguably, general principles of law recognized by civilized nations) and subsidiary sources (judicial decisions and the teachings of the most highly qualified publicists of the various nations). Only the primary sources are formal sources of international law, i.e. they *"provide the legal authority for a substantive statement about conduct making it a rule of law, binding upon States".*[53] Subsidiary sources help establish and confirm the content and correct interpretation of primary sources.

47. NSAs actively engage in processes resulting in the conclusion of ***international treaties.***[54]

48. First of all, they may play a role in the drafting of treaties adopted by other actors, typically States and international organizations. In some instances, this role is informal: NSAs influence law-making processes through informal channels and arrangements. For instance, NGOs had important roles in the processes leading to the conclusion of the 1997 ***Ottawa Treaty on the Anti-Personal Mines***, the 1998 Rome Statute of the International Criminal Court, and the 2003 United Nation Convention Against Corruption. NSAs – particularly NGOs – may also form coalitions that, though not an official participant in the negotiations, can have a significant impact upon its course and outcome.

49. In addition to NGOs, other NSAs may become informally involved in the conclusion of an international treaty, particularly when the treaty relates to their activities. Thus, private military and security companies (PMSCs), a specialised type of MNEs, are following and seeking to influence the outcome of the *UN Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies*, which has been tasked with the elaboration of a treaty on State obligations relating to the activities of PMSCs.[55]

50. Some NSAs engage in treaty-making processes on the basis of a more formal mandate. For instance, the International Committee of the Red Cross (ICRC) has, under its Statute approved by State Parties to the Geneva Conventions, the task to *"work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof"* (Article 4(g)). This provision is traditionally interpreted as implying the right, if not the obligation, of the

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[50] *Ibid.*, p. 16 (the original French text: "*Les acteurs non-étatiques sont influents, mais, d'un point de vue strictement juridique, ils ne sont jamais décisifs. Leur influence est certaine dans une perspective de science politique, mais incertaine dans une perspective juridique.*").

[51] The Hague Report 2010, pp. 8-13. See also Sofia Report 2012, pp. 4-26.

[52] Sofia Report 2012, pp. 4-6.

[53] The Hague Report 2010, p. 8.

[54] The 1969 Vienna Convention on the Law of Treaties defines a treaty as *"an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation" (Article 2(1)).* The customary definition is broader and encompasses also agreements concluded between other subjects of international law and instruments in other than written form.

[55] See UN Doc. A/HRC/30/47, *Report of the open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies on its fourth session*, 9 July 2015.

ICRC to submit drafts of new instruments of international humanitarian law to be adopted by States and to participate actively in all phases of the negotiation process.

51. In other instances, NSAs enjoy a formal position (a consultative or observer status), which while not directly entitling them to take an active part in the conclusion of treaties, permits them to have a specific participatory role in the process. This is for instance the case of those NGOs accredited as consultants or observers with the UN under Article 71 of the UN Charter and under many other IGO constitutive agreements.

52. Also, NGOs and other NSAs are competent to make contributions to the formulations of rules binding on the State parties of various Multilateral Environmental Agreements (MEAs) through special 'autonomous institutional arrangements' that empower plenary Conferences or Meetings of the Parties to formulate and adopt rules without a new instrument requiring ratification.[56] Accreditation provides NGOs with the possibility of participating, albeit generally indirectly, in treaty-making processes taking place within the UN or other such IGOs and in MEA processes. Some IGOs, such as the International Maritime Organization, and MEAs provide NGOs with particularly strong participatory rights, including the right to contribute to their treaty and rule-making processes.

53. In addition to participating in the treaty-making processes resulting in the conclusion of a treaty between States and/or IGOs, NSAs may also, albeit more exceptionally, conclude treaties themselves. It is generally accepted that at least some of the *sui generis* entities, namely the Holy See and the Sovereign Order of Malta, have the capacity to conclude treaties.[57] Moreover, some other NSAs – e.g. AOGs and transnational corporations – enter written agreements or contracts with States or other NSAs (special agreements under Common Article 3 of the 1949 Geneva Conventions,[58] State contracts between States and companies[59]). The nature of these acts remains unclear: while some qualify them as international treaties, others speak about hybrid treaties or about acts that are governed by national and not international law.[60]

54. NSAs therefore assume various roles in the processes resulting in the conclusion of treaties. It is less clear what role they play in the formation of ***international custom.***

55. Article 38(1) of the ICJ Statute defines international custom as *"evidence of a general practice accepted as law"* (al. b)) without specifying whose practice (*usus longaevus*) and acceptation (*opinio juris*) should count. In the opinion of some scholars, this means that *"practices may emanate from state and non-state actors".*[61] In its 2000 final report, the ILA Committee on the Formation of Customary (General) International Law also noted that a rule of customary international law is one *"which is created and sustained by the constant and uniform practice of States and <u>other subjects</u> of international law in or impinging upon their international legal relations, in circumstances which give rise to a legitimate expectation of similar conduct in the future"* (emphasis added).[62]

56. This view, however, is not uniformly shared. In his 2014 report, the ILC Special rapporteur on identification of customary international law Michael Wood suggested that *"the better view /.../ is that, while individuals and non-governmental organizations can indeed "play important roles in the promotion of international law and in its observance" (for example, by encouraging State practice by bringing international law claims in national courts or by being relevant when assessing such practice), their actions*

[56] See CHURCHILL, Robin R. ULFSTEIN, Geir, Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law, *American Journal of International Law,* Vol. 94, 2002, p. 623.
[57] See RYNGAERT, Cedric, The Legal Status of the Holy See, *Göttingen Journal of International Law,* Vol. 3, 2011, pp. 827-857; KARSKI, Karl, The International Legal Status of the Sovereign Military Hospitaller Order of St. John of Jerusalem of Rhodes and of Malta, *International Community Law Review*, Vol. 14, 2012, pp. 19-32.
[58] See ZEGVELD, Liesbeth, *Accountability of Armed Opposition Groups in International Law,* Cambridge University Press, 2002, pp. 49-51; and ROBERTS Anthea, SIVAKUMARAN, Sandesh, Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law, *Yale Journal of International Law,* Vol. 37, 2012, pp. 107-152.
[59] See MANIRUZZAMAN, A. F. M., State Contracts in Contemporary International Law: Monist versus Dualist Controversies, *European Journal of International Law,* Vol. 12, 2001, pp. 309-328.
[60] For more details, see Sofia Report 2012, p. 4.
[61] BOHOSLAVSKY, Juan Pablo, LI, Yuefen, SUDREAU, Marie, Emerging customary international law in sovereign debt governance?, *Capital Markets Law Journal*, Vol. 9, No.1, 2013, p. 63.
[62] ILA Committee on the Formation of Customary (General) International Law, *Statement of Principles Applicable to the Formation of General Customary International Law,* London, 2000, p. 8.

are not "practice" for purposes of the formation or evidencing of customary international law".[63] Similarly, the ICRC in its 2005 Study on Customary International Humanitarian Law notes that the practice of AOGs as a NSA does not constitute State practice and *"while such practice may contain evidence of the acceptance of certain rules in noninternational armed conflicts, its legal significance is unclear".*[64] At the same time, the ICRC has not shied away from invoking its own practice as evidence of the existence of certain rules of customary international humanitarian law.[65]

57. Whereas the formal role of NSAs in the formation of international custom – including custom binding upon themselves – remains controversial, it is evident that NSAs can contribute to the formation of custom indirectly. Thus, NSAs may induce States to behave in a particular way and/or to take a particular position with respect to a certain issue.[66]

58. The third source of international law consists of ***general principles of law*** (recognized by civilized nations). For some scholars, general principles of law constitute the third primary source on a par with treaties and custom. For others, it is just a means for filling in gaps in international law and saving courts from having to declare *non liquet.* In both cases, general principles are defined as principles stemming from domestic legal orders that are commonly shared and can be applied at the international level (such as *nemo iudex in causa,* principles of *res judicata* etc.).[67]

59. NSAs may have some influence on the formation of general principles of law. On the one hand, they may pressure States to introduce certain legal institutions into their domestic legal orders and see to it that these institutions are spread enough to be eligible candidates for general principles of law. On the other hand, NSAs may also help select which of the legal principles shared by various legal cultures will be brought to the international level. They may, for instance, provide international courts with evidence of the general nature of a certain principle. In both cases, the NSAs role will only be indirect.
60. Norm-creation at the international level is not necessarily limited to the conclusion of treaties, emergence of customary rules and establishment of general principles of law. In a broader sense, it further encompasses the adoption of unilateral legal acts and, possibly, the formation of soft-law standards.

61. The legal status of ***unilateral legal acts*** is uncertain. Whereas, it is generally accepted that certain unilateral legal acts issued by States[68] or by IGOs have binding effect, it is far less clear whether NSAs have the capacity to bind themselves (or someone else) in a similar way. Some authors believe that *"there is no reason not to extend the binding nature of unilateral acts to other actors* /than States/ *whose international legal personality is functionally necessary for the international community to function adequately".*[69] This view however is not uniformly accepted.

62. NSAs themselves are quite active in adopting unilateral (legal) acts. Typical examples include unilateral declarations by AOGs, codes of conduct adopted by MNEs or ethical codes issued by NGOs. The acts differ very substantively in their content and purposes. Some are meant to bind the author of the act, others simply and solely sum up certain moral or political principles. In case of the former category, the concept of 'legitimate expectations' has been suggested as an argument in favor of the binding nature of such unilateral acts.[70] So far, however, this concept has not been universally accepted and the legal status of unilateral acts of NSAs – or, in fact, their capacity to produce unilateral legal acts – remains controversial.[71]

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[63] UN Doc. A/CN.4/672, *Second report on identification of customary international law by Michael Wood, Special Rapporteur,* 22 May 2014, pp. 32-33.
[64] HENCKAERTS, Jean-Marie, DOSWALD-BECK, Louise (Eds), *Customary International Humanitarian Law, Volume I: Rules,* Cambridge: ICRC/Cambridge University Press, 2005, p. xlii.
[65] *Ibid.*
[66] See ICJ, *Whaling in the Antarctic (Australia v. Japan),* Judgment, 31 March 2014.
[67] See GAIA, Giorgio, General Principles of Law, in WOLFRUM, Rüdiger (ed.), *Max Planck Encyclopedia of Public International Law,* Vol. IV, Oxford University Press, 2012, pp. 370-378.
[68] ICJ, *Nuclear Tests,* Australia v. France, 20 December 1974, par. 43-46. See also KASSOTI, Eva, *The Juridical Nature of Unilateral Acts of States in International Law,* Leiden and Boston: Brill/Nijhoff, 2015.
[69] RYNGAERT, Cedric, Non-state actors in international humanitarian law, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal, op. cit.,* p. 290.
[70] See RYNGAERT, Cedric, Human Rights Obligations of Armed Groups, *Revue belge de droit international,* Vol. 41, No. 1-2, 2008, pp. 355-381.
[71] See MASTORODIMOS, Konstantinos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundation and Framework,* Ashgate, 2015.

63. At the same time, NSAs can contribute to the formation of unilateral legal acts adopted by States or IGOs. Similarly, as in previous cases, their role here is mostly indirect and informal. Thus, for instance, NGOs or MNEs may induce States to recognize a certain entity or to protest against certain acts.

64. The role of NSAs in this area is similar to that they may have with respect to ***soft law***. The term lends itself to different interpretations.[72] Yet, it is mostly used to encompass, at least, non-binding political declarations containing normative provisions (the UN General Assembly Declarations) and/or vague provisions of international treaties not entailing rights or obligations.[73] NSAs may contribute to the formulation of soft-law instruments in the ways described above.[74] Moreover, some of the instruments that NSAs themselves adopt, if qualified as non-binding, could potentially be deemed part of *soft law.*

C) Non-State Actors and Monitoring of Compliance with International Law and Dispute-Settlement

65. As a decentralised, horizontal system, current international law is not subject to any central ***monitoring*** agency. States and IGOs may follow what other States and IGOs, or even NSAs, do. Yet, their capacities are not unlimited and they may also lack political will to pay attention to certain instances of non-compliance with international law (for instance those committed by close allies or by failed or weak States).

66. NSAs therefore have an important role to play in monitoring compliance with international law, sometimes alongside States and IGOs, sometimes even instead of them. When doing so, they may obviously also have their own biases and/or pursue their own agendas. Monitoring by NSAs – for instance by NGOs – is thus not necessarily more objective and impartial than that provided by other actors. Yet, the plurality of sources of information is in itself a value, as it may help to reach a more objective and impartial view of the situation.

67. Some NSAs have been endowed with a formal mandate to monitor compliance with international law. This is the case of the ICRC, which is mandated to *"to undertake the tasks incumbent upon it under the Geneva Conventions, to work for the faithful application of international humanitarian law applicable in armed conflicts and to take cognizance of any complaints based on alleged breaches of that law"* (Article 4(1)(c) of the ICRC Statute). Another example is the 1973 Convention on International Trade in Endangered Species in which its secretariat has entered into agreements with two NGOs (the World Conservation Monitoring Centre and the Trade Records Analysis of Fauna and Flora) to submit particular information and monitoring information.[75]

68. More generally, NGOs are approaching such a position in some areas, for instance in international environmental law and international human rights law. There are formal NGOs monitoring roles in several human rights Committees (e.g., the Committee on the Rights of the Child).[76] In addition, NGOs may submit shadow reports to any of the UN Committees, which on a regular basis check the level of implementation of UN human rights treaties by States. The views of NGOs are also summed up in one of the three reports on which the members of the UN Human Rights Council base their review of all States' human rights record under the Universal Periodic Review (UPR).[77]

69. Monitoring by NSAs is not limited to the acts of States and IGOs but may focus on acts of other NSAs as well. The ICRC, for instance, monitors the behaviour of all parties to a conflict including AOGs and PMSCs.[78] The Geneva Call, a Geneva based NGO, concentrates primarily on AOGs.[79] In the same vein,

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[72] DUPLESSIS, Isabelle, Le vertige et la soft law : réactions doctrinales en droit international, *Revue québécoise de droit international*, hors-série, 2007, pp. 245-267.

[73] See, e.g., CHINKIN, Christine M., The Challenge of Soft Law: Development and Change in International Law, *International and Comparative Law Quarterly*, Vol. 38, Issue 4, 1989, pp. 850-866; ABBOTT, Kenneth W., SNIDAL, Duncan, Hard and Soft Law in International Governance, *International Organization*, Vol. 54, No. 3, 2000, pp. 421–456.

[74] See BOISSON DE CHAZOURNES, Laurence, MALJEAN-DUBOIS, Sandrine, Normes 'parajuridiques', système concurrent ou complémentaire – Le rôle des ONG internationales et de la soft law, in FEUILLET-LE MINTIER, Brigitte (Dir), *Normativité et biomédecine*, Paris: Economica, 2003, pp. 213-223.

[75] WOODWARD, Barbara K., Non-State Actor Responsibilities: Obligations, Monitoring and Compliance, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMAN, Math (eds), *Responsibilities of the Non-State Actor, op. cit.*, pp. 29-54.

[76] See *Ibid.*, Appendix L, pp. 464-467.

[77] See the website of the UPR at http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx (4 June 2015).

[78] See KOH, Harold Hongju, Separating Myth from Reality about Corporate Responsibility Litigation, *Journal of International Economic Law*, Vol. 7, No. 2, 2004, pp. 263-274.

some NGOs such as the International Commission of Jurists have specific programs on "violations of human rights" committed by MNEs or PMSCs.[80]

70. NSAs have also gradually managed to assert themselves in various capacities in the area of ***dispute-settlement.***[81]

71. In some instances, they have the right to initiate cases by submitting complaints on their own behalf or on behalf of victims (e.g. the European Court of Human Rights). Where this is the case, NSAs are generally provided with a *locus standi* and become full parties to the proceedings. This is so especially in the areas in which NSAs have been attributed rights and duties under international law or where it is considered in the public interest to let them directly intervene in the proceedings (typically in the human rights sphere).

72. In other instances, NSAs are not direct participants in the proceedings. They might however enjoy certain procedural rights, for instance that of filing an *amicus curie* brief and offering opinions as experts. In 2004, the ICJ adopted Practice Direction XII permitting international NGOs to submit written statements and/or documents on their own initiative to the Registrar to be held in a designated location in the Peace Palace. Under the WTO dispute settlement mechanism, the panels may allow *"any party to the dispute to attach the briefs by /NGOs/, or any portions thereof, to its own submissions".*[82]

73. NSAs may also serve as direct agents of dispute-settlement. For instance, the Crisis Management Initiative, a Finish NGO founded by the former president of Finland Martti Ahtisaari, helped negotiate the peace agreement between the Government of Indonesia and the Free Aceh Movement in 2005.[83]

D) Substantive Rights and Duties of Non-State Actors

74. The previous two sections demonstrated roles that NSAs have today in norm-creation, monitoring of compliance with international law and dispute-settlement. All these areas relate to the functioning of the international legal system. In addition, NSAs also possess substantive rights and duties, and the violations of international law by NSAs can probably in some instance entail their legal responsibility.

75. The question of substantive rights and duties is closely linked to that of ***legal personality*** of NSAs. It is now largely accepted that States are not the only legal persons under international law. As the ICJ held in the 1949 *Reparations for Injuries* case, *"the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States"*.[84] Few authors deny that in addition to States, IGOs are legal persons under international law.[85] Claiming that NSAs are legal persons is more complicated due to the diversity of NSAs.[86]

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[79] See the website of the Geneva Call at http://www.genevacall.org/ (4 June 2015). See also BONGARD, Pasca, SOMER, Jonathan, Monitoring armed non-state actor compliance with humanitarian norms: a look at international mechanisms and the Geneva Call Deed of Commitment, *International Review of the Red Cross,* Vol. 93, No. 883, 2011, pp. 673-706; and WOODWARD, Barbara K., *Global Civil Society op. cit.*, p. 231

[80] See the webpage of the ICJ at http://www.icj.org/themes/business-and-human-rights/ (4 June 2015).

[81] For more details, see The Hague Report 2010, pp. 14-17.

[82] *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, 98-0000, Report of Appellate Body of 12 Oct. 1998, amended 6 Nov. 1998, WT/DS58/AB/R, p. 39. See also BOISSON DE CHAZOURNES, Laurence, La procédure consultative de la Cour internationale de justice et la promotion de la règle de droit: remarques sur les conditions d'accès et de participation, in DUPUY, Pierre-Marie, FASSBENDER, Bardo, SHAW, Malcolm N., SOMMERMANN, Karl-Peter (eds), *Völkerrecht als Wertordnung – Common Values in International Law, Essays in Honour of Christian Tomuschat,* Kehl: Engel Verlag, 2006, pp. 479-493.

[82] *United States–Import Prohibition of Certain Shrimp and Shrimp Products, op. cit.*, par. 110.

[83] Aceh rebels sign peace agreement, *BBC,* 15 August 2005.

[84] ICJ, *Reparation for Injuries,* Advisory Opinion, 11 April 1949, p. 8.

[85] See AMERASINGHE, C. F., *Principles of the International Law of International Organizations*, Cambridge University Press, 2005; KLEIN, Pierre, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens*, Bruylant, 1997; BECKER, P. H. F, *The Legal Position of Intergovernmental Organisations. A Functional Necessity – Analysis of their Legal Status and Immunities,* Kluwer, 1994; RAMA-MONTALDO, Manuel, International

76. There is consensus that some NSAs enjoy aspects of legal personality under international law. This is the case of the ICRC,[87] the Holy See[88] or AOGs.[89] The legal status of other NSAs, including NGOs and MNEs, is more controversial.[90]

77. The uncertainties surrounding the very concept of legal personality add to the complexity.[91] It is for instance not fully clear whether actors must become subjects of international law in order to be able to acquire rights and duties under this law and if so, how the status is actually gained (*a priori* approach) or whether they become subjects of international law by acquiring concrete rights and duties (*a posteriori* approach).[92]

78. NSAs have acquired an extensive set of ***rights and duties.*** The extent differs depending on the actual type of NSA. Some NSAs are in a position similar to that of States. For example, the Holy See, which is a party to many multilateral treaties as well as a series of bilateral treaties (concordats) with certain States, has generally gained rights and assumed obligations. Other NSAs have a more limited extent of rights and duties which usually remain restricted to a particular area of international law.
79. AOGs are considered to be bound by primary rules of international humanitarian law applicable in non-international armed conflicts (Common Article 3 to the four Geneva Conventions, Additional Protocol II, customary rules etc.).[93] It is less clear whether they are bound by other rules of international law, for instance by human rights standards.[94] Since the late 1990s, the Security Council and other organs of the UN have repeatedly called upon various AOGs to abide by human rights obligations, respect human rights and put an end to human rights violations.[95] It has been suggested that the acts by the UN bodies could themselves establish human rights obligations for AOGs.[96] This view however is not generally accepted.[97]

80. MNEs are subjects of domestic law, but their status under international law remains disputed. There is some support for the view that MNEs have an obligation to refrain from committing crimes under international law. This view has its roots in the post-WWII criminal trials, which however focused on individuals and not companies, and in some national practice (the US Alien Tort Claims Act), which again is rather inconclusive. It has also been suggested that corporations might have obligations stemming from human rights law[98] but, again, there is no consensus reached on this.[99]

Legal Personality and Implied Powers of International Organizations, *British Yearbook of International Law*, XLIV, 1970, pp. 111-135.

[86] See CLAPHAM, Andrew, *Human Rights Obligations, op. cit.*, pp. 68-69. See also THÜRER, Daniel, The Emergence of NGOs and Transnational Enterprises in International Law and the Changing Role of the State, in HOFFMAN, Rainer, GEISSLER, Nils (eds), *Non-State Actors as New Subjects of International Law. From the Traditional State Order towards the Law of the Global Community*, Duncker & Humblot, 1999, pp. 37-58.

[87] See STEENBERGHE, Raphael Van, Non-state actors from the perspective of the International Committee of the Red Cross, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal, op. cit.*, pp. 204-232.

[88] See RYNGAERT, Cedric, The Legal Status of the Holy See, *Goettingen Journal of International Law*, Vol. 3, No. 3, 2011, pp. 829-859.

[89] See RYNGAERT, Cedric, Non-state actors in international humanitarian law, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal, op. cit.*, pp. 284-294.

[90] See KAMMINGA, Menno T., ZIA-ZARIFI, Saman Zia-Zarifi (eds), *Liability of Multinational Corporations under International Law*, Brill, 2000; and DE BRABANDERE, Eric, Non-state Actors, State-Centrism and Human Rights Obligations, *Leiden Journal of International Law*, Vol. 22, No. 1, 2009, pp. 191-209.

[91] On the concept, see NIJMAN, Janne E., *The Concept of International Legal Personality. An Inquiry into the History and Theory of International Law*, The Hague: T. M. C. Asser Press, 2004; and PORTMANN, Roland, *Legal Personality in International Law*, Cambridge University Press, 2010.

[92] See also The Hague Report 2010, pp. 19-23.

[93] BÍLKOVÁ Veronika, Treat Them as They Deserve!? Three Approaches to Armed Opposition Groups under Current International Law, *Human Rights and International Legal Discourse*, Vol. 4, No. 1, 2010, pp. 111-126.

[94] See SIVAKUMARAN, Sandesh, Binding Armed Opposition Groups, *International and Comparative Law Quarterly*, Vol. 55, No. 2, 2006, pp. 369-394.

[95] See CONSTANTINIDES, Aristotelis, Human Rights Obligations and Accountability of Armed Opposition Groups: The Practice of the UN Security Council, *Human Rights and International Legal Discourse*, Vol. 4, 2010, pp. 89-110.

[96] *Ibid.*

[97] See KU, Julian, The Curious Case of Corporate Liability Under The Alien Tort Statute: A Flawed System of Judicial Lawmaking, *Virginia Journal of International Law*, Vol. 51, 2011, pp. 353-396.

[98] UN Doc. A/HRC/RES/17/4, *Guiding Principles on Business and Human Rights*, 6 July 2011.

[99] See COLLINS, Pauline, Enforcement of International Law Obligations concerning Private Military Security Corporations, *University of Tasmania Law Review*, Vol. 33, No. 1, 2014, pp. 28-55.

81. NGOs are also primarily subjects of domestic law, although there have been attempts to harmonize the regulation among States, at least at the regional level (e.g., 1986 *European Convention on the Recognition of the Legal Personality of International Non-Governmental Organisations*).[100] NGOs seem to have obligations, but it is not clear how much these qualify as international legally binding obligations properly so called. Such obligations stem from treaties (international labour law), arrangements within international organizations (ECOSOC), autonomous institutional arrangements (multilateral environmental agreements), and other agreements (CITES, etc.).

82. It is thus well-established that NSAs have some substantive rights and duties under current international law. It is less clear, however, whether the violation of the obligations they have entails international ***responsibility*** (or liability/accountability).

83. In practice, emphasis is often placed on mechanisms of indirect responsibility. Indirect responsibility arises in connection with activities of NSAs that would constitute an international wrongful act if committed or omitted by other actors – typically States, IGOs and individuals – which are somehow linked to NSAs. Thus, for instance, a violation of international humanitarian law committed by an AOG can give rise to the responsibility of the State exercising effective control over such a group, or to individual criminal responsibility of persons acting on behalf of the group.[101] At the same time, NSAs may be held accountable at the domestic level – within civil or criminal procedure. This however can be difficult and is not always successfully achieved.[102]

84. Direct responsibility of NSAs is more controversial. Some instruments seem to indicate that such responsibility is conceivable. For instance, the *UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (UNBPG) state that where *"a person, a legal person, or other entity is found liable for reparation for a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim"* (Principle 15). The ILA Committee on Reparations for Victims of Armed Conflict also noted that AOGs can be held responsible to provide reparations where they commit violations of international humanitarian law.[103] Yet, the international practice is scarce and does not allow us to make any general conclusions.

E) Non-State Actors and Contemporary International Law

85. The previous subsections have demonstrated that NSAs assume many important roles at the international scene. They have also revealed that these roles are not, as it is sometimes believed, fully ignored by international law. In fact, so far, there have been two moves to accommodate non-state actors: the formal incorporation of NSAs within the international legal system and informal integration of NSAs into this system. The border between these two strategies is not strict.

86. ***The formal incorporation of NSAs*** into international law consists of the conferral upon these actors of formal legal personality and/or of concrete rights and duties. We saw above that some NSAs have a well-established position under current international law. The Holy See is a legal person with the capacity to conclude treaties or to send its official representatives to States. The ICRC is recognized as a legal person under international humanitarian law. AOGs are deemed to be bound by primary norms of IHL applicable in non-international armed conflicts.

87. Other NSAs, including NGOs and MNEs, only have a limited set of rights and/or duties, established usually within particular treaty regimes (for instance the regime of the European Convention on Human Rights). It is unclear whether it turns them into legal persons under international law. This confirms that legal

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[100] See WIEDERKEHR, Marie-Odile, La convention européenne sur la reconnaissance de la personnalité juridique des organisations internationales non gouvernementales du 24 avril 1986, *Annuaire français de droit international*, Vol. XXXIII, 1987, pp. 749-761.

[101] See also BÍLKOVÁ, Veronika, Establishing Direct Responsibility of Armed Opposition Groups for Violations of International Humanitarian Law?, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMANN, Math (eds), *Responsibilities of the Non-State Actor*, *op. cit.*, pp. 263-284.

[102] COLLINS, Pauline, International Corporate Criminal Liability for Private Military and Security Companies - A Possibility?, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMAN, Math (eds), *Responsibilities of the Non-State Actor, op. cit.*, pp. 177-202.

[103] ILA Committee on Reparations for Victims of Armed Conflicts, The Hague Report, 2010, pp. 12-13.

personality is not an all-or-nothing institution and that the line between legal persons and non-persons is not as strict as generally assumed; some entities find themselves in a grey zone between the two areas. This is the result of the evolution of international legal personality as a legal technique, of the evolution of international law *ratione materiae* and *personae*, and the lack of rationalisation in the theory of international law.[104]

88. The formal incorporation of certain NSAs into the international law system does not place them on the same level as States. The inequality pertains not only to the extent and content of the legal personality but also, more importantly, to the fact that NSAs have very limited, if any, input in determining what this extent and content will be.

89. Thus, having lost a part of their factual power at the international level, States seek to keep at least the normative power over other actors. They want to continue to serve as gate-keepers who decide which actors, and under what conditions, may enter into the exclusive club of legal persons under international law. This is problematic on many accounts including the growing gap between the theory of international law and the practice of international relations, the controversial legitimacy of the State monopoly over norm-creation[105] and the lack of incentives for some NSAs to abide by State-created rules. Consequently, commentators have proposed various alternatives to the State-centred view of international law that occasionally endow NSAs with an improved position. Some of these alternatives will be examined in section IV of this report.

90. ***The informal integration of NSAs*** in the international legal system relates to the situation in which NSAs are not granted a formal position within this system but their factual role is nevertheless acknowledged by other, informal means. There are various ways in which the participation of NSAs, mostly NGOs, in norm-creation processes is given a certain established basis without the conferral of formal rights and duties to such actors. These include simple recognition of the possibility of interaction with NSAs (Article 71 of the UN Charter) or sharing of information with NSAs (Ospar Convention). Similarly, judicial and quasi-judicial fora have benefited from the expertise of NSAs, again mainly NGOs, without the formalisation of their position (e.g., NGOs serving as expert witnesses in the ICJ etc.).

91. The informal integration of NSAs further relativizes the importance of legal personality and the distinction between those who have acquired it and those who have not. At the same time, for lawyers trained in the traditional positivist approach, it might be somewhat difficult to follow how the law-making and law-enforcement mechanisms actually work. This explains the dissatisfaction with the unclear role of NSAs that authors express as well as the proposals to change the current legal regulation and enhance the legal status of NSAs. Some of these proposals will be discussed in the next section.

92. The current state of affairs is certainly not definitive or unchangeable. Even under the traditional State-centric paradigm of international law, NSAs could have their legal status ***further strengthened*** through the two moves mentioned above – formal incorporation and informal integration. Some NSAs, which today are solely the object of informal integration, could be formally incorporated into the system.

93. In the area of *law-making*, certain NSAs already have the power to conclude international treaties. This power could be extended to other entities, for instance NGOs and MNEs. Moreover, the capacity of NSAs to make binding unilateral commitments could be generally recognized (for instance, the Deeds of Commitments signed by AOGs could be deemed binding upon them). Finally, NSAs could gain a more active role in the creation of customary international law, with their practice and opinion being considered as relevant as that of States (at least with respect to customary rules that bind these NSAs).

94. In the area of *compliance monitoring*, some NSAs, such as the ICRC, have a well-established and generally recognized position. This position could be opened to other actors. For instance, the practice of NGOs submitting their reports to human rights or environmental bodies could be formalised. NGOs would have a right to submit the report and/or the international body would be required to consult them.

[104] LAMALLE, Sandy, L'évolution conceptuelle dans le langage juridique international ou la traduction d'une nouvelle littéralité, *Sémiotica*, Issue 201, 2014, pp. 145-165.
[105] See RYNGAERT, Cedric: Imposing International Duties On Non-State Actors And The Legitimacy Of International Law, *Leuven Working Paper No. 42*, March 2010.

95. In the area of *dispute settlement*, NSAs could have a more active role to play in mechanisms and procedures that are currently *"geared towards States, with rights of* locus standi *typically reserved for States".*[106] For instance, NGOs and other NSAs could acquire a formal right to present expert opinions and *amici curie* to the ICJ and to other international judicial and quasi-judicial bodies.

96. In the area of *primary rights and duties*, NSAs already recognized as persons under international law could have their rights and duties extended, while other NSAs could finally have their legal personality confirmed. Thus, for instance, AOGs could have obligations stemming not only from international humanitarian law but also from human rights law.[107] NGOs and MNEs, in turn, could acquire clear rights and/or duties under human rights law and/or international criminal law.

97. In the area of *responsibility***,** the possibility of strengthening the legal status of some NSAs (AOGs, MNEs) discussed above may emerge at least in some areas of international law (human rights law, international humanitarian law, international criminal law etc.).[108]

98. It thus seems that the position of NSAs under international law ***could*** be further strengthened in the ways described above. The question however is whether this ***should*** be done and, if so, which NSAs should be included and under what conditions, and which, if any, should on the contrary remain outside the system.

99. Formal incorporation, and partly also informal integration of NSAs is not merely a technical operation; it affords these actors opportunities to provide input in important issues. In so doing, it also enhances their legitimacy: those admitted to the club gain certain membership rights and become part of a shared, normative culture. Conferring such a position on some NSAs, for instance PMSCs, might cause controversy.

100. Moreover, strengthening the international legal status of NSAs means further blurring the line between national and international law. Operating in the territory of one or several States, NSAs are subject to such State'(s') legal order. If, in addition, they are subject to international law, the relationship with the State becomes more complex. Special rules would be required to solve, or avoid, conflicts between several legal orders (for instance national legal orders of several States, international law and rules created by NSAs). Thus, the legal status of NSAs under international law is not merely a question for international law; it has important domestic implications as well.

101. Most of the changes described above would not constitute a radical departure from the traditional paradigm of international law. The legal status of NSAs would be strengthened but the degree to which this would destabilise the State-centric system would probably be limited. Yet, it is exactly this State-centric system that some authors find problematic.[109] Other scholars suggest that the system does not exist in the first place and that the traditional paradigm of international law is not the only (and the most correct) one through which to read and interpret international law. The next section presents alternatives to the traditional paradigm and examines some of the practical consequences that the adoption of such alternative views could have for international law and for the position of NSAs.[110]

IV. ALTERNATIVE APPROACHES TO NON-STATE ACTORS

102. The previous section discussed the role of NSAs from the traditional, positivist perspective. While still dominant at the international level, this theoretical perspective is far from exclusive. A number of alternative approaches exist that conceptualize international law differently. Consequently, they also differ

[106] The Hague Report 2010, p. 14.
[107] See CLAPHAM, Andrew, *Human Rights Obligations of Non-State Actors,* Oxford University Press, 2006.
[108] See BÍLKOVÁ, Veronika, Establishing Direct Responsibility, *op. cit*.,; VAN AAKEN, Anne, Markets as an Accountability Mechanism in International Law?, in GAL-OR, Noemi, RYNGAERT, Cedric, NOORTMANN, Math (eds), *Responsibilities of the Non-State Actor, op. cit.,* pp. 154-176; COLLINS, Pauline, International Corporate Criminal Liability for Private Military and Security Companies - A Possibility?, in *Ibid.,* pp. 177-202; or DE ALMEIDA RIBEIRO, Manuel, Responsibility of Private Entities in International Environmental Law: Transport of Oil by Sea and Nuclear Energy Production, in *Ibid.,* pp. 217-234.
[109] See CLAPHAM, Andrew, *Human Rights Obligations of Non-State Actors,* Oxford University Press, 2006.
[110] See also OLIVIER, Michele: Exploring Approaches to Accommodating Non-State Actors within Traditional International Law, *Human Rights and International Discourse,* Vol. 4, 2010, pp. 15-31.

in their views of the role of NSAs. This report focuses on those approaches that have dealt with the position of NSAs in more detail: global legal pluralism, transnational law approach, constitutionalism, the policy-oriented approach, and interdisciplinary IL/IR approach.

103. The main purpose of this section is to demonstrate that the role assigned to NSAs under international law is not objectively determined. Rather, it reflects the particular theoretical position that one embraces with respect to (international) law.[111] In this regard, we are all "prisoners of the theory", which provides us with lenses through which we contemplate and assess the (international) reality. The theory determines which factors and actors are deemed relevant and what position is attributed to them. It then largely depends on the persuasive force of the supporters of the theory whether, and to what extent, they gather the support of the relevant epistemic community.[112]

A) Global Legal Pluralism[113]

104. The theory of legal pluralism starts from the premise that people are part of multiple groups and feel that they are bound by the norms of these groups. Besides the familiar groups, such as States and political affiliations, people can have affiliations that are not part of an "official" State-based system, such as subnational ethnic groups, religious institutions and trade organizations. These communities may exert tremendous power over the actions of people.[114] Thus, the key insight of legal pluralism is *"a recognition that multiple orders exist and a focus on the dialectical interaction between and among these normative orders".*[115] Legal pluralists empirically study which statements of authority tend to be treated as binding in actual practice and who treats them as such.[116]

105. The theory of global legal pluralism has emerged more recently, primarily as a reaction to the globalization process. Whereas some see it as a mere adaptation of legal pluralism to the new global context, others believe it constitutes a new paradigm.[117] Global legal pluralism is interested in the coexistence of different legal systems stemming from different sources. It also studies the relationship between various actors participating in the creation and/or implementation and application of such legal systems.

106. The theory of global legal pluralism is in itself ***pluralist.*** Its supporters are interested in different aspects of global developments. Teubner, for instance, argues that 'global law' constitutes a new legal order stemming from intersections between multiple actors in many spheres of activities. To understand this law, it is necessary to make a turn from groups to discourses and communicative networks.[118] Snyder defines global legal pluralism as the totality of episodic conjunctions of multiple sites which are strategically determined and situationally specific. Pluralism in his view has two main aspects: the structural aspect involving a variety of institutions, norms and dispute resolution processes, and the relational aspect, concerning the relations between sites.[119] Berman, in his turn sees global legal pluralism as a normative project aimed at striking a middle ground between strict territorialism and open-ended universalism.[120]

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[111] Fitzmaurice elucidated how choice of theoretical approach and understandings about sources of international law affect content. In his view, *"direct relationship between certain differences of approach to international law, certain controversies as to its basic character, on the one hand, and on the other, divergencies of view regarding sources of international law, formal and informal, are capable of influencing their content, or the view taken or suggested as to the content of the law because of the absence of any legislator, legislature or statute law"*. FITZMAURICE, Gerald, Some Problems Regarding the Formal Sources of International Law, in *Symbolae Verzilj*, The Hague: Martinus Nijhoff, 1958, pp. 156-160.

[112] See KOSKENNIEMI, Martti, *From Apology to Utopia. The Structure of International Legal Argument*, Cambridge: Cambridge University Press, 2006.

[113] This section is based on TJEN-A-KWOEI, Alberto, RYNGAERT, Cedric, *Background Paper on Global Legal Pluralism and NSA*, 21 September 2015.

[114] BERMAN, Paul Schiff, Global Legal Pluralism, *Southern California Law Review*, Vol. 80, 2007, pp. 1169-1170.

[115] *Ibid.*, p. 1171.

[116] BERMAN, Paul Schiff, From International Law to Law and Globalization, *Columbia Journal of Transnational Law*, Vol. 43, 2005, p. 510.

[117] MICHAELS, Ralph, Global Legal Pluralism, *Duke Law School Faculty Scholarship Series* paper 185, 2009; and MICHAELS, Ralph, Global Legal Pluralism, *Annual Review of Law and Social Science*, Vol. 5, 2009, pp. 243-262.

[118] TEUBNER, Gunther, Global Bukowina: Legal Pluralism in the World Society, in TEUBNER, Gunther (ed.), *Global Law Without a State*, Darthmouth: Brookfield, 1997, pp. 3-28

[119] SNYDER, Francis, Governing Economic Globalisation: Global Legal Pluralism and European Law, *European Law Journal*, Vol. 5, No. 4, 1999, pp. 334-374.

[120] See BERMAN, Paul Schiff, Global Legal Pluralism, 2007, *op. cit.*

107. The theory of global legal pluralism has been used to explain certain developments within ***international law.*** For instance, it has been applied to the process of fragmentation.[121] Burke-White identifies seven trends in international law, out of which three suggest fragmentation and four suggest *"new forms of interaction between national and international actors and the development of an international legal pluralism".*[122] The three trends that point towards fragmentation are the diversification of international tribunals, the growth and potential conflict of legal norms, and the increased access by NSAs to the international legal adjudication fora. The four trends that suggest the development of a pluralist legal system are the application of a common body of law by international tribunals, inter-judicial dialogue, the blending of procedures and traditions, and the hybridization of international law enforcement.

108. The theory of global legal pluralism postulates the existence of multiple orders that interact with each other. Law is created through the interaction of these orders. In such a system, there is room for ***NSAs*** as the system does not dictate what types of actors create, implement and enforce the law or are bound by its rules. Global legal pluralism uses the concept of NSAs, favouring however the term "communities". Some communities predate the creation of their normative space (ethnic communities), others emerge together with this space (various social network). In this way, the actors become inseparable from their normative practice or, even, may be constituted by these practices. The production of rules (norm-creation) is therefore the decisive element which allows us to determine which actors (communities) matter under global (international) law and which do not.

109. Berman notes that *"a more pluralist account of international law also recognizes the wide variety of non-state actors engaged in the establishment of norms that operate internationally and transnationally".*[123] He adds that there are several ways in which NSAs could establish such norms. The first is that of NSAs acting as direct lawmaking bodies. In this case NSAs create their own norms of self-regulation, separated from norms created by States or IGOs.[124] Another possibility is that NSAs are delegated lawmaking authority by official legal actors, or that official legal actors recognize the efficacy of non-state norms. In these cases NSAs also create norms that have the effect of law, but instead of creating for the purpose of self-regulation, States and other formal lawmaking entities recognize and take over these norms because of their efficiency, or because they delegated a non-governmental body to create standardizing norms in a specific field. A third way is that of international conventions empowering private parties to develop international norms.[125] This conception still posits the central role of the State but it does not condition the validity of legal norms produced by NSAs on the consent of the State.

110. Teubner also recognizes the capacity of NSAs to establish their own norms. Yet, unlike Berman, he does not see such norms as part of a comprehensive system of international law but, rather, as a nucleus of a new system of global law which has so far been developing at the periphery of the legal systems.[126] His view primarily applies to international economic law. The same is true for Snyder, who is more reluctant to assign NSAs (MNEs) a formal norm-making role within international or global law.[127]

111. Thus, global legal pluralists see NSAs as relevant players in the construction and application of international/global law. Their position is determined primarily by their normative actions that do not require any formal approval by States. They simply have to be efficient enough to produce consequences within the relevant community. Normative systems produced by various actors (communities) interact, though the rules for such interactions are not made very clear in the global legal pluralism literature. It is solely possible to note that often, priority is conceded to the norms established by States (at the national or international level). NSAs are thus still defined by their other-than-State character and the norms they produce remain at the periphery.

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[121] UN Doc. A/CN.4/L.682, *Fragmentation of International Law: Difficulties Arising From the Diversification And Expansion of International Law. Report of the Study Group of the International Law Commission Finalized by Martti Koskenniemi,* 13 April 2006.
[122] BURKE-WHITE, William W., International Legal Pluralism, *Michigan Journal of International Law,* Vol. 25, 2004, pp. 965.
[123] BERMAN, Paul Schiff, A Pluralist Approach to International Law, *Yale Journal of International Law,* Vol. 32, 2007, pp. 312.
[124] See also CAFFAGI, Fabrizio (ed.), *The Enforcement of Transnational Regulation. Ensuring Compliance in a Global World,* Edward Elgar, 2012.
[125] BERMAN, Paul Schiff, A Pluralist Approach, *op. cit.*, pp. 312-315.
[126] TEUBNER, Gunther, Global Bukowina, *op. cit.*
[127] SNYDER, Francis, Governing Economic Globalisation, *op. cit.*

B) Transnational Law Approach

112. Transnational Law approach emerged in the 1950s, as a reaction to the growing displeasure with the positivist mainstream in international law. While the first usage of the term is disputed, "transnational law" is conventionally associated with the US scholar Phillip C. Jessup. Jessup defined transnational law as *"all law which regulates actions or events that transcend national boundaries".*[128] Such actions and events involve not only States but also IGOs, individuals, and various NSAs. Yet, the positions of these actors differ substantially under international law according to Jessup – whereas States and, to a certain extent, IGOs, are subjects of the law and its norm-makers, NSAs remain objects of the law or, as a maximum, norm-takers.[129]

113. In 1972, a collection of essays entitled *Transnational Law in a Changing Society* was published in honour of P. C. Jessup.[130] While putting emphasis on the pluralistic nature of the international society, the authors showed scepticism as to the strengthening of the status of actors other than States in international law. For instance, in his chapter on MNEs, Wilfred Jenks wrote: *"/N/o international status for multinational corporations can be created in the foreseeable future by a mandatory decision and the status would become a significant reality only insofar as corporations sought it and governments recognize it".*[131] The quote suggests that those writing about transnational law did not do enough to conceptualize this law, distinguish it from national and international law, and to consider the role of various actors within it.

114. In the 1990s, the concept of transnational law/relations, as conceived during the Cold War, attracted criticism. In his book on NSAs published in 1995, Thomas Risse-Kappen wrote that *"the original concept of transnational relations was ill-defined. It encompassed everything in world politics except state to state relations".*[132] The alternative definition, Risse-Kappen proffered, conceptualized transnational relations as *"regular interactions across national boundaries when at least one actor is a non-state agent or does not operate on behalf of a national government or an international organization"*.[133] NSAs have an important role to play in transnational relations, because as the author stresses *"we cannot explain state behaviour in crucial issue-areas without taking the cross-boundary activities of non-state actors into account"*.[134] Thus, analysing the activities of NSAs and assessing the impact they have on transnational relations is one of the main tasks of scholars of international relations. What this would mean for (international) law however is unclear, as the book does not pay much attention to law.

115. It is different in the work of contemporary legal scholars writing about transnational law or, more typically, transnational legal process. This is the case of Harold Koh, who combines the elements of policy-oriented approach (so-called New New Haven School) with those of transnational law. For Koh, transnational legal process is *"the theory and practice of how public and private actors /.../ interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law"*.[135] Transnational law breaks down the distinction between public and private and international and national – NSAs, traditionally relegated to the national and private sphere but more and more present in the international and public sphere is one of the main agents of change in this area. What concrete changes this should bring for the position of NSAs in international law, and for international law as such, remain however yet to be determined by transnational law scholars.

C) Constitutionalism

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[128] JESSUP, Phillip C., *Transnational Law*, New Haven: Yale University Press, 1956, p. 156.
[129] See also NOORTMANN, Math, Understanding Non-State Actors in the Contemporary World Society: Transcending the International, Mainstreaming the Transnational, or Bringing the Participants Back In?, in NOORTMANN, Math, RYNGAERT, Cedric (eds), *Non-State Actor Dynamics in International Law. From Law-Takers to Law-Makers*, Ashgate, 2010, pp. 153-170.
[130] FRIEDMANN, Wolfgang, HENKIN, Luis, LISSITZYN, Oliver (eds), *Transnational Law in a Changing Society: essays in honor of Philip C. Jessup*, New York: Columbia University Press, 1972.
[131] JENKS, Wilfred, Multinational entities in the law of nations, in *Ibid.*, p. 73.
[132] RISSE-KAPPEN, Thomas (ed.), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*, Cambridge University Press, 1995, pp. 7-8.
[133] *Ibid.*, p. 3.
[134] *Ibid.*, p. 280.
[135] KOH, Harold H., Transnational Legal Process, *Nebraska Law Review*, Vol. 75, 1996, pp. 183-184.

116. Constitutionalism[136] is often presented as an opposite to (global legal) pluralism.[137] It stresses unity instead of plurality, common values instead of separate normative orders, hierarchy instead of coordination. It, however, shares with pluralism the rejection of the classical State-centric theory of international law.[138] That would suggest that it should be open to NSAs. Yet, in reality, *"the impact of new participants in the international legal system is ambivalent from a constitutionalist perspective".*[139]

117. Although stressing unity, constitutionalists are not uniform in their approach. Yet, the aim most of them seem to share is *"to constrain free state will with regard to both the conduct of international relations and the design of domestic constitutional orders".*[140] One of the main tools bringing about such constraints is international law, which limits freedom of States internationally and domestically. For constitutionalists, international law is not comprised of consent-centred instruments whose content is fully determined by States. Rather, international law *"increasingly focuses on the realization of community interests and the promotion of global public goods".*[141] To achieve these goals, international law itself is construed as a hierarchical system with certain higher norms placed at the top of the normative pyramid. Concepts such as *jus cogens* or *erga omnes* obligations are conventionally referred to in this context, expressing those community interests and global public goods that the international community is to pursue.

118. So far, the theory of constitutionalism has not paid much attention to ***NSAs.*** This is partly due to the fact that, as Kleinlein notes, *"subjects doctrine does not play prominent role in constitutionalists´ studies, which are, in general, rather focused on sources doctrine".*[142] Another factor is that constitutionalists largely concentrate on two specific actors (beyond States) – IGOs and individuals, both of which fall outside the definition of NSAs adopted in this report. Whereas IGOs are seen as crucial actors in the creation and application of international law, individuals constitute the main and in the final stage the only real addressee of legal norms. *"In a constitutionalized world order, natural persons are the primary international legal persons and the primary members of the global constitutional community."*[143]

119. Anne Peters is the principal scholar who has analysed the legal position of NSAs from the constitutionalist standpoint.[144] Starting from the assumption that *"there is a global constitutional community which is made up by individuals, states, international organizations, NGOs, and business actors",*[145] she discusses not only the three "usual suspects" (States, IGOs, individuals) but pays attention to two NSAs as well: NGOs and MNEs. Peters first recognizes the factual relevance of these actors. NGOs *"*de facto *play an increasingly important role in the international legal process".*[146] MNEs *"form part of the global constitutional community and are embedded in an economic constitutional framework. Transnational commercial activities have been a crucial factor for the development of international law".*[147]

120. Peters asserts that *"the constitutionalist approach allows the reframing of the doctrinal debate on the international legal personality".*[148] The statement relates specifically to NGOs but there is no reason why it should not apply to other NSAs as well. In Peters´view, the question is not, whether NSAs are subjects of international law but *"which precise fundamental rights and obligations they possess and should possess in*

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[136] PETERS, Anne, KLABBERS, Jan, ULFSTEIN, Geir, *Constitutionalization of International Law,* Oxford: Oxford University Press, 2009.

[137] Krisch, for instance, speaks about the contest between constitutionalism and pluralism. See KRISCH, Nico, The Case for Pluralism in Postnational Law, *LSE Working Paper* 12, 2009, p. 2. See also KRISCH, Nico, The Case for Pluralism in Postnational Law, in DE BÚRCA, Grainne, WEILER, Joseph H.H. (eds), *The Worlds of European Constitutionalism,* Cambridge: Cambridge University Press, 2012, pp. 203-261.

[138] Certain authors express doubts as to whether constitutionalism is an alternative of positivism or just a strand within it. For instance, Kleinlein notes that *"as a contribution to international legal scholarship, international or global constitutionalism is not so much a public international legal theory of its own, but a particular doctrinal approach within the positivist mainstream of public international legal scholarship".* KLEINLEIN, Thomas, Non-state actors from an international constitutionalist perspective, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal System, op. cit.*, p. 43.

[139] *Ibid.*, p. 41.

[140] *Ibid.*, pp. 41-42.

[141] *Ibid.*, p. 42.

[142] *Ibid.*, p. 44.

[143] PETERS, Anne, Membership in Global Constitutional Community, *EJILTalk*, 20 July 2010.

[144] PETERS, Anne, Membership in Global Constitutional Community, in PETERS, Anne, KLABBERS, Jan, ULFSTEIN, Geir, *Constitutionalization of International Law, op. cit.,* pp. 153-262.

[145] PETERS, Anne, Membership in Global Constitutional Community, *EJILTalk*, 20 July 2010.

[146] PETERS, Anne, Membership in Global Constitutional Community, in PETERS, Anne, KLABBERS, Jan, ULFSTEIN, Geir, *Constitutionalization of International Law, op. cit.*, p. 219.

[147] *Ibid.*, p. 240.

[148] *Ibid.*, p. 219.

a constitutionalized world order".[149] She opts for a functionalist approach claiming that NSAs should hold rights and obligations that reflect their functions. She then provides an overview of functions that NGOs and MNEs assume at the international level and of rights and obligations they have under current international law because of these functions. The overview is not radically dissimilar to that provided in the previous section of this report (and, in more detail, in the reports adopted by this Committee in 2010-2014). The reframing of the doctrinal debate is therefore, if it occurs at all, rather moderate.

121. Moreover, the relationship of constitutionalists to NSAs is difficult, even ***ambiguous***. On the one hand, NSAs assume important functions in promoting community interests and global public goods as well as in advocating for the rights of individuals. Thus, their rise is perceived as *"a step towards inclusiveness and empowerment of entities other than states".*[150] On the other hand, the rise of NSAs, particularly when entities other than NGOs and MNEs are included in the analysis, may be viewed as problematic, because it *"threatens the overall coherence of the international order from a normative point of view".*[151] The pluralization of actors endowed not only with right and duties but also, potentially, with the capacity to establish, apply and enforce legal rules could place the normative unity of international law constitutionalists strive for in jeopardy.

D) Policy-Oriented Approach

122. The policy-oriented approach constitutes a more radical departure from the traditional approach to international law than global legal pluralism and constitutionalism. The term is not used in a completely uniform way. In the narrow sense, it usually refers to the New Haven School of international law.

123. The New Haven School arose from the Yale Law School in the United States. Representatives include Myres S. McDougal and Harold Lasswell in the first generation and a host of other scholars in the next generation, including W. Michael Reisman, Richard Falk, Harald Koh, and Rosalyn Higgins. Their understanding is encapsulated by the view that law is *"not just a set of rules governing the behaviour of social actors, but a process of authoritative decisions".*[152] The supporters of this approach are practice-oriented: they seek to provide decision-makers with legal advice that would be both scientifically sound and politically relevant. The analysis proceeds in five steps (labelled as the praxis of intellectual tasks) encompassing: goal formulation, trend description, factor analysis, projection of future decisions, and the invention of alternatives.[153]

124. The New Haven School stresses the value of human dignity that international law should strive to protect. In a public order of human dignity, all individuals should have access to the things they cherish, that is, power, wealth, enlightenment, skill, well-being, affection, respect and rectitude. Borrowing from social sciences, the New Haven School analyses social processes rather than merely rules, that are described through six aspects: (1) those who engage in it (participants), (2) the factors that motivate them (perspective), (3) the situation in which they interact (situations), (4) the resources upon which they draw (bases of power), (5) the ways they manipulate those resources (strategies), and (6) the aggregate outcomes of the process of interaction (outcomes).[154]

125. The New Haven School rejects the concept of (formal) legal personality, replacing it with that of participation. As Higgins put it: *"It is not particularly helpful, either intellectually or operationally, to rely on the subject-object dichotomy that runs through so much of the writings. It is more helpful and closer to perceived reality to return to the view of international law as a particular decision making. Within that process (which is a dynamic and not a static one) there is a variety of* participants*, making claims across state lines, with the object of maximizing various values".*[155]

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[149] *Ibid.*, p. 219.
[150] KLEINLEIN, Thomas, Non-state actors from an international constitutionalist perspective, *op. cit.*, p. 44.
[151] *Ibid.*, p. 45.
[152] BACHAND, Rémi, Non-state actors in North American legal scholarship. Four lessons for the progressive and critical international laywer, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal System, op. cit.*, p. 99.
[153] See REISMAN, W. Michael, WIESSNER, Siegfried, WILLARD, Andrew R., The New Haven School: A Brief Introduction, *Yale Journal of International Law*, Vol. 32, 2007, p. 576.
[154] *Ibid.*, pp. 578-581.
[155] HIGGINS, Rosalyn, *Problems and Process: International Law and How We Use It.* Oxford: Clarendon Press, 1994, p. 50.

126. The participants in global decision making include *"those formally endowed with decision competence /.../ and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decision outcomes".* [156] The scope is thus not restricted to States or IGOs, but includes various NSAs as well, with particular attention being again paid to NGOs.[157] The circle of such NSAs is potentially open-ended and there is no *a priori* condition, accept for the factual participation in the decision process, that would limit this circle to certain NSAs or to those meeting a specific definition. Thus, whether NSAs are organized or not, whether they have a link to States or not, whether they are considered legitimate or not, and whether they enjoy formal legal recognition, is irrelevant. What matters is merely their factual power. Thus, the list of participants includes such diverse entities as individual human beings, States, IGOs, transnational political parties, civilizations, folk cultures, mafia and terrorists, etc.[158]

127. Unlike the traditional approach, global legal pluralism and constitutionalism, the New Haven School does not presuppose hierarchy among actors and does not place the State at the centre of the international legal order. That is another reason why it does not need the concept of the NSA. Absent a single paradigmatic participant, it does not make much sense to introduce a State/non-State dichotomy. This general position is however not always followed in concrete analyses. For instance, when discussing the use of force, a field in which NSAs have notably asserted themselves in recent years, the distinction between States and other actors is as clearly made by New Haven scholars as by scholars belonging to the other approaches.[159] This shows how deeply rooted the distinction between States and NSAs is in positive international law and also in the minds of most international legal scholars.

E) Interdisciplinary IL/IR Approach

128. In recent years, interdisciplinary approaches have become popular in social sciences. This is also true in international law (IL) where they usually seek to combine international law and theories of international relations (IR). More exactly, it looks at international law from the perspective of various theories of international relations. Despite the scepticism of influential authors,[160] this approach has gained many supporters in both IL and IR camps.[161] What unites them is the social sciences methodology used to analyse international law. What divides them is the concrete IR theory they apply.
129. Noortmann has suggested that despite its internal plurality, the interdisciplinary approach could help *"understand and explain the role and position of all participants in the constitutive process of order and justice at the world level".*[162] He concedes that both IL and IR have so far primarily engaged in the study of political and legal relations *"by the states for the states and of the states".*[163] Yet, he asserts that the lack of inclusiveness and the hegemonic position of the State that have traditionally characterized IL and IR could be overcome by means of three potential solutions.

130. The first is the elaboration of the concept of transnationalism. Recalling Jessup's distinction between internationalism and transnationalism, Noortmann rejects a division of the world into several spheres of interaction based on participants and suggests replacing it with one based on an understanding of the structure and process of the world. Thus, for instance, NGOs should not be pigeon-holed in the sphere of national or transnational law, provided their activities have an impact on the international scene as well.

131. The second solution calls for revisiting and overhauling the concept of participants as suggested by the policy-oriented approach. Noortmann supports the New Haven School's approach whereby *"international*

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[156] REISMAN, W. Michael, WIESSNER, Siegfried, WILLARD, Andrew R., The New Haven School, *ibid.*, p. 578.
[157] See WIESSNER, Siegfried, Legitimacy and Accountability of NGOs: A Policy-Oriented Perspective, in HEERE, W. P. (ed.), *From Government To Governance – 2003 Hague Joint Conference On Contemporary Issues of International Law,* T. M.C. Asser Press, 2004, pp. 95-101.
[158] See MC DOUGAL, Myres S., REISMAN, W. Michael, WILLARD, Andrew R., The World Community: A Planetary Social Process, *University of California Davis Law Review,* Vol. 21, 1988, pp. 816-833.
[159] See, for instance, REISMAN, W. Michael, International Legal Responses to Terrorism, *Houston Journal of International Law,* Vol. 22, No. 3, 1999, pp. 4-62.
[160] KLABBERS, Jan, The Bridge Crack'd: A Critical Look at Interdisciplinary Relations, *International Relations,* Vol. 23, No. 1, 2009, pp. 119-125.
[161] See DUNOFF, Jeffrey L., POLACK, Marc A. (eds), *Interdisciplinary Perspectives on International Law and International Relations. The State of the Art,* Cambridge University Press, 2013.
[162] NOORTMANN, Math, Towards an interdisciplinary approach to non-state participation in the formation in global law and order, in D´ASPREMONT, Jean (ed.), *Participants in the International Legal System, op. cit.*, p. 77.
[163] *Ibid.*, p. 76.

law is in theory stripped of its state-oriented biases, and the practices and opinions of non-state actors are assessed in a similar way to those of states". [164]

132. The third solution is to design a new sociology of IL and IR where they are understood within a social context that is construed to include not only States, as was traditionally the case, but also NSAs. *"An interdisciplinary approach to non-state participants and non-state participation would acknowledge the opinions and practices of these participants as a variable in the process of understanding the world beyond the state".* [165]

133. Noortmann thus calls for a new approach not only to NSAs but to international law more generally. This approach, inspired by the New Haven School and Jessup´s theory of transnationalism, would take into account the dynamic and flexible nature of international relations. It would expand the research focus beyond the State while at the same time not framing the debate about actors in terms of legal personality as traditionally conceived. It would also look in more detail at institutions and legal frameworks rather than merely legal rules and would abandon preconceived categorisations such as State/non-State and national/international /transnational.[166]

F) The Role of Non-State Actors Under Alternative Approaches to International Law

134. Although most alternative approaches to international law may reject the State-centric, consent-based perspective of international law,[167] they have few other traits in common. They differ in their definition of international law, its functions, and its relevant actors. They also disagree about whether these actors should be defined solely based on factual reality (i.e., anyone having an impact upon international relations is a valid "participant") or whether there should still be some formal selection system and requirements (e.g., relevant actors must have particular characteristics or a certain normative position).

135. Despite their diversity, alternative approaches are valuable in that they show the non-automatic nature of many of the concepts that mainstream international lawyers tend to assume. This opens the door for possible reconceptualization particularly when it comes to the role of NSAs. While it may be premature to draw some expedient suggestions as to this role from the alternative accounts, it is at least possible to raise certain questions that the rise of NSAs render interesting, relevant and in some cases even urgent.

136. The first question is whether the ***category of NSAs*** is theoretically sound and practically useful and whether it can work as a general category at all.[168] Under the traditional paradigm of international law, States occupy the position of normative supremacy within the legal system. Anyone else is then defined through its opposition to, or difference from, States.

137. This position does not recognize the plurality of NSAs. It is already common not to construe the category of NSAs as one encompassing all actors except States. Entities that have gained special prominence internationally (IGOs) or that are simply seen as distinct from the others (individuals), are often excluded from the definition of NSAs. This is also the case in this report. With the rise in importance of other entities, the trend to break up the general category and "name" the concrete "NSAs" will grow, especially if this rise is accompanied by a decline of factual power and normative centrality of the State. From that perspective, the concept of "NSAs" may sooner or later become obsolete. The dichotomous classification between States and non-States might then be replaced by a more pluralistic conception. Such a conception would make it possible to take into account the particular features of each actor and would not force these actors into a one-size-fits-all mould.

138. The second question relates to ***the concept of legal personality.*** This concept has been used in IL theory to apply to inter-State relations as a way to organize actors by drawing a line between those whose acts matter

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[164] *Ibid.*.
[165] *Ibid.*, p. 79.
[166] See NOORTMANN, Math, Globalisation, Global Governance and Non-State Actors: Researching beyond the State, *International Law FORUM de Droit International,* Vol. 4, No. 36, 2002.
[167] Some alternative theories remain largely focused on States. This is, for instance, the case of TWAIL (Third World Approaches to International Law). See MUTUA, Makau, ANGHIE, Antony, What Is TWAIL?, *Proceedings of the Annual Meeting (American Society of International Law),* Vol. 94, 2000, pp. 31-40.
[168] See GAL-OR, Noemi, Observations on the Desirability of an Enhanced International Legal Status of the Non-State Actor, in NOORTMANN, Math, RYNGAERT, Cedric (eds), *Non-State Actor Dynamics op. cit.,* pp. 125-149.

and those who remain outside the legal system. It can also, however, become a straitjacket that renders this system quite inflexible. The situation is further complicated by the lack of consensus over what legal personality really means and what has to be done for an actor to acquire it. Whereas, some scholars suggest that the way out of this pitfall is simply to rethink the concept of legal personality, others argue that the concept itself is unviable and should be eliminated. Still others propose replacing it with the more flexible concept of 'participants' that would take the factual role of various entities in global decision-making process as its starting point.[169]

139. While such proposal may seem *prima facie* appealing, clearly much more must be done to establish what it would mean for the system of international law in general. Those in favour have usually offered merely a very general description of their new vision of international law,[170] while maintaining the traditional legal analysis when discussing concrete legal problems.[171] Thus, the reformulation proposal probably raises even more questions than it answers. Would the position of participants be determined simply by their factual power (along the "might means right" maxim)? How would the line between law and politics be drawn if preserved at all? Which rules would be considered as making part of international law? How would that law differ from domestic law, or would it just be merged into some kind of global law? The choice between the legal person and the participant perspectives cannot be made unless, and before, these issues are addressed.

140. In addition, it is necessary to consider the evolution of the use of the concept of international legal personality in international law (principally in the context of IGOs) and the legal distinctions created in its wake (i.e., varying capacities, rights and obligations according to each institution), as techniques of international legal theory. The reformulation/ reconsideration of the concept would then need to include the technical evolution of the concept as a scientific tool for determining the extent of capacities, rights and obligations of each actor; the diversification and multiplication of actors; the plurality of legal systems and traditions; and the rethinking of the international system beyond the traditional State-centered approach.[172]

141. The third question is that of the ***position of NSAs*** and the status of "laws" they produce. Global legal pluralism would consider the normative orders created by non-state entities as independent legal orders along, though probably not on par with, classical international law produced by States. Constitutionalists would seek to integrate them into a uniform system of international law striving towards certain common goals. Supporters of policy-oriented and interdisciplinary approaches would, most probably, simply assess the international impact of NSA acts. None of the approaches is very clear about the relationship between such normative orders/acts. Thus, as before, the alternative theoretical approaches are more explicit on what they reject than on what they wish to embrace.

V. CONCLUDING REMARKS

142. This report has analysed the role of NSAs in contemporary international law. Despite the increase in books and articles on NSAs in recent years, the topic remains under-theorised. Gal-Or rightly notes that there is *"an urgent doctrinal /.../ need for an integrated and comprehensive assessment of the status of the NSA in international law"*.[173] This final report, together with the previous reports adopted by the Committee in 2010-2014, responds to this need by offering an overview of the actual practice of NSAs in terms of their rights and obligations and their effect on the functioning of the international legal system. It demonstrates that this practice is rich and diverse, negating the traditional view that only States make international law and other actors do not have much to say in the matter.

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[169] See NIJMAN, Janne E., *The Concept of International Legal Personality, op. cit.;* and PORTMANN, Roland, *Legal Personality, op. cit.*

[170] See KOH, Harald Kongju: Why Transnational Law Matters?, *Penn State International Law Review,* Vol. 24, 2006, pp. 745-753.

[171] See, for instance, WIESSNER, Siegfried, WILLARD, Andrew R., Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity, in RATNER, Steven S., SLAUGHTER, Anne-Marie (eds), *The Methods of International Law,* Buffalo and New York: ASIL, 2006, pp. 47-78.

[172] LAMALLE, Sandy, Multilevel Translation Analysis of a Key Legal Concept: Persona Juris and Legal Pluralism, in CHENG, Le, SIN, King Kui, WAGNER, Anne (eds), *The Ashgate Handbook of Legal Translation,* Ashgate, 2014, pp. 299-312.

[173] GAL-OR, Noemi, Observations on the Desirability, *op. cit.,* p. 125.

143. NSAs play an important role in international practice that differs depending upon the particular actor and the area of activity. International law has not completely ignored this development. Through the procedures of formal incorporation and informal integration, it has taken account of the rise of NSAs. Its response, however, has not been comprehensive or systematic but, rather, incremental and on a case-by-case basis. Some NSAs have acquired formal legal personality, albeit a limited one, but others have not. Some take part in norm-creation and/or dispute settlement; others do not. Some have rights and duties, others do not. There is probably not a single legal characteristic that all NSAs share. From that perspective, the concept of NSAs has a very limited use as an analytical category. It tells us what certain entities are not but not what they are. In fact, the concept can hardly do that due to the heterogeneity of NSAs.

144. When assessing the position of NSAs, the current report has examined not only the traditional State-centric theoretical perspective but it has also applied several alternative approaches to international law (global legal pluralism, transnational law approach, constitutionalism, policy-oriented approach, interdisciplinary IL/IR approach). This report does not aspire to select one of those approaches as the most appropriate and to promote its use with respect to NSAs or within international law more broadly. As has become apparent, this is in fact quite difficult, if not impossible. Members of the Committee do not share the same theoretical and methodological preferences. Moreover, none of the approaches scrutinized in this report is truly a "winner", i.e. none has offered a truly comprehensive account of the legal consequences of the rise of NSAs. All seem to be lagging behind the reality on the ground.

145. In its 2010 Report, the Committee undertook to produce a set of general principles in its final report.[174] This, however, has turned out to be difficult. Such principles would be either mere generalities or they would need to focus on specific NSAs rather than the whole category of NSAs. Moreover, the questions that arise in connection with NSAs do not relate to these entities only. Rather, they bring us back to the very foundations and ontology of international law and reveal that these foundations are not as firm and unshakable as they have seemed.[175] Reopening the debate about the foundations of international law and considering again certain fundamental concepts (international legal personality, sources of international law, etc.) may therefore be a necessary precondition to further understand where we stand and where we should stand with respect to NSAs.

[174] See The Hague Report 2010, p. 2.

[175] See also CARTY, Anthony, Critical International Law: Recent Trends in the Theory of International Law, *European Journal of International Law*, Vol. 2, 1991, pp. 66-96; KENNEDY, David, *International Legal Structures*, Baden-Baden, 1987; FALK, Richard A., *Revitalizing International Law*, Ames: Iowa State University Press, 1989; O'CONNELL, Mary Ellen, New International Legal Process, *American Journal of International Law*, 1999, pp. 334-351.