UNIVERSITY OF AMSTERDAM

NON-STATE ACTORS IN INTERNATIONAL LAW: OSCILLATING BETWEEN CONCEPTS AND DYNAMICS

Jean d'Aspremont

Amsterdam Law School Legal Studies Research Paper No. 2011-06

Amsterdam Center for International Law No. 2011-05

Electronic copy available at: http://ssrn.com/abstract=1843248

Amsterdam Center for International Law

University of Amsterdam

ACIL RESEARCH PAPER NO 2011-05

Non-State Actors in International Law: Oscillating between Concepts and Dynamics

Jean d'Aspremont

Cite as: ACIL Research Paper No 2011-05,
finalized 3 May 2011, available on SSRN

Forthcoming in: J. d'Aspremont, "Non-State Actors in International Law: Oscillating between Concepts and Dynamics", in J. d'Aspremont (ed.), Participants in the International Legal System – Multiple Perspectives on Non-State Actors in International Law (London: Routledge, 2011) 1-21

Amsterdam Center for International Law
Oudemanhuispoort 4-6
NL-1012 CN Amsterdam
website: www.jur.uva.nl/acil

Electronic copy available at: http://ssrn.com/abstract=1843248

Introduction

Non-state actors in international law: oscillating between concepts and dynamics

Jean d'Aspremont

From the vantage point of international law, the role and status of non-state actors, despite being the objects of much scholarly attention, remain a topic of significant complexity, for they simultaneously raise conceptual as well as dynamic issues. On the one hand, even though the current legal system can accommodate more of the contemporary developments than what we often suggest,[1] it is true that non-state actors' activities (and the normative outcomes of their actions) cannot entirely be caught by the 'net'[2] that international legal scholars have fabricated to catch reality, and definitely do not fall under the existing formal categories of the discipline of international law. On the other hand, non-state actors shed new light on the dynamics of international law-making and international law-enforcement, which have long been underestimated in a state-centric normative system. These two types of theoretical difficulties are rarely approached simultaneously.[3] Scholars only take on one of them at a time. This is hardly surprising, for each of these issues rests on radically different perspectives. Yet, these two different logics cannot be severed completely, as the dynamics of law – and especially those of law-making and law-enforcement – necessarily unfold against the backdrop of an existing normative system which, however one conceptualizes it, cannot be empirically denied.[4] It is this abiding tension between dynamics and concepts that the title of this book – which otherwise could sound contradictory – illustrates. More specifically, it points to the tension – at the heart of the volume – between the dynamic idea of participation and the static concepts of subjects, personality, rules and responsibility inherent in any legal system.

1 A preliminary conceptual difficulty: the impossibility of a formal ascertainment of authors and addressees of international legal rules

The appellation 'international law'[5] conveys the idea that international law is exclusively delineated by virtue of the actors among which it applies.[6] Yet, nothing is more misleading. Indeed mainstream theories, despite

some contemporary endeavours to move away from a source based conception of international law,[7] still elevate the – allegedly formal[8] – sources of international law as the litmus test to ascertain international law.[9] Nowhere is the author of the rule the paramount and direct yardstick to identify those rules that make international law. This is hardly surprising. The identification of subjects of international law has inextricably remained immune from any formal capture, which is as much the cause and the consequence of the utterly political nature of subject-identification processes on the international plane. For instance, as far as the identification of states is concerned, international law continues to be dependent on recognition. International legal scholars – who classically resent such political contingencies – have nonetheless long tried to convince themselves that the determination of the subjects of international law is, to some extent, governed by international law.[10] This has been the illusion at the heart of the scholarly construction of the three (or four) elements-theories of statehood. Although it is true that some international legal rules, like those pertaining to self-determination, human rights and democracy may occasionally impinge on the formation of new subjects and the gender of the new born,[11] this illusion – which I call the 'Montevideo mirage'[12] – has not sufficed to formalize the identification of the subjects of international law and rein in the politics of subject-certification.

This impossibility to formally certify the existence of subjects of international law, the overarching determinative role of recognition and the illusion of formalism behind the theories of statehood probably explain why some – somewhat dissident – scholars put forward the idea that subject-identification, as a scholarly inquiry, should be abandoned. In particular, scholars affiliated with the policy-oriented school of New Haven came to thwart the relevance of a formal determination of the subjects of international law. They call upon legal scholars to back away from any quest for a determination of the subjects of international law (and the correlative concept of legal personality) and, rather, to embrace the – far more complex – idea that what should be looked at are the *participants* in the process of international law-making. They argue that the static concept of subject is too restrictive to encapsulate the multiple dimensions of that process and that a more dynamic concept like that of participation is needed to unravel these various fluxes in which law originates or which it contributes to generate. It is well known that the invitation to look at participants rather than subjects made by these scholars did not come out of the blue. It was inherent in their presupposition that law is primarily a comprehensive process of decision-making rather than a defined set of rules and obligations.[13] If law is envisaged as a process, scholars are brought to observe a more complex field of inquiry that requires a different type of sophistication and more dynamic concepts, like that of participation.

It should be made clear that looking at international law from the vantage point of participation is, however, not inherently linked to New

Haven. That one disagrees with the idea that law exclusively is a process and embraces a more traditional view that law primarily is a set of rules does not prevent him or her from exploring law-making from the vantage point of participation. Unsurprisingly, numerous scholars have tried to reconcile the process based approach of the New Haven School and more static conceptions of international law.[14] For my part, I have backed away from the rejection of formal ascertainment of international legal rules associated with process based conceptions of law.[15] Yet, I undoubtedly recognize the added value of approaching law-making from the angle of participation, for exploring this angle allows legal scholars to liberate themselves from some excessively constraining containers[16] in order to appraise contemporary practice while simultaneously gaining some critical distance. Although participation is certainly not a legal concept, it is of great relevance to international legal scholars, even those who are mostly interested in the legal product of these processes. It is also relevant to how one should understand the title of this volume – which is directly borrowed from the vocabulary of New Haven – as well as the thoughtful foreword kindly written by Michael Reisman. They are meant to indicate that the hindsight provided by a participants based outlook is indispensable to a critical reflection upon the contemporary features (and the legal issues inherent therein) of international law-making.

It should again be made clear, however, that the participation based outlook of this volume is not at loggerheads with scholarly inquiries about legal personality, law and non-law or bindingness.[17] Although there is some merit in looking at law-making from the angle of participation, law primarily remains a set of norms, which like other social norms, need to be ascertained at some point in the process between their creation and their enforcement. The ascertainment of international legal rules and the determination of their effects simultaneously require formal categories to ultimately determine those bound by the rules or those who have a legal interest in the application of the rules.[18] This is why the title of this book, while putting the emphasis on participation still refers to the existing legal system into which the rules created by these underlying participatory fluxes insert themselves. As was already indicated earlier, the apparent contradiction between the dynamic concept of participants and the static concept of legal system is thus purposefully aimed at indicating that participation necessarily takes place against the backdrop of existing rules[19] and institutions.[20]

2 Contemporary dynamics: an unabated pluralization of international law-making

The appellation 'international law' does not teach us anything as to how international law is commonly identified, nor does it include any pointer as to who makes international legal rules. Classically, it has always been

deemed, however, that international law was made by states, which is the reason why the translator of Bentham's *An Introduction to the Principles of Morals and Legislation*, Etienne Dumont, added the adjective 'public' in the French version of the text.[21] Ever since, it is essentially by reference to the public nature of its makers that international law has been denominated public international law,[22] especially among French-speaking scholars.[23] Since its inception, the making of modern international law has nonetheless weathered a growing *ratione personae* pluralization and states have incrementally been joined by other actors in the law-making processes. Indeed, states have ceased to be (perceived as) the only actors in charge of international law-making. While not being an utterly new phenomenon,[24] this *ratione personae* pluralization of international law-making has, over the last few decades, reached an unprecedented degree. It is uncontested nowadays that law-making processes at the international level involve myriad actors, regardless of whoever may eventually formally hold the rights and obligations created thereby. In fact, normative authority is no longer exercised by a closed circle of high-ranking officials acting on behalf of states, but has instead turned into an aggregation of complex procedures involving non-state actors.[25] This is not to say, as I have argued elsewhere, that these new actors have turned into new legal subjects or formal law-makers.[26] It simply means that public authority is now exercised at the international level in a growing number of informal ways which are estranged from the classical international law-making processes.[27]

It is true that international law-making has also undergone other types of pluralization. For instance, international law-making processes have also weathered a diversification of the types of instruments through which norms are produced at the international level, a diversification which has been perceived as either the reflection of a healthy pluralism or a daunting fragmentation.[28] While not underestimating these types of pluralization of international law-making processes, and not excluding that these various types of pluralization may reinforce each other, this book is primarily concerned with the pluralization *ratione personae* of law-making processes and the unprecedented degree of involvement of non-state actors in international law-making processes.

The abovementioned types of pluralization of norm-making at the international level – and especially the growing participation of non-state actors – should certainly not obfuscate the fact that states have retained a very strong grip over global law-making processes. As has been argued by some authors, the pluralization of law-making processes is not necessarily leading to a retreat of the state. On the contrary, in at least some contexts, states have expanded their clout.[29] Such a reinforced state dominance may take various forms. First, it may be the result of more intensive law-making activity through the classical state-centric convention-making system.[30] This is also manifest in the unprecedented resort to existing institutional law-making mechanisms within international organizations where states still

wield a sweeping clout and, in particular, a more frequent use by states of the UN Security Council to create wide-ranging and binding rules.[31] But the renewed dominance of states over international law-making processes is not only the upshot of a greater use of the classical channels of law-making. The emergence of new forms of law-making, outside the normal abovementioned blueprints, also contributes to reinforcing the dominance of states. It is well known that nowadays individual government agencies and actors negotiate directly with their foreign counterparts and that these intercourses are the source of new regulatory frameworks. These transnational regulatory networks (TRNs) have already been the object of much attention in the literature.[32] TRNs illustrate how the power of states has been thriving outside traditional law-making frameworks. This pluralization of the exercise of public authority first originates in the fact that the state itself may be undergoing an internal diversification of its organization and of the allocation of powers within its machinery.[33] But this can also be traced back to a deliberate attempt by states to design norms or standards outside the classical law-making processes[34] with a view to escaping the rigidity as well as the – although limited – accountability constraints that accompany formal rules of international law.[35] Whatever its origins, the pluralization of the exercise of public authority at the international level can also be construed as a reinforcement of states' powers, for it allows states to be even more present and influential, even in areas traditionally adverse to it and without being subject to accountability mechanisms.[36]

Contemporary international law-making is thus undergoing developments which, at first glance, could be seen as going in opposite directions. Yet, it is argued here that there is no necessary contradiction between the unprecedented involvement of non-state actors in law-making processes and this continuous state dominance over these processes. These two simultaneous phenomena may simply reflect an unprecedented complexity. It is precisely on how we capture this complexity that this book tries to shed some light, arguing that the manner in which we construe the phenomenon of non-state actors mirrors the way in which we approach the complexities of contemporary international law, and especially those pertaining to its making.[37]

Although the greater involvement of non-state actors first begs the question of its impact on *law-making*, it must eventually be emphasized that this phenomenon also bears upon the content of international legal rules. In particular, these non-state actors – while being increasingly involved in law-making processes – have also become the object of more and more regulations.[38] They have simultaneously also entered into formal relations with traditional actors. This is why any inquiry about non-state actors inevitably calls for an examination of the consequences of this pluralization in law-making processes in terms of the *content of international legal rules* as well as the conceptualization of the *relations* between these actors and traditional actors like states and international organizations.

3 A sketch of the literature: from the positivistic study of the rights and duties of legal subjects to the multidisciplinary examination of international law-making and law-enforcement processes

Although the involvement of non-state actors in law-making processes is anything but new, international legal scholarship has, until recently, shied away from paying much attention to that phenomenon. This is hardly surprising. As was alluded to above, the dynamics of international law-making – including the material sources of international law[39] – have long been deemed as falling outside the scope of scholarly legal inquiry. In other words, for a long time, international law-making processes were never the object of much scholarly attention. International legal scholars traditionally zeroed in on the identification of the subjects of international law, the products of their normative intercourses and the consequences of non-compliance.

The research agenda of international legal scholars evolved with the rise of international organizations at the end of the nineteenth century and the beginning of the twentieth century.[40] Likewise, with the advent of the law of armed conflict and subsequently international humanitarian law and human rights law, the question of the bindingness of international law upon actors other than states also became more central in the literature.[41] The question of the personality of new actors like NGOs[42] and multinational companies[43] occasionally fuelled some controversy.[44] These new research questions did not, however, spawn a major upheaval of the research agendas which remained centred on questions of legal personality and rights and duties, largely construed as serving an exclusive function.[45] It was not until the abovementioned contemporary pluralization of global law-making mechanisms became too salient to be ignored by international legal scholars – frustrated by the difficulty in grasping its various manifestations as well as its distorting effects on traditional legal concepts – that a change in the scholarly legal literature became perceptible.

That change was first buoyed by the aforementioned move towards the study of law-making processes, a move that can partly be traced back to the influence exerted by schools of thought like New Haven or International Legal Process.[46] Indeed, subject to the specific difficulties of treaty-making processes and law-making by international organizations, law-making processes had always been perceived – despite being a common object of study in political science and international relations[47] – as falling outside the scope of legal scholarly inquiries.[48] Once the legal scholarship eventually elevated law-making processes – or standard setting[49] – into a noble topic worthy of scholarly inquiry,[50] its attention became automatically drawn to the participation of actors that do not qualify as formal legal subjects. This is why, in only a few decades, international legal scholars massively delved into the study of the phenomenon of non-state actors. Certainly, this came

at the price of a deformalization of international law-ascertainment criteria,[51] which is not without harmful consequences for the authority and normative character of international law as well as the ability of the legal scholarship to produce meaningful knowledge.[52] Yet, whatever its consequences in terms of the authority and normativity of international law and upon the international legal scholarship, it is this move away from a scholarship strictly centred on static concepts that has allowed the international legal scholarship to focus its attention on this whole range of new participants in international law-making processes. The same is true with respect to their role in law-enforcement mechanisms processes.

Nowadays, the legal literature about these new actors is aplenty. Just over the last few years, three important volumes in the English language[53] have come to complement an already prolific scholarship.[54] This book could thus simply be seen as a penultimate work in an already rich literature. In that sense, it could potentially fuel the current proliferation of international legal thinking.[55] Yet, it is precisely the proliferation of works on the topic of non-state actors which calls for the study that is undertaken here. Because the literature on the topic has come to enshrine endless reams of studies, articles and books, it has become necessary to (partly) take stock of the various trends of *legal* studies on non-state actors as well as the various theoretical foundations of each of them. Sufficient time has passed to be in a position to take a step back and critically reflect upon the manner in which the core problems spawned by the participation of new actors have been approached by international legal scholars. This book thus aspires to offer a panorama of some of the main important legal questions which arise as a consequence of the multiple new participants in international law-making and law-enforcement processes, while simultaneously attempting to unravel some of the theoretical biases underlying this wide array of legal studies over non-state actors. In pursuing that twofold objective, this book will look at non-state actors both as participants in international law-making and law-enforcement processes as well as objects of regulations. Indeed, as was explained above, the role of non-state actors has not been without influence on the content of international legal rules. Moreover, although it is primarily focused on legal questions and the legal scholarship pertaining to non-state actors, the study undertaken here will not exclude cross-cutting interdisciplinary inquiries (as is illustrated by the various chapters of Math Noortmann who has called for a move away from strictly compartmented in-depth disciplinary studies).

4 The structure of this volume: four main families of cognitive biases

As has just been explained, this book, not only offers a panorama of the most central legal issues inherent in the rise of non-state actors in international law, but also endeavours to expose the diverging approaches taken

by legal scholars when engaging with some of these most challenging legal questions. It should be made clear, however, that in undertaking such a task this book stops short of appraising these multiple cognitive biases. Although any presentation or depiction is, by its configuration or sequence for instance, inevitably opinionated, the aim is not to side with one or the other. Likewise, this book does not attempt to reach any consensus on how this phenomenon should be (or should have been) approached. The aim is, more modestly, to unravel some of the grounds of the disagreements between legal scholars, thereby generating a greater awareness of the theoretical premises that impinge upon the determination of our theoretical and methodological choices when we approach the legal questions triggered by the role of non-state actors in international law.

Four families of biases are mentioned here. There probably are many more. It seems, however, that the following cognitive partisanship suffices to provide some critical distance from the subject-matter while simultaneously offering a good panorama of the central legal problems raised by the role and the status of non-state actors in international law. In each of these families, many more specific perspectives could have been broached. Yet, it suffices for each of them to mention a few. By the same token, there inevitably are overlaps between these various perspectives. Some schools of international law are more prominent in some regions of the world or are followed within some international institutions. In the same vein, some institutional perspectives mirror the perspectives generally espoused in a given branch of international law. These overlaps nonetheless demonstrate the extent to which, when we grapple with legal questions spurned by the participation of non-state actors in the international legal system, we may simultaneously approach them from multiple and interlacing perspectives.

4.1 Theoretical perspectives

Part I of the book rests on a distinction between several mainstream schools of thought or theoretical approaches to international law. It is far from being comprehensive, for only a few schools or approaches have been selected. This however suffices to demonstrate that each school of thought or theory conveys a different conception of the role and status of non-state actors inherent to the conception of international law at its heart.

In the very first chapter, I explain why, from a positivist standpoint, the role of non-state actors is of fundamental importance. Despite most of the time being deprived of any legal personality, non-state actors generate a social practice that is very instrumental to the meaning of our law-ascertainment criteria. Using Herbert Hart and Brian Tamanaha's theories, I show how non-state actors can be a useful source of communitarian

semantics, which can help confer a meaning for the criteria used to distinguish law and non-law.

Thomas Kleinlein explores the significance of the role and status of non-state actors in the light of one of the most successful theories of international law in the contemporary international legal scholarship, that is the constitutionalist approach to international law. After giving a short account of the basic features of the constitutionalist approach, he elaborates on the possible interfaces between international constitutionalism and subjects doctrine and shows how the impact of new participants in the international legal system is ambivalent from a constitutionalist perspective. Despite this finding, he attempts to evaluate the extent to which non-state actors can nevertheless be accommodated in a general concept of international legal personality perceived as membership in the global constitutional community. Considering an important objection to international constitutionalism, he contends that, from a normative point of view, participation of affected individuals is a necessary feature of constitutionalization.

The chapter by Jörg Kammerhofer looks at the concept of legal personality from the Pure Theory of Law's theoretical vantage point, applying it to the debate on non-state actors in international law. The Pure Theory's view of legal personality on a legal-normativistic basis is applied to international law and then its case is restated with respect to non-state actors. Kelsen's removal of non-legal or pre-legal elements that adhere to many doctrines and their reduction to the legal core has the salutary effect of showing the positive law in force and unmasking the myths that needlessly complicate international legal doctrine.

In a slightly provocative contribution, Anthony d'Amato ventures a reappraisal of the perspective of the New Haven school. After recalling some of the main features of the New Haven perspective on the actors in legal processes, he formulates, in his distinctive famous style, some critical thoughts on the New Haven take. In doing so, he offers some insights on the various concepts which are subsequently examined by the other authors of this volume.

Math Noortmann, in a contribution that reflects the particular interdisciplinary take that he has been advocating in his work over the last few years, argues that, in order to understand and explain the role and position of all participants in the constitutive process of order and justice at the world level, we need inclusive concepts and theories. Internationalism is considered to defy that inclusiveness, as it is built upon the hegemonic position of the state. There are three potential solutions to the problem, which are all built upon existing approaches and theories, and which all assume a trans-disciplinary understanding of the problem. They are to elaborate the concept of transnationalism, to revisit and overhaul the concept of 'participants' as suggested by the policy-oriented approach, and/or to design a new sociology of international law and international relations.

4.2 Regional perspectives

Part II aims at demonstrating that the understanding of the role and status of non-state actors also is fragmented along regional lines. Only a few regional perspectives have been selected. Additional research will need to be carried out regarding regional traditions that are not examined here.

In his contribution, Nicolas Leroux shows that the question of legal personality has always been central in the French legal scholarship. French legal scholars have always approached the phenomenon of non-state actors through the prism of international personality. While contending that focusing on legal personality makes it difficult to capture some realities, such as the normative influence of non-state actors, Leroux argues that many insights can still be reaped from studying the question of non-state actors from the vantage point of legal personality. However, Leroux argues that, to remain meaningful, the yardstick of legal personality that infuses the French legal scholarship ought to be refreshed.

Rémi Bachand takes on the challenging task of providing some critical thoughts on the American legal scholarship. Although the wide diversity of approaches to non-state actors taken in the American legal scholarship does not allow any comprehensive account, he identifies some important scholarly projects and their distinctive takes on non-state actors. Although not ignoring Anne-Marie Slaughter's government networks studies or Benedict Kingsbury's global administrative law, particular mention is made of New Haven, the critical studies inspired by David Kennedy as well as Third World Approaches. In doing so, Bachand emphasizes the great heterogeneity of the American legal scholarship, which can be construed as a sign of continuous dynamism.

In her contribution, Tan Hsien-Li outlines the behaviour of Asian states in the international legal order with a special focus on the emerging pattern of a greater contribution by civil society to the creation of human rights norms in the state-centric environment of Southeast Asia. Her approach is mostly empirical, for the legal scholarship in that region of the world has not yet generated a specific understanding of the function and status of these actors. Yet, the practice reported by Hsien-Li already provides a useful bellwether of the greater amenability witnessed in that part of the world to according a place to these new actors in the international legal system.

In his chapter on the Russian legal scholarship, Lauri Mälksoo proceeds from a distinction made by the English school of international relations – between state-centred (Grotian) and individual-centred (Kantian) approaches to international law. After the distinction is laid out, he takes measurements with the 'barometer' of the scale of Grotian and Kantian tendencies in the international legal scholarship of contemporary Russia. He then pays attention to the notion of sovereignty in the Russian scholarship, which will help the reader understand where the cautiousness towards non-state actors comes from.

4.3 Institutional perspectives

For the sake of this part, the concept of institution will be used in a very broad sense and will embody bodies as different as international governmental organizations, organs of international organizations, learned societies and NGOs. Part III is premised on the fact that many of these types of entities have been confronted with or decided to engage in relations with non-state actors. It is of great relevance to compare the perspective endorsed by each of these institutions and appraise the extent to which the goals or purposes for which each of them has been established impinge on their understanding of the role and status of non-state actors. Likewise, this part tries to provide the necessary practice to evaluate whether the fact that each of these institutions itself constitutes a non-state actor, and one that possibly participates in international law-making, influences the vision that it defends. This is why each of the contributions in this part will generally follow the same pattern, first evaluating the role and status of the institution concerned before turning to how, in its work, it has construed the role of non-state actors. Attention is paid here to only some of those institutions – in the broad sense – whose contribution to the understanding of the role and status of non-state actors is of particular relevance.

First, Gleider I. Hernández focuses on a selection of the International Court of Justice's recent contributions to the international law relating to non-state actors. In doing so he shows the extent to which the Court has actively taken part in clarifying the status of these actors. He also recalls the Court's occasional dalliances with non-state actors within its own judicial process. Eventually, he expresses some thoughts on the desirability of further expanding the participation of non-state actors, in particular international organizations, in proceedings before the Court.

In his chapter on the International Law Commission (ILC), Gentian Zyberi examines how the Commission can itself be considered a non-state actor. He then turns to the substantive work of the Commission to evaluate how the Commission has construed the status and role of non-state actors in some of the topics that have been on its agenda. The work of the ILC relating to non-state actors is separated into three distinct categories, which largely reflect the emancipation of non-state actors from partakers in the international legal system whose conduct could be attributed and give rise to state responsibility to become participants in their own right with ensuing rights and obligations. He also provides some insights on the work of the ILC and the growing need to address certain problems arising in the course of its activity in the codification and progressive development of international law.

François Rigaux zeroes in on one of the oldest and influential non-state actors. He recalls that, created in 1873 in Ghent, the Institut de Droit international – which remains called by its French name – has undoubtedly contributed to the development of some important rules of the international

legal system. Rigaux first offers a sketch of the various evolutions undergone by the Institut and how these evolutions have impinged on the role played by the Institut. He subsequently outlines some of the most important topics that the Institut has delved into, thereby offering some insights on the substantive contribution of the Institut to our understanding of non-state actors. In his endeavour, Rigaux makes use of his rich experience as a member of the Institute.

Guido Acquaviva's chapter deals with one of the consequences of the proliferation of international criminal tribunals over the past two decades: the increasing interaction between these courts and non-state actors, despite the fact that their founding members did not explicitly envision such a power in the tribunals' constitutive instruments. He notes that these courts have taken for granted their right to enter into relations with non-state actors, not just by concluding international agreements with them, but also by assuming the authority to request material and, in general, cooperation. On the basis of a few representative examples, he concludes that a new rule of international customary law may be forming, a rule allowing direct interaction between international judicial institutions and non-state entities.

Raphaël van Steenberghe first seeks to offer insights on the International Committee of the Red Cross (ICRC) as an actor itself. He particularly reflects upon the controversial status of the ICRC itself, for it is a particular kind of non-state actor intervening in conflict situations, and on the potential influence of non-state actors such as international organizations, (other) NGOs or private business companies on the fulfilment by the ICRC of its tasks in the field. He then turns to the ICRC's own position on the status of non-state actors in the context of armed conflicts, and especially the applicability of international humanitarian law (IHL) to those actors. He particularly examines the ICRC perspective on armed groups, such study having been quite neglected in the legal literature, although it is of great importance. In doing so, he offers interesting parallels with Cedric Ryngaert's subsequent contribution.

Drawing on his knowledge of the International Law Association (ILA), as well as his experience as the chairman of the ILA Committee on Non-State Actors, Math Noortmann provides a short historical overview of the institutional development of the ILA before critically assessing the ILA's profile on the basis of scholarly opinions and qualifications. He then reevaluates the ILA and its work through the lens of the discourse on non-state actors, i.e. more particularly in the light of the debate on epistemic communities, providing sociological and interdisciplinary insights. He eventually provides a useful overview of the work of the ILA Committee on Non-State Actors.

Gaëlle Breton-Le Goff explains how, especially since 1992, NGOs have gained in importance on the international scene. They have attracted the attention of international lawyers, who began to study their various

impacts on international law. But more than that, NGOs perceive their role at the international level as actors that can bring about social change in a state-centric international society. This chapter will explore some aspects of these avenues.

4.4 Subject-matter based perspectives

It will not come as a surprise that one's understanding of the role and status of non-state actors is eventually influenced by the substantive features of the area of law concerned. In other words, the conception of the role and status of non-state actors may also hinge on the content of the substantive rules at stake. This may first be influenced by the overall function of the rules concerned. But this may more simply be the result of the actual role and status of non-state actors within that area of law. The foregoing means that Part IV will not only contribute to the critical assessment of the role and status of non-state actors pursued by the book, it will also simultaneously provide an account of the actual role and status of non-state actors *in practice*. Accordingly, Part IV provides a significant empirical account of the role of non-state actors.

Eric de Brabandere, putting the emphasis on multinational corporations, examines the debates pertaining to the role and status of non-state actors in the light of international human rights law. He shows that multinational corporations have had no direct human rights obligations under contemporary international law. He nonetheless argues that international lawyers can no longer ignore the increasing role of non-state actors in international society. His chapter first explores the factual and normative dimensions of international corporation responsibility for human rights violations. It then analyses existing mechanisms and new proposals for enhancing the accountability of transnational corporations, either through the use of 'soft' instruments, domestic jurisdictional mechanisms or through the extension of international individual criminal responsibility to corporations. The ultimate goal of this chapter is to demonstrate that to date no attempt to take on direct international corporate responsibility has led to the inclusion of corporations as formal participants in the international legal system.

Cedric Ryngaert starts from the finding that treaties on international humanitarian law – the Geneva Conventions and their Protocols in particular – contain binding obligations for non-state armed groups. In his chapter, he examines how such groups can be bound by such treaties if they are not formal parties to the treaty. He concludes that the legitimacy of the binding character of the treaties for non-state actors is bolstered when states secure the consent of non-state actors to be bound by the treaties through various formal and informal mechanisms. Ryngaert's contribution insightfully complements that of Raphaël van Steenberghe on the ICRC, although the two authors disagree on some conceptual questions.

In her chapter Cassandra Steer argues that the role of non-state participants in international criminal law (ICL) is key to the formation of the normative content of this nascent branch of law. According to her, the traditionally primary sources of international law prove insufficient when it comes to determining normative notions such as modes of participation; instead subsidiary sources such as judgments and academic commentaries have become predominant sources. A dynamic description of the process by which such sources are formed by non-state participants, and the fact they are driven by their personal or institutional legal backgrounds, leads to a conclusion that there must be some methodological restraints on this process to protect the legitimacy of the international criminal justice project.

In his contribution, Richard Collins explains why, from the perspective of international organizations – which can themselves be classified as non-state actors – it is so difficult to make any general statements about the place of *other* non-state actors. Moreover, given the multi-layered character of international organizations and the hybrid character of their legal orders, any finding in this respect remains either ambiguous or limited to the institutional regime concerned. It is against that backdrop that he provides a brief overview of the difficulties that have arisen in coming to terms with the legal identity of intergovernmental organizations (IGOs) since the mid-to-late nineteenth century. He also explain how this impacts upon the legal identity of IGOs through institutional law's focus on the legal personality of international organizations and especially how IGOs have come to occupy a position somewhere between the *inter-state* and the *non-state*.

Nicholas Tsagourias considers the application of the international rules on the use of force to non-state actors. His chapter claims that the customary rule on the non-use of force binds non-state actors as international actors. With respect to forcible responses to uses of force by non-state actors, he claims that states can use force by way of self-defence against states when they are implicated in the activities of non-state actors but can also use force by way of self-defence directly against non-state actors when other states are not implicated therein. In the latter case, any incidental breach of obligation by the acting state is precluded according to the law of state responsibility.

Eric de Brabandere attempts to reevaluate the multifaceted role and involvement of non-state actors in the settlement of international disputes. He especially zeroes in on the *active* participation of non-state actors in dispute settlement procedures and the position of individuals and corporations as parties in recent investment dispute settlement procedures. His inquiry also includes some thoughts on the role played by NGOs as *amici curiae* in international proceedings. In doing so, he argues that the diversity of solutions found in practice should entice us to resist the temptation of formalizing the status of non-state actors in international dispute settle-

ment, although it is a natural inclination of scholars to seek to do so. He thereby differentiates himself from the position advocated by Patrick Dumberry and Érik Labelle-Eastaugh.

Focusing on corporations, which are claimants in the overwhelming majority of investor-state arbitration cases, Patrick Dumberry and Érik Labelle-Eastaugh revisit the old controversial question of the legal status of corporations under international law. After shedding some light on the main features of international investment law, they examine whether or not corporations may be considered to be subjects of international law in that context. They particularly argue that an entity qualifies as a subject of international law to the extent that it holds rights and is given the possibility to commence a direct claim against a state before an international tribunal, and that these two conditions are clearly met by corporate investors in the context of modern investment treaties.

Makane Moïse Mbengue, in his contribution, explains that international environmental law has been, since its very inception, a fertile ground for non-state actors. The latter were even at the core of environmental protection long before states and international organizations started to shape rules and policies concerning the preservation of natural resources and ecosystems. Based on what he calls 'a Rousseauist perspective', his chapter depicts the emergence and evolution of the role of non-state actors in the field of environment protection. It also highlights the legal and institutional mechanics through which non-state actors contribute to the architecture of the 'environment global partnership' and have been able to produce self-regulation in order to foster sustainable development.

Penelope Mathew portrays refugee law as a response to a private actor who crosses sovereign boundaries. Her chapter explores some state responses that seek to deflect responsibility for refugees and to reassert sovereign control. It then turns to examine two examples of refugee cases that involve non-state actors and in which refugee status may be wrongly denied: domestic violence cases and exclusions from claiming refugee status. In exclusion cases, the threat of another non-state actor – the terrorist – is sometimes present. In domestic violence cases, the onus is often put back on the state of origin to exercise 'due diligence', ignoring the applicant's well-founded fear of persecution. She uses these examples to show how these refugees tell us something about what they are not, i.e. the state. She concludes that a state's border is a site where national identity is constructed, often in opposition to those seeking entry. As a result, border control consists of strategies of exclusion and containment that play out in many ways in law and jurisprudence.

Last but not least, Damien Gerard interestingly argues that the participation of non-state actors is part of the essence of the legal order of the European Union. Yet, in his view, the role of non-state actors in the making of EU law and as enforcement agents has evolved significantly in

recent years. His contribution sketches that evolution by means of concrete examples, both transversal and topical, and assesses its achievements and pitfalls in light of the underlying objective thereof, namely that of a quest for renewed legitimacy.

Notes

1 This is what I have argued elsewhere. See J. d'Aspremont, 'International Law-Making by Non-State Actors: Changing the Model or Putting the Phenomenon into Perspective?' in M. Noortmann and C. Ryngaert (eds), *Non-State Actors Dynamics in International Law: From Law-Takers to Lawmakers*, Aldershot: Ashgate, 2010, pp. 171–194.

2 F. Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality, Book II, Aphorism*, Cambridge: Cambridge University Press, 1982, p. 73. This quote was suggested to me by Andrea Bianchi. For further insights on this idea, see A. Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher', paper submitted for the Informal International Public Policy Making (IIPPM) Workshop, Geneva, 24–25 June 2010 (on file with the author).

3 For a tentative reconciliation, see, however, J.E. Nijman, *The Concept of International Legal Personality: An Inquiry into the History and Theory of International Law*, The Hague: T.M.C. Asser Press, 2004.

4 Neo-realist scholars are probably those who will be the most forceful challengers of that contention. See e.g. Jack Goldsmith and Eric Posner, *The Limits of International Law*, Oxford: Oxford University Press, 2005. For a criticism of their conception of law, see the very interesting contribution of A. Somek, 'Kelsen Lives', 18 *European Journal of International Law* (2007), 409–451. For an empirical criticism of their work, see M. Scharf on the contemporary theories of compliance: M. Scharf, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate', 31 *Cardozo Law Review* (2009), 45.

5 It is Bentham who famously coined the expression 'international law' and defined it by reference to its authors instead of *jus gentium*. In a footnote of his famous work *An Introduction to the Principles of Morals and Legislation* he stated:

> The word *international*, it must be acknowledged, is a new one; though, it is hoped, sufficiently analogous and intelligible. It is calculated to express in a more significant way, the branch of the law which goes commonly under the name of the *law of nations*: an appellation so uncharacteristic that, were it not for the force of custom, it would seem rather to refer to international jurisprudence. The chancellor D'Aguesseau has already made, I find, a similar remark: he says, that what is commonly called droit *des* gens, ought rather to be termed droit *entre* les gens.

J. Bentham, *An Introduction to the Principles of Morals and Legislation*, London, 2005 edn, first published 1781, p. 326.

6 For some occasional manifestations of a conception of international law on the basis of its authors, see Permanent Court of Arbitration, *Russian Indemnity Case* (1912), 2 R.I.A.A., 829, p. 870; T.J. Lawrence, *The Principles of International Law*, London: McMillan (7th edn), 1923, pp. 1–14; L. Oppenheim, *International Law*, London: R.F. Roxburgh (3rd edn), 1920 and 1921, p. 1. See J.L. Brierly (edited by H. Waldock), *The Law of Nations*, Oxford: Clarendon Press (6th edn), 1963, first published in 1930, pp. 1 and 41 et seq.; C. Rousseau, *Principes généraux du droit international public*, Paris: Pedone, Tome 1, 1944, p. 1. Rousseau subsequently qualifies the affirmation that international law only regulates relations

between states: see p. 3. See, however, Kelsen for whom international law has no inherent 'domaine de validité matériel': H. Kelsen, 'Théorie générale du droit international public', *Recueil des Cours*, Tome 42, 1932-IV, pp. 182–183.

7 For a few examples see, J. Alvarez, *International Organizations as Law-makers*, Oxford: Oxford University Press, 2005; J. Brunnée and S.J. Toope, 'International Law and Constructivism: Elements of an International Theory of International Law', 39 *Columbia Journal of Transnational law* (2000–2001), 65. This also seems to be the approach taken by J.H.H. Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *ZaöRV*, (2004), p. 547. These effect based approaches must be distinguished from the subtle conception defended by F. Kratochwil based on the *principled rule-application* of a norm which refers to the explicitness and contextual variation in the reasoning process and the application of rules in 'like' situations in the future: *Rules Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge: Cambridge University Press, 1989, pp. 206–208. See also F. Kratochwil, 'Legal Theory and International Law', in D. Armstrong (ed.), *Routledge Handbook of International Law*, New York: Routledge, 2009, p. 58.

8 I have had the opportunity to put the formal character of the main sources of international law into question. See J. d'Aspremont, *Formalism in the Sources of International Law: Formal Ascertainment of International Legal Rules after Postmodernism*, Oxford: Oxford University Press (forthcoming, 2011).

9 This has usually manifested itself in a strict adherence to the list of sources enshrined in article 38 of the Statute of the International Court of Justice. See A. Pellet, 'Article 38', in A. Zimmermann, C. Tomuschat and K.Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary*, Oxford: Oxford University Press, 2006, pp. 693–735.

10 See e.g. J. Crawford, *The Creation of States in International Law*, Oxford: Oxford University Press, 2006, p. 40 et seq. See also M. Forteau, 'L'Etat selon le droit international: une figure à géométrie variable?' 111 *Revue générale de droit international* public (2007), 737–768.

11 J. d'Aspremont, 'Regulating Statehood: The Kosovo Status Settlement', 20 *Leiden Journal of International Law* (2007), 649–668; J. d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments', 9 *Chicago Journal of International Law* (2008), 1–16; J. d'Aspremont, 'Legitimacy of Governments in the Age of Democracy', 38 *N.Y.U. Journal of International Law and Politics* (2006), 877–918; J. d'Aspremont, 'La création internationale d'Etats démocratiques', 109 *Revue générale de droit international public* (2005), 889–908.

12 By reference to the famous 1933 Montevideo Convention on the Rights and Duties of States, which, for the sake of the Convention, elaborates on the criteria an entity should satisfy to be considered a state.

13 See M.S. McDougal, 'International Law, Power and Policy', 83 *Recueil des Cours* (1952), 133; M.S. McDougal, H. Lasswell and W.M. Reisman, 'Theories about International Law: Prologue to a Configurative Jurisprudence', 8 *Virginia Journal of International Law* (1968), 188; M.S. McDougal, 'International Law and the Future', 50 *Mississippi Law Journal* (1979), 259; H. Lasswell and M.S. McDougal, *Jurisprudence for a Free Society*, New Haven, CT: New Haven Press, 1992; M.S. McDougal and W.M. Reisman, *International Law in Contemporary Perspective*, New Haven, CT: New Haven Press, 1980, p. 5.

14 See e.g. G. Abi-Saab, 'Cours general de droit international public', 207 *Recueil des Cours* (1987-VIII), 39; see also A. Pellet, 'Cours Général: Le droit international entre souveraineté et communauté internationale – La formation du droit international', II *Anuário Brasileiro de Direito Internacional* (2007), 12–74.

According to Martti Koskenniemi, this also was the ambition of Virally in his general course *Recueil des Cours* (1983-V) and Schachter in his general course *Recueil des Cours* Vol. 178 (1982-V): M. Koskenniemi, *From Apology to Utopia*, New York: Cambridge University Press, 2005, p. 159. See also, O. Schachter, 'Towards a Theory of International Obligation', 8 *Virginia Journal of International Law* (1967–1968), 300. According to Rosalyn Higgins, it is highly questionable that these authors have attempted to float a conciliatory understanding of international law. See R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Oxford University Press, 1995, p. 8. See also the earlier attempts by C.W. Jenks, *The Common Law of Mankind*, London: Stevens, 1958, or G.J.H. Van Hoof, *Rethinking the Sources of International Law*, Deventer: Kluwer Publishing, 1983, p. 44.

15 See d'Aspremont (forthcoming, 2011), *supra* Note 8.

16 It has famously been argued by Higgins that legal personality is an 'intellectual prison' if one wants to think about international law-making and its various components: Higgins (1995), *supra* Note 14, p. 12.

17 See among others the contributions of Jörg Kammerhoffer, Gleider I. Hernández Cedric Ryngaert, Raphaël van Steenberghe, Guido Acquaviva, Eric de Brabandere, Patrick Dumberry and Érik Labelle-Eastaugh in this volume.

18 I have argued elsewhere against the radical deformalization of law-ascertainment which accompanies the policy-oriented jurisprudence. See d'Aspremont (forthcoming, 2011), *supra* Note 8.

19 For a classical example, see H.L.A. Hart, *The Concept of Law*, Oxford: Oxford University Press, 1997, 2nd edn, pp. 108–109. For a recent reappraisal of Hart's relevance in international legal scholarship, see J. d'Aspremont, 'Hart et le Positivisme Postmoderne', 113 *Revue Générale de Droit International Public* (2009), 635–654.

20 On the institutional character of a legal system, see J. Raz, *The Authority of Law: Essays on Law and Morality*, Oxford: Clarendon, 1983, p. 88.

21 See D. Lieberman, 'From Bentham to Benthamism', 28 *Historical Journal* 1985, 199–224, p. 201. See also E. Nys, 'The Codification of International Law', 5 *American Journal of International Law* (1911), 871–900, esp. pp. 872, 876.

22 In the meantime, the publicness of international law and the extent to which international law serves a public interest has underpinned its public character. On this point, see J. d'Aspremont, 'Contemporary International Rulemaking and the Public Character of International Law', *International Law and Justice Working Working Paper* 2006/12, online, available at http://www.iijl.org, p. 5 et seq.

23 In the English-speaking literature, see especially I. Brownlie, *Principles of Public International Law*, Oxford: Oxford University Press, 2003. In the French-speaking literature, see among others J. Verhoeven, *Droit international public*, Paris: Larcier, 2000; A. Pellet and P. Dailler, *Droit international public*, Paris: LGDJ, 2002; J. Combacau and S. Sur, *Droit international public*, Paris: Montchretsien, 2004; P.-M. Dupuy, *Droit international public*, Paris: Dalloz, 2002; D. Alland (ed.), *Droit international public*, Paris: Presses Universitaires de France, 2000; H. Thierry, *Droit international public*, Paris: Montchrestien, 1986; C. Rousseau, *Droit international public*, Paris: Dalloz, 1987; D. Ruzié, *Droit international public*, Paris: Dalloz, 1987; D.E. Adouki, *Droit international public*, Paris: L'Harmattan, 2002; P. Vellas, *Droit international public: institutions internationales: méthodologie, historique, sources, sujets de la société internationale, organisations internationales*, Paris: R. Pichon et R. Durand-Auzias, 1967. Likewise, refer to the most prominent French journal devoted to international law, the *Revue générale de droit international public* (online, available at : http://www.rgdip.com).

24 S. Charnovitz, 'Two Centuries of Participation: NGOs and International Governance', 18 *Michigan Journal of International Law*, 1997, 183. See also the brief outline of A. Boyle and C. Chinkin, *The Making of International Law*, Oxford: Oxford University Press, 2007, pp. 42–43.

25 This has sometimes been called 'verticalization'. See J. Klabbers, 'Setting the Scene', in J. Klabbers, A. Peters and G. Ulfstein (eds), *The Constitutionalization of International Law*, Oxford: Oxford University Press, 2009, p. 14.

26 J. d'Aspremont, 'The Doctrinal Illusion of the Heterogeneity of International Lawmaking Processes', in H. Ruiz Fabri, R. Wolfrum and J. Gogolin (eds), *Select Proceedings of the European Society of International Law*, vol. 2, Oxford: Hart Publishing, 2010, pp. 297–312.

27 See M. Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority', 9 *German Law Journal* (2008), 1865–1908, and A. von Bogdandy, P. Dann and M. Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities', 9 *German Law Journal* (2008), 1375–1400.

28 On the discourses about the pluralization of the substance of law, see M. Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', 70 *Modern Law Review* (2007), 1–30; see also Koskenniemi (2005), *supra* Note 14, pp. 392–394. M. Prost, 'All Shouting the Same Slogans: International Law's Unities and the Politics of Fragmentation', 17 *Finnish Yearbook of International Law* (2007), 131–159 or M. Prost, *The Concept of Unity in Public International Law*, *Hart Monographs in Transnational and International Law*, Oxford: Hart Publishing (forthcoming 2011); see also A.C. Martineau, 'The Rethoric of Fragmentation: Fear and Faith in International Law', 22 *Leiden Journal of International Law* (2009), 1–28.

29 A. Clapham, *Human Rights Obligations of Non-State Actors*, Oxford and New York: Oxford University Press, 2006, pp. 5–6; see also d'Aspremont (2010), *supra* Note 26. This is also acknowledged by A. Peters, T. Förster and L. Koechlin, 'Towards Non-state Actors as Effective, Legitimate, and Accountable Standard Setters', in A. Peters, L. Koechlin, T. Förster and G. Fenner Zinkernagel (eds), *Non-State Actors as Standard Setters*, Cambridge: Cambridge University Press, 2009, pp. 496–497.

30 See for instance the area of international economic law (e.g. the overhaul of the international economic order through the Final Act of the 1986–1994 Uruguay Round of trade negotiations or the United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 1771 UNTS 107).

31 See e.g. UNSC Res 1373 (28 September 2001) UN Doc S/RES/1373. On this issue, see generally S. Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (2005), 175.

32 See e.g. A.-M. Slaughter, *A New World Order*, Princeton, NJ: Princeton University Press, 2004; A.-M. Slaughter, 'Global Government Networks, Global Information Agencies, and Disaggregated Democracy', 24 *Michigan Journal of International Law* (2002–2003), 1041–1075; see also K. Raustalia, 'The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law', 43 *Virginia Journal of International Law* (2002), 1–90. For a recent critical reappraisal, see P.-H. Verdier, 'Transnational Regulatory Networks and their Limits', 34 *Yale Journal of International Law* (2009), 113; see also G. Shaffer, 'Transnational Legal Process and State Change: Opportunities and Constraints', IILJ Working Paper 2010/4, online, available at: http://www.iijl.org.

33 D.M. Patterson and A. Afilalo, *The New Global Trading Order, the Evolving State and the Future of Trade*, Cambridge and New York: Cambridge University Press, 2008; see also Shaffer (2010/4), *supra* Note 32.

34 In the same sense, see E. Benvenisti, 'Coalitions of the Willing and the Evolution of Informal International Law', in C. Calliess, C. Nolte and G. Stoll (eds), *Coalitions of the Willing: Avantgarde or Threat?* Köln: Göttinger Studien zum Völker- und Europarecht, Bd. 8, 2008, p. 2. See also Verdier (2009), *supra* Note 32, pp. 171–172.

35 Compensating for the lack of accountability of these new forms of law-making is precisely the aim of projects like Global Administrative Law (GAL) or the project on Informal International Public Policy Making (IIPPM). On GAL, see generally B. Kingsbury, N. Krisch and R. Steward, 'The Emergence of Global Administrative Law', 68 *Law and Contemporary Problems* (2005), 15–61, p. 29; C. Harlow, 'Global Administrative Law: The Quest for Principles and Values', 17 *European Journal of International Law* (2006), 197–214. On IIPPM, see J. Pauwelyn, 'Mapping the Action and Testing Concepts of Accountability and Effectiveness', Project Framing Paper, 31 May 2010, online, available at: http://www.hiil.org/assets/902/Publication_TransnationalConstituionality_IIPPM_Framing_Paper_Pauwelyn_draft_31_May_2010.pdf.

36 D'Aspremont (2010), *supra* Note 26.

37 This is what I have defended elsewhere. See J. d'Aspremont, 'International Law making by Non-state Actors: Changing the Model or Putting the Phenomenon into Perspective?', in M. Noortmann and C. Ryngaert (eds), *Non State Actors Dynamics in International Law*, Farnham: Ashgate, 2010, 171–202.

38 This is particularly the case of Security Council Resolutions. See e.g. UNSC Resolutions 1173 (1998), 1306 (2000), 1343 (2001), 1385 (2001) and 1408 (2002). Some of these sanctions have been accompanied by the creation of specific subsidiary bodies. See for instance the Sanctions Committee created by UNSC Resolution 1267 (1999).

39 On the distinction between material and formal sources, see generally L. Oppenheim, *International Law*, vol. 1, 8th edn, London: Longmans, 1955, p. 24. See the remarks of P.E. Corbett, 'The Consent of States and the Sources of the Law of Nations', 5 *British Yearbook of International Law*, 1925, 20–30; C. Rousseau, *Principes généraux du droit international public*, Tome 1, Paris: Pedone, 1944, pp. 106–108; G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in F.M. van Asbeck *et al.* (eds), *Symbolae Verzijl*, The Hague: Martinus Nijhoff, 1958, p. 153 et seq. G. Abi-Saab, 'Les sources du droit international: Essai de déconstruction', in Manuel Rama-Montaldo (ed.), *Le droit international dans un monde en mutation, Amicorum Eduardo Jimenez de Arechaga*, Montevideo, 1994, p. 30 et seq; See also the controversial account of this distinction made by G. Scelle, 'Essai sur les sources formelles du droit international', in Charles Appleton (ed.), *Recueil sur les sources en l'honneur de Francois Gény*, Paris: Sirey, 1935, vol. III, pp. 400–430. P. Dailler and A. Pellet, *Droit international Public*, 6th edn, Paris: LGDJ, 1999, pp. 111–112.

40 For an interesting study with historical insights on the legal scholarship devoted to the law of international organizations, see David J. Bederman, 'The Souls of International Organizations: Legal Personality and the Lighthouse at Cape Spartel', 36 *Virginia Journal of International Law* (2006), 275.

41 On this question in general, see the contribution by Cedric Ryngaert and by Raphaël van Steenberghe in this volume. See also generally M. Bothe, K.J. Partsch and W.A. Solf, *New Rules of Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague: Martinus Nijhoff, 1982; A. Cassese, 'The Status of Rebels under the 1977 Geneva

Protocol on Non-International Armed Conflicts', 30 *International and Comparative Law Quarterly*, 1981, 416–439; Clapham (2006), *supra* Note 29; C. Ryngaert, 'Human Rights Obligations of Armed Groups', *Revue Belge de droit international*, 2009; L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge: Cambridge University Press, 2002; C. Tomuschat, 'The Applicability of Human Rights to Insurgent Movements', in H. Fischer (ed.), *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin: Berliner Wissenschafts-Verlag, 2004, pp. 573–591.

42 See generally P.-M. Dupuy (ed.), *NGOs in International Law, Efficiency in Flexibility?* Cheltenham: Edwar Elgar Publishing, 2008.

43 On the famous *Texaco* v. *Libya* arbitration (1977), see A. Fatouros, 'International Law and the Internationalized Contract', 74 *American Journal of International Law*, (1980), 134.

44 R. Hoffmann (ed.), *Non-State Actors as New Subjects of International Law: From the Traditional State Order towards the Law of the Global Community*, Berlin: Duncker & Humblot, 1999.

45 This is one of the main ideas of the book by Nijman (2004), *supra* Note 3, p. 454 et seq.

46 A. Chayes, T. Ehrlich and A.F. Lowenfeld, *International Legal Process*, Boston, MA: Little Brown & Co., 1968. See M. Ellen O'Connell, 'New International Legal Process', 93 *American Journal of International Law* (1999), 334. See also H.H. Koh, 'Why Do Nations Obey International Law?' 106 *Yale Journal of International Law* (1999), 2599 and H.H. Koh, 'Bringing International Law Home', 35 *Houston Law Review* (1998), 623.

47 R. Keohane and J. Nye (eds), *Transnational Relations and World Politics*, Cambridge: Harvard University Press, 1972; J. Nye and J. Donahue (eds), *Governance in a Globalizing World*, Washington, DC: Brookings Institution Press, 2000; J. Rosenau and E.-O. Czempiel (eds), *Governance without Government: Order and Change in World Politics*, Cambridge: Cambridge University Press, 1992; J. Rosenau, *The Study of World Politics: Globalization and Governance*, London: Routledge, 2006.

48 See my chapter on positivism in this volume.

49 See Peters *et al.* (2009), *supra* Note 29.

50 For some classical studies on international law-making processes, see R. Wolfrum and V. Röben (eds), *Developments of International Law in Treaty Making*, Berlin: Springer, 2005, or A. Boyle and C. Chinkin, *The Making of International Law*, Oxford: Oxford University Press, 2007.

51 See e.g. Peters *et al.*'s chapter in Peters *et al.* (2009), *supra* Note 29, pp. 550–551.

52 I have had the opportunity to evaluate this deformalization of law-ascertainment elsewhere, see d'Aspremont (forthcoming, 2011), *supra* Note 8.

53 Noortmann and Ryngaert (2010), *supra* Note 37; Peters *et al.* (2009), *supra* Note 20; A. Bianchi (ed.), *Non State Actors and International Law*, Aldershot: Ashgate Publishing, 2009. In the French literature, see R. Ben Achour and S. Laghmani, *Acteurs non étatiques et droit international*, Paris: Pedone, 2007.

54 See the legal works mentioned in the multidisciplinary bibliography provided in Peters *et al.* (2009), *supra* Note 29, pp. 26–32.

55 On the proliferation of international legal thinking, see my remarks in J. d'Aspremont, 'Softness in International Law: A Rejoinder to Tony D'Amato', 20 *European Journal of International Law* (2009), 911–917.