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Non-state actors and the international rule of law: Revisiting the 'realist theory' of international legal personality*

*Janne E. Nijman***

1. Introduction

In the next ten to twenty years our world will transform dramatically. Globalization, demographic challenges, climate change, and the geopolitics of energy, among other developments, will challenge our current world governance structures. There is a looming global governance deficit as new powers – both state and (notably) non-state[1] - rise and international institutions fail to respond adequately, thus risking to create institutional decay rather than institutional innovation and adaptation. *Global Trends 2025: A Transformed World* (2008) of the US National Intelligence Council analyzes these developments and the way in which these (may) interact as change-driving factors. The report identifies global trends and - depending on how the variables are weighed – calculates four possible scenario's or alternative futures.

In each of these futures, non-state actors (NSAs) play a role and in one of the four scenarios, *Politics is Not Always Local*, NSAs and NSA-networks are assessed as the international agendasetters of the future, who even "use their clout to elect the UN Secretary General."[2] Such clout would in fact be unsurprising to IR/IL scholars. After all, NGOs and NGO-networks have played a significant role in the establishment of international criminal tribunals and the ICC to mention just one example of extensive NSA influence. Underlying all scenarios is the "relative certainty" that "the relative power of various nonstate actors—including businesses, tribes, religious organizations, and even criminal networks—will grow as these groups influence decisions on a widening range of social, economic, and political issues."[3] This global trend will bring significant changes to the international system: "By 2025, nation-states will no longer be the only—and often not the most important—actors on the world stage and the "international

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[1] Here, "non-state actors" refers to international actors which are not a state, I do not include Inter-governmental Organisations as NSAs here. See, for IGOs as NSAs, e.g., C.M. Brölmann, *The Institutional Veil in Public International Law : International Organizations and the Law of Treaties*, Hart, Oxford, 2007.
[2] NIC, *Global Trends 2025: A Transformed World* (November 2008), available online at http://www.dni.gov/nic/NIC_2025_project.html, at 81 and 4. This report is a US National Intelligence Council publication, which is based on the expertise of many both US Government and non-USG experts.
[3] Ibidem, at 81. Also, at vi.

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system" will have morphed to accommodate the new reality. But the transformation will be incomplete and uneven." [4] In other words, for the future of the international system one may discern roughly two possible trajectories: either the multiplicity of actors will strengthen the international system for a global public domain to emerge,[5] or this multiplicity will contribute to the further fragmentation of the international system and undermine international cooperation and global governance institutions. The diversification of both state and non-state powers (into multipolarity and into multiplicity) increases the likelihood of the second scenario and complicates working towards realisation of the first. "The need for effective global governance [of the pressing transnational problems such as climate change, regulation of globalized financial markets, migration, failing states, crime networks, etc] will increase faster than existing mechanisms can respond."[6]

In short, we are faced with a real risk that further dispersion of power and authority will contribute to a weakening of the institution of international law and to a growing global governance deficit. The international legal system and global institutions need to adapt to the new global reality, of which NSA power and influence is such a dominant feature. I deliberately use the words *power* and *influence* -- this is what NSAs have and this is the reason why political scientists and IR and IL scholars are interested. We are dealing with actors that have sufficient autonomy and power to exercise influence on the international stage. Unsurprisingly, one of the central characteristics of our times is that power and influence are less based on territory and more based on network, information, knowledge, and function. Next to hard power, we now find soft power, the power to convince (or in Nye's words, the power to influence through attraction, and thanks to a capacity for effective communication) rather than to coerce.[7]

Global Trends 2025 is not the first and surely not the only report to identify possible challenges and opportunities of the near future,[8] but the report's explicitness stimulates strategic thinking about (policy) interventions in developments that may cause a growing deficit of accountability/responsibility, a lack of governance at the global level, and the possible weakening of the international legal order. This once again provokes our discipline to deal with the topic of NSAs, their role in shaping international life and their position in a rapidly changing global

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[4] Ibidem, at 81.

[5] Ruggie goes as far as to argue that "the newly emerging global public domain" is a public domain which is no longer coterminous with the system of states, the latter is actually becoming increasingly embedded in a "non-state-based public domain." J.G. Ruggie, Reconstructing the Global Public Domain – Issues, Actors, and Practices, …, at 519.

[6] *Global Trends 2025*, at 81.

[7] See also David Held et al., *Global Transformations* (Oxford: Polity, 1999), at 447: 'we must recognize that political power is being repositioned, recontextualised and, to a degree, transformed by the growing importance of other less territorially based power systems."

[8] Ibidem, at 85.

(institutional) order. And, at a time in which the international community is committed to strengthening the international rule of law, this contribution also addresses the growing power of NSAs as a potentially undermining factor.

In that context the present chapter argues the inclusion of powerful, international NSAs in the category of 'international legal persons.'[9] The argument builds on the generally accepted idea that for the purpose of both the protection and the accountability of entities within the international legal system, these should have the enhanced status of legal 'subject' rather than 'object'. Behind this legal reality lies the normative reality of the international rule of law ideal: powerful entities that operate to some degree independently on the international plane should be controlled by law and held accountable for their actions. In other words: political or economic actors should be visible also in the international *legal* order (section 2). After these preliminary propositions, this chapter examines if and how the international legal personality (ILP) of NSAs may be constructed today. I distinguish three ways in which the ILP of NSAs is construed within the parameters of the conventional conception of ILP: a) 'transnational ILP', b) 'soft ILP', and c) 'regular ILP' (section 3). The chapter proceeds, however, to search for a new grounding of ILP theory. This search is supported by the general dissatisfaction with the formal conception of ILP, which draws on fiction theory. I will suggest to reconsider the 'real personality' theory or 'realist' theory of international legal personality (section 4). This theory reconnects to the non-or pre-legal realms – of political and social sciences, ethics, psychology, metaphysics etc. – that were cut off from the legal concept of international personality in the past. This chapter aims to provoke debate on the possibility of a 'new' realist theory so that we may be better equipped when addressing questions of NSAs and international law. In doing so it also aims to build an argument against the popular conviction that the concept of ILP and its theory has flopped. It defends the view that ILP is relevant and useful in today's international legal reality, provided that a new theoretical grounding is developed.

2. Preliminary propositions

a. Based on their social, political and economic subjectivity, NSAs should be legal subjects, not objects

This chapter proceeds from two preliminary claims or propositions. The first is that because NSAs are such important powers in the political and social reality of today's world, it is necessary

[9] Following the general use in international law scholarship, legal personality, legal person, and legal subject are considered to be synonymous here.

that they are considered actors in the *legal* reality as well. 'Legal personality' then is the status which "enables an entity to function in a legal order."[10] Being a 'legal person' or 'subject' of international law better captures today's NSA's role than being an 'object' of international law. This is not an attempt to get back into the prison house,[11] or to disregard Koskenniemi's fair critique of the object/subject dichotomy.[12] It is merely an effort to be clear on the underlying proposition of this chapter: in the confusion about whether to "relativiz[e] the subjects" or to "subjectivize the actors" this chapter is inclined to do the latter.[13] The dichotomy may be an obstacle at times, but that doesn't mean that international law is unlike any other legal system in that it can do without the notion of legal personality.[14]

Traditionally, NSAs are not 'subjects' or 'persons' of international law. The conception of the NSA as an object of international law does however not sufficiently explain its present-day position in the international (legal) order. For one thing, it does not explain situations in which NSAs are the driving agents of important treaties (Ban on Mines Treaty), or the establishment of international institutions (ICC), the consultative status of NGOs within the United Nations, or the equality of States and MNCs as parties in ICSID procedures.[15] In other words, the power and influence of NSAs in many cases goes far beyond that of entities to which international law has traditionally accorded object-status. The various developments have not caused a (formal) adjustment of the traditional view on ILP to facilitate *legal* accommodation of these actors. As candidate international legal persons, NSAs are living in a conceptual twilight zone.

The global reality of NSAs operating on the international plane however can no longer be ignored. Considering the discrepancy between the *de jure* conception of the non-state actor, which basically amounts to that of an object of international law, and the *de facto* global socio-political and legal role of powerful, rational, and purposeful NSAs, it is time to change the position of the non-state actor in international law. Moreover, as Jan Klabbers has rightly pointed out, international legal personality or "[s]ubjectivity" is "both declarative and constitutive."[16]

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[10] Cf the treatment of ILP in Catherine M. Brölmann, *The Institutional Veil in Public International Law: International Organisations & the Law of Treaties* (2007), chapter 3.
[11] Higgins 1994, at 49-50. See also Allott 1990, at 373.
[12] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).
[13] Bianchi in his Introduction to A. Bianchi (Ed.), *Non-State Actors and International Law*, Series: The Library of Essays in International Law, Ashgate, (2009).
[14] Or, to emphasize its crucial important by means of Klabbers' words: "subjects doctrine forms the clearing house between sources and substance: it is through subjects doctrine that the international allocation of values takes place, and as any political scientist knows, the authoritative allocation of values is one of the main political functions." Jan Klabbers, (I Can't Get No) Recognition: Subjects Doctrine, Petman & Klabbers (Eds.), *Nordic Cosmopolitanism. Essays in International Law for Martii Koskenniemi* (2003), at 369.
[15] ECOSOC Resolution 1996/31 of 25 July 1996; Art. 25 Convention on the Settlement of Investment Disputes between States and Nationals of other States, opened for signature 18 March 1965, entered into force 14 October 1966, 575 UNTS 159
[16] Klabbers, (I Can't Get No) Recognition, at 368.

Consequently, "creating rights and obligations left, right and centre, however useful perhaps in itself, does not add up to the sort of paradigm shift that international law might need in order to truly accommodate entities other that states. Indeed, it may even backfire, in that without a clear grounding, those non-state entities may always reject the authority international law holds or claims over them."[17]

Indeed, a paradigm shift is required: without the recognition of NSAs as ILPs the gap between "the *de facto* significance" and "the *de jure* insignificance" is not resolved and, as Claire Cutler argues with regard to MNCs in particular, a "crisis of legitimacy" is at hand.[18] And the inability of theory and practice to deal with the ILP of NSAs in another way than a formalistic way contributes to this crisis.[19] Rather than abandoning the conceptual category – possible in theory but hardly feasible in practice - the category of international legal persons is now broadened, due to 'a requirement of international life'.[20] When NSAs are not visible – quoting the 1933 Montevideo Convention – "in the eyes of international law," [21] there is a disjunction not only between theory and practice, but also between law and state. This ultimately undermines international law's claim to authority.[22]

As indicated, this chapter defines 'non-state actor' as any entity that is not a state under international law. It thus follows Clapham in his choice of terms, which means that "[t]he range of possible entities includes: rebel groups, terrorist organizations, religious groups, civil society organizations, corporations, all kinds of businesses, and international organizations. Anything less comprehensive starts to suggest immunity from certain international responsibilities that are being generated and increasingly recognized in international relations."

Thus, the first preliminary claim of this chapter is that in order to clarify the legal position of the NSAs, enhance their legal accountability to international society, and defuse a legitimacy crisis, NSAs have to be accommodated as subjects of international law. This leads us to the second proposition.

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[17] Klabbers, (I Can't Get No) Recognition, at 368.
[18] A. Claire Cutler, Critical reflections on the Westphalian Assumptions of International Law and Organisation: A Crisis of Legitimacy, 27 *Review of International Studies* (2001); see also on this point but from a different perspective, Allott 1990, at 372 (17.77).
[19] Ibid., Cutler, Critical reflections, at 149.
[20] ICJ Rep. 1949 *Reparation for Injuries* Case, at 178: "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."
[21] Art. 2 Montevideo Convention on the Rights and Duties of States, signed at Montevideo, 26 December 1933, entered into force on 26 December 1934.
[22] Cutler, Critical reflections, at 147-149.

b. International Legal Personality (ILP) of NSAs contributes to the strengthening of the International Rule of Law

The second preliminary claim of this chapter is that the ILP of NSAs is a prerequisite for the strengthening of the international rule of law (IRoL). In other words, the constructive conception of NSAs as international legal persons helps to reinforce the international rule of law, which is a declared need of the international community today, and which has been identified on multiple occasions as a prime objective of the UN. In the words of the UN Legal Counsel: "the rule of law is today at the centre of the United Nations' concerns."[23]

In my understanding, an international rule of law cannot but extend international law's power-constraints to *non*-state actors. The exercise of power on the international stage is less and less a state-only privilege, due to the privatization of authority,[24] the privatization of governance,[25] deterritorialization,[26] outsourcing of public tasks,[27] globalization of corporate power, diversification of actors (among which increased participation of international NGOs), et cetera. In a vision of an international rule of law NSAs, as powerful governing and governed actors, should therefore be conceptualized as ILPs.

(i). The Rule of Law <u>*at the international level*</u>

Here, focus is on what is meant by "the international level" when dealing with the conceptualisation of the RoL at this level. In the next paragraph, we will deal with the RoL concept as such.

The conceptualisation of the International Rule of Law (IRoL) – here taken as synonymous with "the rule of law at the international level" - is going through a revival in practice and theory. In the first decades of the last century as well, the IRoL received much scholarly attention. Back then, between the two World Wars in particular, this attention was related to the attack on the late nineteenth century 'idolatry of the state', the reduction of

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[23] Address by Legal Counsel of UN on June 15, 2009, *The Rule of Law at the International Level*, at 1.

[24] See, e.g., Christine Chinkin, Monism and Dualism: The Impact of Private Authority on the Dichotomy Between National and International Law, in Nijman & Nollkaemper (Eds.), *New Perspectives on the Divide between National and International Law* (Oxford: OUP, 2007).

[25] See, e.g., Claire Cutler's argument that 'firms are basically functioning like governments', reflecting 'deeper processes of globalization at work that are producing a disengagement of law and state' from the arena of global governance. (2002: 32–3); see for the privatization of global administrative regulation, GAL Bibliography.

[26] See, e.g., Catherine Brölmann, Deterritorialization in International law: Moving Away from the Divide Between National and international Law, in Nijman & Nollkaemper (Eds.), *New Perspectives on the Divide between National and International Law* (Oxford: OUP, 2007).

[27] See, e.g., Anne Peters, The Globalization of State Constitutions, in Nijman & Nollkaemper (Eds.), *New Perspectives on the Divide between National and International Law* (Oxford: OUP, 2007).

sovereignty, and the attempts to 'rehabilitate' and renew international law.[28] Possibly the current revival rests on similar grounds – another rehabilitation of international law after the weakening of international law during the Bush years;[29] an attempt to strengthen international law in response to its increased fragmentation and diversification;[30] another defence of the Kantian project;[31] or a response to the scepticism of CLS scholarship on international law[32] (like the Realists uttered their critique on international law before). It is also possible the renewed interest has been tinkered by (accountability) questions in relation to failing UN missions[33] (such as the one in Srebrenica); questions of transitional justice in conflict and post-conflict societies;[34] new international law phenomena, such as the Chapter VII-based International Criminal Tribunals; or it may be called for by an active UN Secretary-General with a view to improving local rule of law programs. This composite and complex background will not be further entered into here. In any case, contrary to what one might expect, the IRoL revival is *not* directly spurred by the increasing power and influence of NSAs.[35] This is especially remarkable since "the international level," to which we intend to transpose the RoL, is changing dramatically precisely due to the activity of powerful NSAs in the framework of globalisation. When we turn to global governance literature the image of disregard for the role of NSAs becomes somewhat nuanced.

Over the last decade, many International Relations (IR) and International Law (IL) scholars have become unsatisfied with the traditional state-centric paradigm, and its seemingly limited explanatory power for the contemporary state of global affairs.[36] "Global governance"[37] has emerged as a viable new paradigm for many IR and IL theorists and practitioners (it was

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[28] See on these scholarly objectives, J.E. Nijman, *The Concept of International Legal Personality: An inquiry into the history and theory of International Law* (The Hague: Asser Press, 2004). (Hereinafter: Nijman 2004)

[29] See for a complaint about the lack of concern for the Rule of Law, Philip Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005) and *Torture Team: Deception, Cruelty and the Compromise of Law* (2008).

[30] See, ILC Report, *Fragmentation of international law: difficulties arising from the diversification and expansion of international law*, finalized by Martti Koskenniemi, 13 April 2006, UN Doc. A/CN.4/L.682.

[31] See, e.g., Jürgen Habermas, *The Divided West* (Cambridge: Polity Press 2006), chapter 8 "The Kantian Project and Divided West."

[32] See, e.g. Georgiev's response "Politics or Rule of Law: Deconstruction and Legitimacy in International Law," 4 *EJIL* 1-14 (1993) to Martti Koskenniemi, Politics of international Law, 1 *EJIL* 4-32 (1990).

[33] UN Legal Counsel, Speech, at 5.

[34] See UN report infra note

[35] IL scholarship appears to be lagging behind when it comes to NSAs and the conceptualisation of the Rule of Law at the *international* level. The 2007 HiiL Rule of Law Inventory Report confirms this *prima facie* impression. See, HiiL, Rule of Law Inventory Report (2007), Academic Part, section 8 Conclusions: "There is little research on: how non-state actors (academia, NGOs, media, and the population at large) contribute to strengthening the rule of law."

[36] In 1993, e.g., Slaughter proposed a new paradigm, the liberal agenda, to meet *inter alia* the challenge of emerging non-state actors: A.-M. Slaughter, International Law and International Relations Theory: A Dual Agenda, 87 (2) *AJIL* (1993), at 227.

[37] "At the global level, governance has been viewed primarily as intergovernmental relationships, but it must now be understood as also involving non-governmental organizations (NGOs), citizens' movements, multinational corporations, and the global capital market." Report of The Commission of Global Governance, *Our Global Neighborhood* (New York: Oxford University Press, 1995), p. 2-3. See also, Thomas G. Weiss, Governance, good governance and global governance: conceptual and actual challenges, *Third World Quarterly,* Vol 21, No 5, pp 795–814, 2000.

rapidly absorbed by diplomatic and UN jargon) since it recognised the wide range of (non-state) actors now involved in governance at a post-national level. In Slaughter's definition it is "the formal and informal bundles of rules, roles and relationships that define and regulate the social practices of state and nonstate actors in international affairs."[38] It describes and examines the realities of the changing international (legal) system, while recognising the increased and variegated participation of sub-state and NSAs on the global stage.[39] In the words of this book's title, NSAs as both law-makers and law-takers. Once the role and impact of NSAs are recognized, the need to adjust accountability and responsibility mechanisms becomes paramount.

A 'global governance' understanding of international life is indeed the context in which the RoL "at the *international* level" has to be conceptualised. The challenge then is how to conceive of an IRoL in the absence of a world *government* and in the reality of global *governance*, which moreover is not purely inter-statist but involves non-state participants too. This is the international context in which the IRoL has to function and assert meaning.

At least two legal approaches to global governance recognise the significant role of NSAs at the international level and the importance of securing RoL values where these actors are involved in global governance practices: Global Administrative Law (GAL) and Global Constitutionalism (the relation between the two has to be left aside here).[40]

Firstly, there is the NYU Law School IILJ's project on the administrative law of global governance.[41] 'Global governance' is understood as global *administration*, which in the absence of an international executive power is exercised in various ways. Formal inter-governmental organisations exercise only one type of the identified global administrative actions : *international* administration. Other types of global administration are carried out by, for example, hybrid intergovernmental-private or purely private bodies. A great variety of actors is involved in global administration. On the one hand, private actors are involved in functions at the global level which would qualify as 'public' or 'governmental' in the domestic sphere. On the other hand, the global administration of classic transnational interests such as 'international peace and security' is still a largely intergovernmental business regulated by traditional international law.

In this perspective, classic (inter-state) international law is only one of the sources of GAL and states are only one category of GAL subjects. The subjects of global administration are

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[38] Slaughter & Tulumello & Wood, International Law and International Relations Theory: A new generation of interdisciplinary scholarship, 92 *AJIL* (1998), at 371.

[39] A succinct report of NSAs' involvement in the Copenhagen process in Anna Spain *Who's Going to Copenhagen?: The Rise of Civil Society in International Treaty-Making,* ASIL Insight of December 11, 2009, Volume 13, Issue 25,

[40] In the book chapter version, elaboration on these two very relevant schools of thought is left aside.

[41] Benedict Kingsbury, Nico Krisch & Richard Steward, The Emergence of Global Administrative Law, 68 *Law & Contemp. Problems* (2005), p. 15. GAL is a project of the Institute for International Law and Justice at NYU Law School. For numerous working papers, workshop reports, bibliographies, and other links, http://iilj.org/GAL/.

basically identical to those in the domestic context: individuals (in various roles), corporations, NGOs and other collectivities. Private actors then function both as global administrators and as addressees of global administration. Thus, in global administrative law the question of 'subjects' is not problematic. Moreover, with the disappearance of the divide between the domestic legal sphere and the international legal sphere – a 'global administrative space' encapsulates (part of) both – the concept of ILP fades into the background. From a GAL's perspective traditional inter-national law is shrinking, it functions increasingly within a global governance space regulated by global administrative law. Traditional sources and subjects doctrine insufficiently describe and accommodate important new developments, and so GAL argues for a new lens. 'International legal personality', as a formal international law-concept, is not used to try and capture the new developments.

The normative dimension of the GAL project focuses on the values (such as participation, transparency, review, and - key -: accountability) and consequent principles that should play a role within global administrative regimes to enhance the legitimacy of these regimes and to ensure "that those – increasingly important – areas of global governance that escape the jurisdiction of both public international and domestic administrative laws are not thereby beyond the reach of the rule of law altogether."[42] The RoL and human rights are among the central values of the emerging GAL, and are meant to set the standard for global administration, also when NSAs are involved. To ensure these standards within the global legal order, global administration must develop more adequate mechanisms and become more 'institutionally mature.'[43] The context of 'global administration' among other things requires clearly further conceptualisation of the RoL.

A second approach to address NSAs and the RoL is the global constitutionalism (GC) perspective on international law. It understands global governance practices as developing within a global constitutional space. In this vision a global constitution is emerging – its norms scattered over various sources,[44] yet drawing on common values -, which provides the basis for a constitutional (hierarchical) reconstruction of international law. The interpretation of global governance practices through the lens of a (emerging) value-laden 'global constitution' brings out problems of accountability, legitimacy, and – to some extent - the RoL. Global constitutionalism emphasises that a constitutional framework is developing at the global level, which may complement domestic constitutional law and compensate for the fact that many governmental

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[42] S. Cassese et al. (Eds), *Global Administrative Law: Cases, Materials, Issues* (2nd ed, 2008), at XXV. Also, supra fn. 41, p. 26.

[43] See, on the shortcomings of international law in securing Rule of Law and human rights values, an excellent paper by Dyzenhaus, The Rule of (Administrative) Law in International Law, 68 *Law & Contemp. Problems* (2005), p. 127.

[44] Some argue the UN Charter should be read as a global constitution.

functions take place increasingly beyond the state level. Global constitutional law must then develop to secure 'constitutional principles' (including the RoL) at the global level.

In the international-constitutionalist version of Anne Peters, constitutional values help to overcome formalism and to improve global governance. She points to a possible constitutional strategy for safeguarding human rights, which obliges NSAs (empowered by global governance processes) to comply with international human rights law directly.[45] This could remedy the emerging RoL deficiency due to NSAs participation in global governance. Daniel Thürer discusses in great length the new role of NSAs from a constitutionalist perspective and confirms that touching on the IRoL is inevitable in this context.[46] He argues that international law itself is changing due to a) the diffusion of power from the state to the sub-state and international levels; and b) globalisation, which he defines as, the shift of power to private actors. Since the state is conceived of as a "normative concept," i.e "a legal entity designed to realize basic values of justice and the 'rule of law'," these two trends diminish the role of the state and thereby potentially undermine the IRoL. In order to prevent the IRoL from weakening together with the waning nation-state, Thürer argues that the international community should purposely include NGOs. In his view, these NSAs often function as "the judicial conscience of the international community"[47] and may thus work as "countervailing forces"[48] to global political and economic powers. Within the global constitutional order then NGOs will remind states of their responsibilities and thus be "stimulate[d] ... to live up to their function under the rule of modern international law." In addition, Thürer argues that the rule of international law should be extended (by the creation of new law and new institutions) to improve control over transnational enterprises and to ensure responsible corporate conduct. A constitutional approach to international law offers, according to Thürer, a way to "escap[e] the rigidly defined circle of traditional subjects of international law."[49] By means of this approach, "these new entities can be elegantly integrated into a broader concept of 'international community'."[50] Rather than to propose extension of 'the circle' or to redefine ILP under the pressure of the international rule of law, Thürer avoids what he calls "the sterile question" about the ILP of NSAs. Thus it could seem that, although in a global constitutional order no power can operate unchecked, the

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[45] Anne Peters, The Globalization of State Constitutions, Janne Nijman and André Nollkaemper (Eds), *New Perspectives on the Divide between National and International Law* (Oxford: OUP, 2007), 274-276.

[46] Daniel Thürer, The Emergence of Non-Governmental Organizations and Transnational Enterprises in International Law and the Changing Role of the State, Rainer Hofmann (Ed.), Non-State Actors as New Subjects of International Law (1999), as published in Andrea Bianchi (Ed.), *Non-State Actors and international Law* (Surrey: Ashgate, 2009), at 57-78.

[47] Ibid., at 66.

[48] Ibid., at 75.

[49] Ibid., at 73.

[50] Ibid., at 73.

ultimate legal consequence of global constitutional developments – the formal vehicle of legal personality – is left untouched.

Thus, both GAL and GC recognise the significant role of NSAs at the international level and the importance of securing RoL values where these actors are involved in global governance practices. Both, however, also decline to deal with the consequences of a strengthening of the IRoL for the international legal status of NSAs. The traditional, formal definition of ILP as well as the textbook-catalogue of international legal persons are considered obsolete. This critique of the current ILP doctrine is valid. Nonetheless, a reconceptualisation of ILP and a reconstitution of NSAs as IL persons would arguably benefit the IRoL more than rejecting ILP altogether. To substantiate this claim I will now take a different point of departure: the RoL concept itself.

(ii) *The Rule of Law* at the international level

To substantiate the claim that the IRoL would benefit more from the reconstitution of NSAs as legal persons it is helpful briefly to look at the RoL concept as such. In spite of its long history,[51] there is no clear definition of the 'international rule of law' (IRoL), neither in customary international law nor in treaty law, nor in pronouncements of the ICJ. Over the past five years, however, the term has come to feature in many UN documents,[52] as the international community through the UN repeatedly expressed its commitment to the 'strengthening of the IRoL'. There is general consensus on such a commitment, yet the precise normative content of the IRoL and the question of whether its definition should be 'thick' or 'thin'[53] remain to be determined. By consequence, the body of scholarship on the conceptualisation of 'the international rule of law' is growing.[54] The debate revolves around the possibility of an IRoL as such,[55] as well as the path along which the IRoL would be emerging.[56] The history of the IRoL and the fine points of this

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[51] See, for "the 'arrival' of the rule of law argument within the discourse of global order" F. Kratochwil, Has the 'Rule of Law' become a 'Rule of Lawyers'? An inquiry into the Use and Abuse of an Ancient *Topos* in contemporary debates, in Gianluggi Palombella and Neil Walker (Eds.), *Relocating the Rule of Law* (2009), at 173; see, for the history of the rule of law at the national and international level, also, Simon Chesterman, An International Rule of Law?, 56 (2) *Am. J. Comp. L.* 331-361 (2008); also, Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004), and Palombella, The Rule of Law Beyond the State,

[52] Three UN documents that are central to UN project on the Rule of Law at this point may be mentioned. The Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies*, 23 August 2004 (UN Doc S/2004/616) famously contains the 'UN definition' of the Rule of Law in § 6 (see infra note ...) Secondly, the 2006 Secretary-General report, *Uniting our strengths: Enhancing United Nations support for the rule of law* (UN doc. A/61/636). Thirdly, in August 2009 the UNSG issued the first *Annual report on United Nations efforts to strengthen engagement on the rule of law at the national and international levels*, which focuses on the RoL at the international level, the national level and the internal-institutional level.

[53] In this context, an intriguing paragraph of SG Report 2004 is para. 138 "Justice is a vital component of the rule of law."

[54] To mention just a few, Beaulac, Chesterman, Crawford, Goodin, Nollkaemper, Tamanaha, Gianluggi Palombella and Neil Walker (Eds.), Relocating the Rule of Law (2009)

[55] See e.g., Martti Koskenniemi, The Politics of International law, 1 *EJIL* 4 (1990).

[56] Ph. Allott, *The Health of Nations: society and law beyond the state* (Cambridge: CUP, 2002), pp. 65-66.

debate are outside the scope of this chapter, which rather aims to contribute to the conceptualization of 'the international rule of law' by considering the inclusion of NSAs in the international legal system.

International law scholarship aimed at the conceptualisation of the IRoL is frequently state-centric.[57] The IRoL is then applied to a grid of inter-governmental relations, within an international community constituted primarily by states and international organisations.[58] In an attempt to transpose the domestic rule of law model to the international context,[59] many refer to the three principles of A.V. Dicey's classic definition of the rule of law.[60]

I will not discuss the difficulties that come with the transposition to the international level of Dicey's model. At this point I merely want to put in a caveat to avoid a false premise : the IRoL is meant to *check* states and international organisations, but states are not the beneficiaries of the IRoL. This would go against the essence of the RoL ideal. In the context of this chapter, I would like to try and move behind the more technical considerations to consider the IRoL *ideal*. Such in order to better understand what we aim to do, what we *mean,* when we seek to apply the RoL at the international level. Surely the meaning of a concept changes along with the context in which it is used. [61] Yet there appears to be a core meaning that persists. This must be the reason why we seek to *transpose* the concept existing in the domestic law context to the international level in the first place?

To underpin the proposition that the IRoL requires the ILP of international NSAs, I make three claims.

i) The RoL is a political ideal, the beneficiaries of which are human individuals also in the international context. From this follows that *all* international 'governing actors' (that is : actors involved in a form of global governance) are subjected to international law, whether state or non-state.

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[57] The same is true for UN reports, which conceive of the international rule of law as governance values but without concern for NSAs position. See, e.g., Secretary General's Report *In Larger Freedom: Towards Development, Security and Human Rights for All*, (A/59/2005). Rule of Law section, para. 133-139, p. 34-35.

[58] See, e.g., Mohammed Bedjaoui, *The New World Order and the Security Council* (Dordrecht, 1994). See also, Simon Chesterman's report The United Nations Security Council and the Rule of Law (2008).

[59] See e.g. S. Beaulac, *An Inquiry into the International Rule of Law*, EUI Working Papers Series. Chesterman,

[60] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885), 193-194: "[1] the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. … [2] equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; … [and 3] the law of the constitution … are not the source but the consequence of the rights of individuals as defined and enforced by the courts."

[61] Quentin Skinner, *Visions of Politics, vol. 1 Regarding Method* (Cambridge 2003). J.L. Austin, *How to do things with words, the William James Lectures delivered at Harvard University in 1955* (Londen 1962, revised edition 1967).

ii) The RoL ideal is perhaps best known for placing governing actors under the law, protecting individuals in a 'vertical' relationship. However, we should not forget the RoL equally addresses 'horizontal' relationships, stipulating that *all* actors, governing and non-governing, are subject to the law. The RoL presupposes the 'rule by law' - the idea that law governs society. It moreover envisions a legal order which covers the entire *social* order with its acts and actors. Thus, when we aim to apply the RoL to the international level, this arguably entails a claim that the international order operates on an international law to which *all* actors, governing and non-governing, state and non-state, are bound.

iii) If the essence of the RoL ideal is protection of the individual against the arbitrary and unjust use of – governing or non-governing - power by any international actor, it follows that the RoL ideal has at least some substantive content, a *minimum level of justice.*

The first claim refers to the RoL as an ideal about the relation between the individual, society, politics and law. Applied to the international level, the RoL is an ideal about the relation between (the constitution of) the global political order and international law. With the transposition to the international level, institutional mechanisms and legal arrangements may change, but the objective of the RoL ideal does not. As a political ideal, it is aimed firstly at the protection of individual liberty and human dignity against the arbitrary and unjust use of governing power.

Arguably, this objective, or rationale,[62] is the essence of the RoL ideal, and this does not change with its transposition to another level of governance. Human individuals, not states, are "the bearers of ultimate value,"[63] they are "the real concerns that underlie the ROL," as Jeremy Waldron points out. It is "the raison d'être" of the RoL "[t]o eliminate uncertainty in the interests of freedom and to furnish an environment conducive to the exercise of individual autonomy." [64] With the *raison d'être* of protection of individual autonomy against lawlessness and arbitrariness, human individuals are indeed the beneficiaries of the RoL. These core elements of the RoL ideal – the standards of protection and the individual beneficiary - may serve best as starting point for the conceptualization of the RoL at the international level. In my view this is more helpful than conceptualisation which proceeds from the power *against* which the rule of law was first developed to make a stand – arguably this is historically contingent. The distribution of governing power changes; but the ideal to protect the people against power abuse by law in

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[62] Cf Palombella, *op cit.*, p. 9.

[63] Jeremy Waldron, Are Sovereigns Entitled to the Benefits of the International Rule of Law?, *IILJ Working Paper* 2009/3, p. 10.

[64] Ibid., p. 23. See also, p. 10: "The real purpose of IL and, in my view, of the ROL in the international realm is not the protection of sovereign states but the protection of the populations committed to their charge. People are not now regarded just as chattels of the sovereign powers, if they ever were."

essence remains the same. The fact that there is no central world government but rather a set of complex patterns of global governance, complicates things but does not ultimately prejudge that ideal.[65]

To fulfil its purpose at the international level, the IRoL claims the subjection to international law of state *and* non-state actors involved in global governance in order to constrain their governing power and therewith protect the people. I have argued elsewhere,[66] following others, that human individuals are the primary legal persons in international law. States are the subsidiary legal persons in international law, representing internationally their citizens. States can best be understood as 'agencies', or in the words of Abram Chayes: "[i]f states are the 'subjects' of international law, they are so, not as private persons are the 'subjects' of municipal legal systems, but as government bodies are the 'subjects' of constitutional arrangements."[67] In other words, governing bodies are the actors subjected to IRoL arrangements to the benefit of human individuals.

Strengthening the IRoL entails the development of the international legal order to better constrain and channel the exercise of governing power. The IRoL may thus be conceived as a model in which states, international institutions, and other NSAs fulfilling global governance functions are obliged to use their power justly and with respect for the liberty and dignity of human individuals. In order to have any significance at all, the IRoL can only mean that *all* powerful international actors participating in global governance are bound by the law. This view on NSAs and the IRoL appears to be supported by the 2004 Transitional Justice report of the UN SG.[68] The IRoL implies that all governing actors are conceived of as addressees of international law norms and values, in other words - that these actors are international 'legal persons'.

The second claim recalls that the RoL exists on the basis of the prerequisite that there is law, that law is created and enforced, that a public legal order exists which addresses every (significant)

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[65] It does explain however the fact that the RoL features at all governance levels (domestic, international and in between) of multilevel governance analysis. See for the rule of law "in between," André Nollkaemper, The Internationalized Rule of Law, *Hague Journal on the Rule of Law,* 1: 74–78, 2009.

[66] Nijman 2004

[67] As cited in Waldron, at 13.

[68] Report of the Secretary-General The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, U.N. Doc. S/2004/616 (23 August 2004), para. 6: "The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency."

entity within that order. It is worth recalling that the RoL ideal has developed within the European domestic power structures of the last few centuries. This was a time of state-building, i.e. a period of the centralisation of power, the monopolisation of force, and the supremacy of public order over private power. In other words, the RoL idea developed in societies where a 'rule of man *by* law' already existed. This was a context in which ruler or government (theoretically) had to serve the people, to uphold the law, to secure social peace, and thus to protect the individual against the unlawful use of power by members of society. Hence, the most important power from which an individual would need to be protected was public or governmental power. The governed, on the other hand, were already subject to the law and thus theoretically protected from each other by the law.

In the development of the definition(s) of the RoL, much emphasis has been placed on limitation of governing power by law to the benefit of human individuals. Although the RoL ideal may have been specifically geared to constraining the power of governing actors, it also binds non-governing actors in their relationship with one another. The RoL essentially proceeds from the idea that *all* actors, governing and non-governing, are subject to the law.

In part this is a normative claim inherent to the IRoL ideal: the catalogue of actors subjected to international law is thus expanded to include international NSAs so that their (mostly non-governing) powers, too, are constrained for the protection of human dignity and individual autonomy. Reading the 2005 World Summit Outcome document with this in mind, the sentence "the theory of the rule of law demands that actors exercising public authority be subject to the law," [69] may be completed with "*just as all other actors are subject to the law*." It is a reality of present-day international society that some internationally operating NSAs are more powerful than some states. Hence, to be true to the ideal and effective in pursuing its objective (the protection of individual dignity and autonomy against arbitrary and unjust use of – governing and non-governing - power) the IRoL requires the subjection of state and NSAs to the law. [70]

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[69] 2005 World Summit Outcome, G.A. Res. 60/1, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[70] Cf in this context Weeramantry's call for a re-assessment of the traditional ILP-doctrine: "When it is considered that some of the major trading multi nationals have revenues which far [sic] those of over 150 of the nation states, it becomes clear that they have a correspondingly large role to play on the international stage and that any attempt to advance the international rule of law requires reorientation of traditional principles discounting the importance of non state actors [such as the ILP doctrine]. The proliferation of powerful non-governmental organisations, which are often bonded together across national boundaries, is another factor requiring a reconsideration of traditional attitudes. Many of the standard international instrumentalities lack the ability to deal with these entities because of traditional attitudes." C.G. Weeramantry, *Universalising International Law*, (Leiden: Martinus Nijhoff Publishers, 2004), p. 192.

ILP could be instrumental in the reconstitution of global political life and the global public order,[71] so as to further the IRoL and to contribute to the closing of "the gap between rhetoric and reality" as the UN Secretary-General pleaded in 2005 report.[72] Fostering "[t]he rule of law as a mere concept is not enough. New laws must be put into place, old ones must be put into practice and our institutions must be better equipped to strengthen the rule of law." Construing ILP for NSAs may be such an innovation. As this would constitute a further link between the factual actor and the law, it would enable the rule of law to play its ordering role and to guide the conduct of all social international actors in the international arena.

The third claim is that if the essence of the RoL ideal is protection of the individual against the arbitrary and unjust use of – governing or non-governing - power by any international actor, it follows that the RoL ideal has at least some substantive content, a *minimum level of justice*. In other words, the RoL ideal also has a substantive dimension. As set out above, the commitment to a stronger IRoL raises a claim for an international law that protects human individuals against infringements of their dignity and autonomy by governing actors as well as globally operating influential private actors or NSAs. This is not a neutral objective. Fuller argued indeed that the rule of law is 'a moral good', because of the aforementioned objective. But then again, a moral good such as the enhancement of individual autonomy can be nurtured by a set of *procedural* requirements of the law (generality, predictability, degree of certainty, *nulla poena*, etc.) *only*, i.e. the *formal* conception of rule of law. This line of argument explains Raz's statement

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies. This does not mean that it will be better than those western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.[73]

This is part of an extremely positivist position on law. I would argue that Raz's position in fact runs contrary to the RoL ideal. In defending Radbruch's formula that 'extreme injustice is no law' in discussions with Raz, Robert Alexy has established that there is "an utmost limit" to certainty

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[71] At a 2009 UN Expert Meeting on the Rule of Law, David Kennedy pointed out that "global governance and the international rule of law are about more than management and problem solving. They concern the structure and ends of our global political life. As a result, in building the global legal order, we must grasp the depth of the injustice of the world today and the urgency of change. … … Revitalizing the international rule of law is to remake the forms and channels of global political life. My own hope is that we carry the revolutionary force of social justice and the democratic promise – of individual rights, of economic self-sufficiency, of citizenship, of community empowerment, and participation in the decisions that affect one's life --- to the sites of global and transnational authority, however local they may be." Opening statement "The Rule of Law at the International Level", UN, New York, June 15, 2009.
[72] SG Report 2005, In Larger Freedom, para 133-4. rule of law section, p. 25.
[73] Joseph Raz, The Rule of Law and its Virtue, 93 *The Law Quaterly Review* (1977), p. 196.

trumping justice that is fixed by "substantial correctness."[74] I would argue that this utmost limit is set by the essence or raison d'être of the RoL, the protection of human dignity and individual autonomy. This is not the place to discuss extensively the 'thickness' of the definition of the RoL, but it is definitely 'thicker' than the very 'thin' version. There is some non-instrumental, moral substance to the RoL. Fuller explains that underlying the 'internal morality of law' (his words for the RoL) there is in fact an implicit view of man: human dignity requires the law to be committed to "man as a responsible agent."[75] Respect for autonomy and human dignity are moral values that underpin the RoL and set the parameters for the institutional and legal framework created on that basis.

This substantive, and essential, dimension of the RoL is not lost when transposed to the international level. This means that a call for a stronger IRoL entails a moral claim for an international law and international institutional order which better respect and protect the autonomy and dignity of the individual. There are in fact signs of support for a normatively 'thicker' conception of the IRoL, such as substantive human rights norms having entered the international RoL discourse, or substantive standards more generally, as expressed in the statements by former UN Secretary-General Annan : "Justice is a vital component of the rule of law."[76] The commitment to the strengthening of the IRoL includes a commitment to a minimum of substantive justice. [77]

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[74] Robert Alexy, My Philosophy of Law: The Institutionalisation of Reason, in: Luc Wintgens (ed.), *The Law in Philosophical Perspectives*, Law and Philosophy Library vol. 41, (Dordrecht: Kluwer, 1999), p. 34. Alexy defended Radbruch's formula in discussions with Raz; according to Radbruch's formula extreme injustice is no law: "…wo Gerechtigkeit nicht einmal erstrebt wird, wo die Gleichheit, die den Kern der Gerechtigkeit ausmacht, bei der Setzung positiven Rechts bewußt verleugnet wurde, da ist das Gesetz nicht etwa nur „unrichtiges Recht", vielmehr entbehrt es überhaupt der Rechtsnatur. Denn man kann Recht, auch positives Recht, gar nicht anders definieren denn als eine Ordnung und Satzung, die ihrem Sinn nach bestimmt ist, der Gerechtigkeit zu dienen." Gustav Radbruch, Gesetzliches Unrecht und übergesetzliches Recht (1946), in: G. Radbruch, *Der Mensch im Recht* (Göttingen 1961), p. 119. See also John Rawls, *A Theory of Justice* (Oxford: OUP, 1972), p. 351: "When the basic structure of society is reasonably just […], we are to recognize unjust laws as binding provided they do not exceed certain limits of unjustice."

[75] Lon L. Fuller, *The Morality of Law*, Revised Ed., (New Haven: Yale University Press, 1969), p.162: "legal morality can be said to be neutral over a wide range of ethical issues. It cannot be neutral in its view of man himself. To embark on the enterprise of subjecting human conduct to the governance of rules involves of necessity a commitment to the view that man is, or can become, a responsible agent, capable of understanding and following rules, and answerable for his defaults. Every departure from the principles of the law's internal morality is an affront to man's dignity as a responsible agent."

[76] SG Report 2005, In Larger Freedom, para. 138

[77] In Dworkin's reinterpretation, this means that the RoL includes individual rights: "the second conception of the rule of law [is called] the 'rights' conception. It is in several ways more ambitious than the rule-book conception. It assumes that citizens have moral rights and duties with respect to one another and political rights against the state as a whole. It insists that these moral and political rights be recognizes in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule-book conception does, between the rule of law and substantive justice; on the contrary it requires, as part of the ideal of law, that the rules in the rule book capture and enforce moral rights." Ronald Dworkin, *A Matter of Principle*, (Cambridge: Harvard University Press, 1985), p. 11-12.

Even from these few points it seems fair to say that the rule of law within international society raises a claim for inclusion of all governing and non-governing powers of the international society in order to prevent any powerful, globally operating actor from being outside or 'above' international law. How else can the IRoL be upheld while a considerable degree of power is shifting away from states to NSAs? An international legal system with blind spots for powerful actors contributes to a weakening of the IRoL. The concept of ILP contributes to the IRoL by functioning as a linchpin between the factual and the legal, by bringing actual power under the law.[78] The IRoL prescribes international law to rule supremely, and the tool of ILP connects NSAs to international law. Proceeding from here, it is now time to examine *how* to develop the reconstitution of NSAs as international legal persons.

3. Conventional approaches to ILP[79] – shortcomings and opportunities

Unlike most domestic legal systems, international law lacks the rules to stipulate which are the system's legal persons. There is no "Vienna Convention on the law of international legal persons", similar to the *Code Civil Livre premier: Droit des Personnes* in Civil Law countries. Nor is there an unequivocal, substantive *stare decisis* developed body of law on personality, as in the way of the Common Law tradition. Of course, there are a number of relevant international judgements, most notably the 1949 *Reparation for Injuries* case of the International Court of Justice. However, no positive international law catalogue of legal persons exists. This may be a shortcoming as well as an opportunity.

In the absence of black letter law, doctrine and practice cover up controversy by quoting from the Court's 1949 Advisory Opinion:

> [Being an international person] does not even imply that all its rights and duties must be upon the international plane, any more than all the rights and duties of a State must be upon that plane. What it does mean is that it is a subject of international law capable of possessing international rights and duties, and that it has capacity to maintain its rights by bringing international claims.

The *dictum* of which this passage is part,[80] has become an incantation for dealing with the controversies of ILP. Being probably the most authoritative judicial statement on ILP, it has

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[78] See also, Allott in Health of Nations for example 420-421; A theory of representation, states as well as non-states are representation of, see eg Health of Nations or Eunomia.

[79] See, for an extensive examination of twentieth century ILP scholarship, Nijman 2004.

[80] *Advisory Opinion on Reparation for Injuries suffered in the service of the United Nations* Case, 1949 *ICJ Rep.*, at 178-179; it is preceded by the other famous sentences: "[t]he subjects of law in any legal system are not necessarily identical in their nature or 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."

come to serve as the basis for the conventional approach to ILP. It defines the international legal person as an entity capable of possessing international rights and duties and of bringing international claims when it needs to maintain these rights.[81] Over the years the *Reparation* definition has also been criticized sharply for being – as Brownlie explains - "unfortunately circular because the indicia referred to depend on the existence of a legal person."[82] The definition may be circular indeed, but what is relevant is that it provides for international legal personality *created by* the international legal system (viz when this system addresses an actor through an international norm, or when it attributes rights, duties, and/or competences). This implies that inclusion of new, non-state, actors is well possible if international life so requires. The Court takes a formal or fictional approach to ILP (as opposed to a 'real personality' approach[83]): legal personality is created by international law by way of attribution of specific rights and/or duties to an actor (the Court grounds the ILP of the UN on the rights, duties and competences attributed to the United Nations in the Charter, i.e. international law). This formal concept of ILP has come to dominate mainstream, positivist international law scholarship. In the words of Hans Kelsen, ILP is generally not understood as a "*reality* of positive law or of nature,"[84] but as an epistemological fiction and "thoroughly formal concept."[85] Formal in the sense that not a certain reality causes a legal person to emerge but merely the law.

One could say that with this inductive line of reasoning the Court provided international law with an in principle inclusive, open system of ILP. After all, the *Reparation* opinion seemed to suggest that normally, NSAs would become international 'legal persons' if international life so required. But, although the 'conventional approach' to ILP is open-textured, in practice it has failed to fulfil an inclusive role. Two related factors may be mentioned by way of explanation.

Firstly, international law never developed a new theory of personality that could have offered a way out of the circularity of the *Reparation* doctrine. Arguably, with an open-textured model the need for a *theory* of international personality increases. If 'legal personality' means '(apparent) capacity of being a subject of rights and duties', there is need for a theory which addresses the question as to "*when* an actor has the capacity of possessing rights and duties?", or "when an actor *should* possess rights and duties under international law?", or "to *which social reality*

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[81] See, e.g., I. Brownlie, *Principles of Public International Law* 57 (OUP, 6th ed. 2003); A. Cassesse, *International Law* 46 (OUP, 2nd ed. 2005); M. Dixon, Textbook on International Law (OUP, 5th ed. 2005); P. Malanczuk, Akehurst's Modern Introduction to International Law 91 (7th ed. 1997); M.N. Shaw, *International Law* 175 (CUP, 5th ed. 2003); R.Y. Jennings & A. Watts (Eds.), *Oppenheim's International Law* (9th ed. 1992).
[82] Ian Brownlie, *The rule of law in international affairs: international law at the fiftieth anniversary of the United Nations*, Volume 1 van Hague Academy of International Law Monographs (The Hague: Martinus Nijhoff Publishers, 1998), p. 35.
[83] See below.
[84] Hans Kelsen, *Principles of International Law* (1952) at 98. Emphasis added.
[85] Ibid., at 152.

ILP is to be attached," to name a few. However, according to the conventional approach ILP is a formal concept, that is a legal fiction wielded by the legal order. By consequence scholars have focused on the technical legal aspects, while socio-psychological and ethical dimensions or philosophical underpinnings of the concept were basically left aside.[86] As the prevailing 'fiction theory' ignored all extra-legal considerations, the social reality behind the attribution of ILP was purposely ignored.[87] An alternative theory about the nature of ILP, eg grounded on the idea that social circumstances may be a source of ILP, never took hold.

Secondly, how the formal conception of ILP works out, depends on how international law is defined. An actor exists as a legal person in the 'eyes of international law' when international law attributes rights and duties to it and thus grants it legal 'visibility'. Legal personality is merely a legal fiction, collective entities are not 'persons' but in law. In John Dewey's classic words: "for the purposes of law the conception of 'person' is a legal conception; put roughly, 'person' signifies what law makes it signify."[88] Only law gives existence to legal personality, the creation of an international legal person is a purely formal exercise. This may seem 'politically neutral,'[89] but international law defined as a law between states 'sees' different subjects than international law defined as 'the universal law of humanity.' In other words, the *conception* of international law plays a vital role in the identification of the international person. The positivist paradigm has famously dominated international law in practice and in theory.[90] It holds a view of international law that is state-centric and consent-based. Unsurprisingly, the catalogue of international legal persons by definition includes states and international organisations established by states. States are the 'primary' and 'original' persons in international law.[91] Oppenheim's International Law in the third edition captures well the mainstream approach:

> *The conception of International Persons is derived from the conception of the Law of Nations*. As this law is the body of rules which the civilised States consider legally binding in their intercourse, every State which belongs to the civilised States, and is, therefore, a member of the Family of Nations, is an International Person. And since now the Family of Nations has become an organised community under the name of the League of Nations with distinctive international rights and duties of its own, the League of Nations is an

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[86] Alston 2005; Nijman 2004, at 392.

[87] John Dewey: 'There is no general agreement regarding the nature *in se* of the jural subject; courts and legislators do their work without such agreement, sometimes without any conception or theory at all regarding its nature'. J. Dewey, The Historic Background of Corporate Legal Personality, *Yale Law Journal*, XXXV (6), April 1926, 655-673.

[88] Ibid., at 655.

[89] W. Friedmann, *Legal Theory* (London: Stevens& Sons, 1967, 5th ed.), p. 557.

[90] Koskenniemi 2002, Nijman 2004

[91] Nations-states are the principal subjects of international law (Shaw at 1) the "normal type" of international legal persons, since "in spite of the complexities, it is as well to remember the primacy of states as subjects of the law." (Brownlie at 57).

International Person *sui generis* besides the several States. But apart from the League of Nations, sovereign States exclusively are International Persons—*i. e.* subjects of International Law.[92]

The accommodation of new, non-state, actors into the international legal system is thus hampered by the conventional positivist understanding of international law, that is basically defined by the actors it regulates primarily: sovereign states.

In other words, together with the formal conception of ILP there is another view on ILP at work which is determined by the political outlook on international law. When ILP is defined as 'bearing rights and duties under international law', ILP is inferred from the international rights and duties borne by a particular actor. ILP then "merely is an *ex post* qualification on the basis of apparently performed legal acts." However, at the same time ILP in relation to some actors is used as "a threshold – proceeding from an established catalogue of international legal subjects, which keeps actors from being considered as a subject of international law regardless of their actions at the international plane."[93] If not a priori included in the catalogue, an actor does not have ILP, and neither can it obtain ILP on the basis of actual doings in the international arena. This 'threshold approach' – international law *a priori* stipulating or withholding legal personality for a specific actor – seems to explain the legal practice with regard to *some* NSAs, notably NGOs. Whatever their actual functioning in international law, NGOs are generally excluded from the catalogue of international legal persons, according to some in order to prevent further 'empowerment' of these NSAs on the international plane.[94] This approach, when geared by a mainstream conception of international law, then functions so as to exclude most actors other than states as persons of international law. In addition, both the 'inductive approach' and the 'threshold approach' see ILP as attributed by international law. If international law then is defined as inter-state law this will logically mark the choice of actors which qualify for ILP.

Now, when the ILP concept operates in the context of a different view on international law, as in the case of Hans Kelsen's *Pure Theory of law*, ILP as a legal fiction and a mere point of attribution (*Zurechnungspunkt*), is found to contribute to *inclusion* of the individual - and in principle of all international actors – in the group of international *legal* actors.[95] The same holds true for the

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[92] L. Oppenheim, *International Law: A Treatise,* R. F. Roxburgh (ed) (3rd edition, 1920) at 125. Emphasis added. As to the source of ILP, Oppenheim's approach – the international legal person emerges through the explicit or implicit attribution of ILP by international law (to states primarily) – has remained the standard well into the 20th century.
[93] Brölmann, *op cit* note 10, at 69-70.
[94] Ibidem, at 70.
[95] In 1932, Hans Kelsen argued at the Hague Academy: "Comme tout droit, le droit international est …, lui aussi, une réglementation de la conduite humaine. C'est à l'homme que s'adressent les normes du droit international, c'est contre l'homme qu'elles dirigent la contrainte, c'est aux hommes qu'elles remettent le soin de créer l'ordre. … La "personne" en tant que sujet de droits et d'obligations n'est que l'expression personnifié de l'unité d'un système de normes réglementant des actions humaines, de 'unité d'un ordre total (Etat) ou partiel (autres personnes juridiques et << personnes physiques>>). H. Kelsen, *Théorie Générale du Droit International Public, Problèmes Choisis,* RCADI (1932-

views of other progressive scholars of the Interwar and post-WWII years: they supported a truly open and inclusive approach to international legal personality, but did adhere to the 'fiction theory' on ILP since 'real' personality could only be attached to individuals who therefore counted as the original persons in international law. James Brierly also called for as "the broadening [of the] notion of international legal personality"[96] and so did sociological school scholars Politis[97] and Scelle.[98] This goes to demonstrate that the formal conception of legal personality, which draws on fiction theory, is *in theory* not an obstruction to the expansion of the catalogue of international legal persons.

In short, the formal conception of ILP is not used in a neutral world. ILP may be an epistemological fiction and a purely legal auxiliary device, but its application cannot escape the political agenda or ideological outlook of those who advance fiction theory. Much depends on the general theory of international law that focuses the ILP lens when looking at new, non-state, actors: this may be a conventional, positivist or, for example, an individualistic outlook on international law.[99] Traditional international law creates a legal person by attribution of international rights and duties to an entity, but since it defines international law as the law that is created by states for the regulation of relations between states, other actors are not readily addressed. The term "non-state actor" is in fact an indication of prevailing exclusivist trends or even fundamental reflection about it.[100] Rather than to include, the mainstream positivist use of ILP excludes new (non-state) actors from the international legal system. This means that the formal conception of ILP leads to an open system in theory, yet a closed system *in practice*.

In light of the growing influence of NSAs in international life and the (related) changing identity of international law, I see three ways in which currently ILP may be, and is, construed for NSAs. In all cases, the notion of legal personality is used in a rather conventional way - as a legal fiction –, but it is operationalized by 'new' international law (conceptions). Consequently, 'new'

IV), at 142-146, 162. *See also*, Kelsen's 1926 Course at the Hague Academy, *Les Rapports de Système entre le Droit Interne et le Droit International Public*, RCADI 243-244 (1926-IV).

[96] Brierly, The basis of obligation, at 51-52.

[97] N. Politis, *Condition juridique des associations internationales. Rapport préliminaire et avant-projet de convention internationale.* Quatorzième Commission de l'Institut de Droit International, Session de Bruxelles (1923).

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[99] Scholarship that firmly upholds this definition of international law and aims to refrain from including non-state actors, the possession of a capacity to create international law is frequently added as a criterion to be fulfilled in order to be an international person. If one has an individualistic take on international law and aims at the inclusion of the individual as legal person in international law, the capacity to make law is not a requirement to be fulfilled.

[100] P. Alston, The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in P. Alston (Ed.), *Non-State Actors and Human Rights* (2005), at 21: "Various explanations might be suggested: an intrinsic lack of imagination; a natural affinity with the status quo; a deeply rooted professional commitment to internationalism, albeit one premised on the continuity of the system of sovereign equality; a reluctance to bite the hand that feeds; or simply the conviction that respect for that system has taken a great deal of time and human suffering to achieve and that it continues to offer a better prospect than any alternative that has so far been put forward."

international legal persons are created. This is discussed in the following paragraphs a) on 'transnational ILP'; b) on 'soft ILP'; and c) on sufficient 'regular' ILP.

a. Transnational legal personality

Unsurprising for someone standing in the Yale school *International Law as Process* tradition, Rosalyn Higgins rejects the positivist subject-object dichotomy; it is without "credible reality" or "functional purpose." Higgens argues moreover that "[w]e have erected an intellectual prison of our own choosing and then declared it to be an unalterable constraint."[101] The inflexible subject-object dichotomy of the positivist school is "unhelpful," both intellectually and operationally, she states, and many have repeated her words since. In her view international law has "only *participants*." "Individuals are participants, along with states, international organizations (…), multinational corporations, and indeed private non-governmental groups."[102] Here too, the definition of 'international law' determines the concept of ILP; when international law appears as a dynamic process of authoritative decision-making aimed at realising certain common values in which many actors interact, only a flexible and holistic notion can serve as a basis for ILP: the participant. A clear-cut legal definition of the 'international legal person' is less important in the 'law as process' approach. Rather, it hinges on a more fluent and inclusive conception which links up with the actor's participatory role in the global decision-making processes. Higgins carries on the line of Myres McDougal who indeed used 'participant' deliberately to include new actors into international law and put an end to the "blind[ness]" of international law for non-state participants.[103]

Currently, Harold Koh carries the process approach further with what may be termed the "transnational legal process" understanding of international law.[104] International law develops into transnational law. National and international law take part in the same system and the same processes. In other words, international law is redefined. It becomes more dynamic and "nonstatist: the actors in this process are not just, or even primarily, nation-states, but include nonstate actors as well." The transnational legal process moreover includes both hard law and soft law instruments. Koh too considers the traditional ILP notion unsuited as a tool for determining which international actors are bound by, and part of, the international *legal* system. In his view, the actual influence of a NSA on policy making and legal decision-making is a yardstick

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[101] R. Higgins, *Problems and Process: International Law And How We Use It* (1994), at 49-50.
[102] Ibidem, at 50.
[103] M. McDougal, International Law, Power, and Policy: A Contemporary Conception, *RCADI* (), at 160-162.
[104] H.H. Koh, Transnational Legal Process, 75 *Neb. L. Rev.* (1996), at 183-184: "Transnational legal process describes the theory and practice of how public and private actors -- nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals -- interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law."

in judging whether that actor is included in the system of transnational law.[105] Lindblom sums up well Koh's understanding of ILP: "The New ILP, in Koh's version, requests the lawyer to take the full scope of *societal interaction* into consideration when analysing the process and normativity of transnational law."[106] If through its interaction – of whatever type - an international actor can be seen to exercise influence on the shaping of transnational law and policy, that actor has ILP in Koh's version of the concept, ie 'transnational legal personality'. In this transnationalist version ILP is a more dynamic and more relative concept, defined by a new understanding of international law. It is noteworthy that with this redefinition of international law and ILP, Koh also leaves the 'fiction theory' and opens the door to a 'real theory' of personality, in which social circumstances create 'transnational legal personality'. Legal personality then emerges from *social interaction* and actual *influence* on the transnational decision-making processes in which NSAs participate.

b. Soft international legal personality?

Outside the 'law as process' school, certainly softness of international law is also an issue. The end of the binary opposition between international law as a system of 'hard' rules on the one hand and 'soft' international law on the other,[107] arguably leaves room also for a softer (version of) international legal personality. The general idea then is that for actors to be addressed by soft international norms, to be involved in the creation of soft law instruments, et cetera, may not be enough to have full-fledged ILP in international law - yet it stands for something. 'Soft international legal personality' may then express the 'existence' of a particular actor in the eyes of international soft law instruments. In other words, it is not so much a fundamental adaptation of the definition of ILP as it is an implication of the growing "softness in international law"[108] for the ILP conception. While Jean d'Aspremont is right that the binary nature of law is worth fighting for, I beg to differ on the point of his explanation for the softening of international law. In this case, the introduction of a softer version of ILP for NSAs means a more adequate description of a serious normative development, i.e. soft law that addresses NSAs.[109] It is not "an artificial extension of the frontiers of international law" for the sake of mere scholarly pleasure.[110]

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[105] Ibidem, at 181.
[106] A.K. Lindblom, *Non-governmental organisations in International Law* (2006), at 98.
[107] C.M. Chinkin, The Challenge of Soft Law: Development and Change in International Law, 38 (4) *ICLQ* (1989), pp. 850- 866
[108] J. d'Aspremont, Softness in International Law: A Self-Serving Quest for New Legal Materials, 19 (5) *EJIL* 1075-1093 (2008).
[109] D.L. Shelton, Soft Law, in David Armstrong (Ed.), *Handbook of International Law* (New York: Routledge, 2009), p. 68-80; also, Ch Chinkin, 'Normative Development in the International Legal System,' in D Shelton (ed.), *Commitment And Compliance, The Role Of Non-Binding Norms In The International Legal System*, (Oxford: OUP, 2000), pp 21-42.
[110] J. d'Aspremont, Softness in International Law (2008).

It is worth developing our terminology so as to encompass also softer tones of 'legalness' and recognise that international law can have normative force also for actors which are not formally bound by a particular international norm, yet sometimes willing to comply; or that international normativity can be shaped by international documents which escape the binary structure of law, such as non-binding documents of international organisations, Codes of Conduct, private governance arrangements. A soft ILP notion would thus accommodate and recognise the new role of NSAs within the international legal system. Otherwise they are left with an unclear, controversial status within a global legal arena that will become only more complex and plural.

Obviously, on the one hand softening ILP is an inclusive exercise. It may serve to rescue ILP from the positivist, binary understanding of international law and contribute to its adaptation to new legal phenomena. On the other hand, softened ILP confirms to some extent the validity of Higgins' critique of how our discipline has 'erected an intellectual prison' that obstructs the adaptation of international law to the social reality. Alston has uttered similar critique with his 'Not-a-Cat' image;[111] the use of the term '*non*-state actors' is in itself an intentional technique to exclude these actors from the international legal system. Behind our discipline's terminology functions the exclusive club or 'catalogue' approach to ILP,[112] which stands in the way of inclusion. Against the backdrop of the traditional approach to ILP and the exclusion it builds into international law, the idea of 'soft ILP' is not unappealing. Soft ILP works well for the declaratory as well as constitutive role played by ILP. The idea may suffer from indeterminacy, but it takes hesitations and concerns about the recognition of ILP for NSAs serious as the soft aspect steers clear of the suggestion that NS actors instantly come to possess *rights*, apart from duties and obligations, under general international law. This particular concern regarding the participation of NSAs within the international legal order – of which international human rights law forms an important part - is found neither with Alston nor with Clapham. Both scholars readily accept obligations for NSAs under international law.

c. Clapman rescues the prisoners of doctrine: sufficient 'regular' ILP of NSA

In order to counter the formal exclusion of NSAs from the international legal system and to rescue them from their doctrinal imprisonment,[113] Andrew Clapham calls for "radical" new thinking with respect to these actors in international law.[114] In his view, "[e]verything [in respect to ILP] turns on the conception that one has of the Law of Nations." In this sense, Clapham's

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[111] P. Alston, The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?, in P. Alston (Ed.), *Non-State Actors and Human Rights* (2005), at 3-4 and 19-20.
[112] Ibidem (Alston), at 19. Clapham 2006, at 70-71: "*doctrinal filters*". Brölmann: threshold approach.
[113] A. Clapham, *Human Rights Obligations of Non-State Actors* (2006), at 59.
[114] http://untreaty.un.org/cod/avl/ls/Clapham_IL.html

approach to ILP is rather conventional: only law defines ILP. However, he reconceptualizes international law to be also the law of NSAs and thus renders the 'threshold' or exclusive catalogue approach inoperative. He argues that "we need to see international law not only in terms of obligations for governments but also for non-state actors."[115]

First, Clapham disentangles ILP from "the misleading concept of 'subjects' of international law and the attendant question of attribution of statehood under international law."[116] This leads to resistance among mainstream scholars, because expansion of the category of international legal persons would "lead to an expansion of the possible authors of international law. [And t]his, of course, is seen to threaten the viable development of a decentralized, state-centred international legal order."[117] The inclusion of *not-yet*-state actors is seen moreover as another threat to the system: the recognition of their ILP would empower these actors in their quest for statehood. The arguments to include (or exclude) NSAs as an ILP category are – to put it in Koskenniemi's words - "vulnerable to the charge that such law [or doctrine] is in fact political because apologist or utopian."[118] For that reason, most scholars stick to a functional approach and avoid the question about the formal status of NSAs.[119] Clapham on the other hand does not dodge the question.

Subsequently, Clapham develops a way around the self-imposed problem of legal formalism by moving from 'personality' to 'capacity'. He draws on the circular description of ILP by the ICJ in the *Reparation for Injuries* opinion[120] but only to break out of it. In the view of the ICJ, ILP may be a precondition for the exercise of international rights and duties, but at the same time to have these rights and duties is evidence of an actor's ILP. Clapham focuses on the more general "*capacity to fulfil obligations*,"[121] which was brought in by the Court in 1980: "subjects of international law …, as such, are bound by any obligations incumbent upon them under general rules of international law …"[122]

Clapham shows how in international relations today, NSAs have acquired direct rights and obligations under positive international law (the prerequisite for ILP) and that under particular circumstances they have a capacity to be party to a claim.[123] From the established capacity to enjoy rights and obligations, it is then "only a short jump … to imagining that non-

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[115] http://untreaty.un.org/cod/avl/ls/Clapham_IL.html
[116] Clapham 2006, at 59.
[117] Ibid., at 59. See, for the fears which prevent MNCs from being recognised as international legal persons, at 78-79.
[118] M. Koskenniemi, The Politics of International Law, 1 *EJIL* (1990), at 8.
[119] Clapham 2006, at 60-61.
[120] See supra, note .. *Reparation for Injuries* opinion, at 179.
[121] Clapham 2006, at 65.
[122] Ibid., at 65.
[123] He reminds us however that it is not unusual for actors to have rights and/or duties and yet not to be able to give effect to them.

state actors may have, not only the capacity to enjoy rights and obligations, but also the capacity to be held accountable for failure to fulfil those obligations to which they have been subjected."[124] From this viewpoint there is no "conceptual barrier" or formalistic legal problem to preclude recognition of NSAs (including MNCs) as international legal persons which are bound by the rights and obligations of general international law.[125] Clapham convincingly demonstrates how in recent years positive international law has attributed rights and obligations to NSAs of various types. In particular, developments in international human rights law and international humanitarian law in turn have changed international law radically. NSAs which have acquired rights and obligations under international law may then be conceived of as international legal persons.[126] In Clapham's view on the ILP of NSAs, the *onus probandi* has turned, since

> various non-state entities today have enough international legal personality to enjoy directly rights and obligations under general international law as well as under treaties. The burden would now seem to be on those who claim that states are the sole bearers of human rights obligations under international law to explain away the obvious emergence onto the international scene of a variety of actors with sufficient international personality to be the bearers of rights and duties under international law.[127]

In conclusion, all of the abovementioned views in their approach of ILP and NSAs remain within the conventional parameters, based as they are on the understanding that international law creates ILP. Their difference lies primarily in the underlying conceptions of international law. At the same time, all three views show how hard it is in the current international constellation to keep the legal realm and the non-legal or social realm apart. In Koh's approach to international law as transnational legal process, the non-legal reality of 'influence' actually contributes to the emergence of ILP. In the next section, we will try and take it one step further; we will revisit the 'real personality' or 'realist theory' of ILP and explore its possibilities of offering a theoretical framework fitting to contemporary international life.

4. The need for Grounding ILP: a new realist theory of ILP

Most scholars regard the conventional approach to ILP as useless with respect to questions concerning the position of NSAs. Arguably we have come to a deadlock in ILP doctrine and theory. The idea that legal personality is merely a fiction created by international law through attribution may be flexible and open in theory, in practice *de facto* significant actors are ignored *in jure*. In other words, international law is in need of a theory of personality that can accommodate

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[124] Clapham 2006, p. 71.
[125] Ibidem, p. 79.
[126] Ibidem, p. 82.
[127] Ibidem, p. 82.

non-state (collective) entities.[128] These entities, like the human subject, emerge from 'components'. Elsewhere I have argued for the restoration of the human individual as the original and primary international legal person. Related to this proposition ILP was reconstructed on the basis of anthropology and ethics.[129] Here, rather discussing ILP theory with respect to the collective non-state subject on the basis of the hermeneutics of the collective self, I aim to stir up the debate on the nature of ILP and to revisit 'real personality theory', also called the 'realist theory'. Gunther Teubner and Alexander Wendt are already participants in this debate. A revisit of the real personality theory may provide us with leads for a new theory which can contribute to the grounding of ILP, and can reconnect the emergence of ILP to social facts and moral foundations. Before recapturing three elements of the real personality theory that are relevant here, I will briefly discuss the controversy that surrounded its eclipse.

a. On the controversy over realist theory of personality

Today's conventional use and definition of ILP is formally indifferent to the social reality bearing ILP. As mentioned, it draws on one of the two principal theories on the nature of legal persons, the fiction theory. On the other hand, the real personality or realist theory, which in brief holds that the legal person is not merely a legal fiction created by law but emerges from social facts, disappeared from both the municipal law debate and the international law debate in the early decades of the twentieth century. John Dewey's article The *Historic Background of Corporate Legal Personality* has been critical to the disappearance of the real personality theory in the context of the first debate.[130] The international law debate was basically decided around the same time.

Late nineteenth and early-twentieth century mainstream personality discourse focused on the State. For many, the ILP of the state had been firmly connected to a *real* personality of the State or at least to a pre-legal, factual *existence* of a state entity. [131] Gradually, leaving details aside, however, the understanding of both state personality and state 'will' as legal fictions came to dominate mainstream scholarship. Otto von Gierke's realist theory gave way to the fiction theory

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[128] See also, Anthony Carty, International Legal Personality and the End of the Subject: natural law and phenomenological responses to new approaches to international law, Review Essay: The Concept of International Legal Personality, 6 *MJIL* 535 (2005).

[129] Janne Nijman, Paul Ricoeur and International Law: Beyond "The End of the Subject" - Towards a reconceptualisation of international legal personality, 20 *LJIL* (2007), pp. 25-64.

[130] John Dewey, The Historic Background of Corporate Legal Personality, *Yale Law Journal* XXXV (6), April 1926, pp. 655-673.

[131] See, e.g., Triepel who maintained that the State had a *real* personality: "*L'État est une véritable personnalité, il est une personnalité indépendante, distincte de la somme des individus qui le composent.*" H. Triepel, *Les Rapports entre le Droit Interne et le Droit International,* 1 RCADI 87 (1923).

propagated by, for example, another German voluntarist and legal positivist, Georg Jellinek.[132] International law is then seen as created by the fictitious will of sovereign states to apply a self-imposed order. States were the only subjects of international law, [133] safe one or two exceptions. The international rule of law accordingly is weak - international law is law *by* states and not above states.[134]As such, it has failed to prevent world war and to constrain state power.

It may be kept in mind that in the nineteenth century, realist theory had emerged in a rather progressive context, and had aimed to contribute to the establishment of the responsibility of corporations. However, developed at that time as part of German jurisprudence, it was marked by Hegelian and Neo-Hegelian thinking about the State. This means that the State was personified as a real person, glorified as God marching on Earth. In this version of real theory, the individual as well as all social groups are absorbed by, and merged into, the state collective, thus losing their identity and liberty. The real personality was later perceived to have prepared the way for "corporative" and Fascist states. As Friedmann points out,[135] it became "an important stepping-stone towards that merger of the individual in the collective, which is an essential and vital aspect of modern totalitarian government."[136] Realist theory became untenable in the actual political context of growing collectivism and totalitarianism. The individual, its autonomy, dignity and liberty had to be protected. Progressive international law scholars of the Interbellum indeed recognised these political dangers intrinsic in the realist legal personality conception and fought against it. Each with their own approach aimed for a renewal of international law and the liberation and emancipation of the individual.[137] Many – Hans Kelsen was already mentioned - drew on fiction theory.

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[132] Jellinek rejected the idea that legal personality could have its source in factual existence: legal persons come into being *only* by attribution of an entity by the legal order. The law determines which entity has legal personality, the factual existence of an entity, its nature, and properties belong to the world of (social) facts and not to the legal realm. Legal personality is established by the law and is a relation of the law with an entity irrespective of (the nature of) existence. In Jellink's view the state can only be bound by his own sovereign will, international law is created by *Selbst-Verpflichtung*. Hence, international law attaches ILP to sovereign states only. Jellinek conceived of the law of the international society as "*anarchisches Recht*." G. Jellinek, *Allgemeine Staatslehre* (1905), at 368.

[133] H. Triepel, *Les Rapports entre le Droit Interne et le Droit International,* 1 RCADI 82 (1923); D. Anzilotti, *Cours de Droit International* vol. I, (1929); A. Cavaglieri, *Règles Générales du Droit de la Paix*, 28 RCADI 318-9 (1929); P. Heilborn, *Les Sources du Droit International*, 11 RCADI 5 (1926); P. Heilborn, *Subjecte des Völkerrechts*, in K. Strupp (Ed.), II *Wörterbuch des Völkerrechts und der Diplomatie* 685 (1925); L. Oppenheim (R.F. Roxburgh Ed.), *International Law: A Treatise* 18-19 (1920). *See also, e.g.*, E. Kaufmann, *Règles Générales du Droit de la Paix*, 54 RCADI 324-5 (1935-IV) ; S. Séfériadès, *Principes Généraux du Droit International* de la Paix, 34 RCADI 294-5 (1930).

[134] Oppenheim-Roxburgh, at 19; Triepel, at 81; Cavaglieri, at 318; Heilborn-1926, at 5; Kaufmann, 320-5; The PCIJ confirmed this position in 1927 in the Lotus case, PCIJ Ser. A. 10, at 18 (1927).

[135] W. Friedmann, *Legal Theory* (London: Stevens& Sons, 1967, 5th ed.), p. 559.

[136] Ibid., p. 248.

[137] Nijman 2004, at 126 *et seq*.

'The fiction theory … regards the legal personality of entities other than human beings as the result of a fiction. *"Real" personality can only attach to individuals.* States, corporations, institutions, cannot be subjects of rights and persons, but they are treated as if persons.'[138]

Brierly, Kelsen, Lauterpacht, Politis, Scelle, to mention just a few of the anti-statist liberal IL scholars, repudiated collectivist and organic conceptions of the (international) legal personality of the state for having autocratic and anti-democratic tendencies. They noticed the dangers of the state as a "real corporate personality" – a (mysterious) super-entity with a will and life of its own – and thus adhered to (methodological) individualism.[139] They basically denied the existence of anything like a real collective entity and reduced it to the level of individual actions. Social entities are nothing but the aggregation of individuals. The individual was in their eyes the *true* or *real*, primary and original subject of international law.[140] Brierly, Kelsen, Scelle, and many more were committed to strengthening the international Rule of Law[141] and saving individual human responsibility.[142] The ILP of individual human beings makes the individualisation of responsibility conceptually possible. For the abovementioned authors, only individuals have consciousness, will, and personality required to bear the moral obligation to obey (international) law and to further justice through law and institutions. Hence "[r]*eal" personality can only attach to individuals*, not to states nor to any other social actor. If attributed by the legal system to such actor it was a pure fiction.

The realist understanding of the international legal person has been considered methodologically and epistemologically as well as politically questionable ever since the early twentieth century. Rejection of this old version of realist theory of personality will not be disputed here. The human individual may never be a means to an end, nor merged into a collective subject at the expense of its identity and autonomy. The susceptibility of the 'old'

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138 W. Friedmann, *Legal Theory* (London: Stevens& Sons, 1967, 5th ed.), p. 556. Emphasis added.

139 See, e.g., H. Kelsen, Problem der Souveränität (1920), at 19; G. Scelle, La doctrine de L. Duguit et les fondements du droit des gens, 1-2 *Archives de Philosophies du droit et de Sociologie juridique* (1932), at 118. See also, N. Politis, *The New Aspects of International Law* (1928), at 13. Hersch Lauterpacht's theory of law is also carried by methodological individualism. H. Lauterpacht, The Grotian Tradition of International Law, in E. Lauterpacht (Ed.), International Law: being the Collected Papers of Hersch Lauterpacht (1970-1978), vol. 2, at 333-337. Also, James Brierly, *The Law of Nations* (4th edition, 1949), at 56?. Also, The basis of obligation, at 51. See, Nijman 2004, at 192 et seq. See also, M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), at 330.

140 See, e.g., Le Fur, "*La personnalité juridique doit être la simple traduction juridique de la personnalité réelle, qu'elle doit être reconnue à tout individu.*" L. Le Lur, *La Théorie du Droit Naturel Depuis le XVIIe Siècle et la Doctrine Moderne*, 18 RCADI 404 (1927-III). See, more extensively Nijman 2004.

141 The objective of Brierly's redefinition of ILP is indeed the establishment of "the international rule of law" – see *The Rule of Law in International Society* (1936), at 263. In Scelle's words "*le Droit seul est souverain.*" See also, Scelle: Scelle: "[l]es gouvernants étatique [sont les] principaux sujets du droit des gens" (Théorie et Pratique de la Fonction Exécutive en Droit International (1936), 55 *RCADI* (1936), p. 91).

142 The fiction of the (international legal) personality of the state leads to the eclipse of responsibility: "d'abord, à faire disparaître ensuite la responsabilité. … on cède à une mystique qui attribue des qualités immanentes à des êtres fictifs, mais qui bénéficie à des personnes réelles devenues irresponsables et toutes puissantes derrière l'écran qui les dissimule." Scelle, Précis I, at 12.

realist theory to absolutist tendencies and the role it allegedly played in the dark history of our continent [143] are however related particularly to the version of the Hegelian scholar Otto von Gierke. There is another version of the realist theory of personality, which also draws on Gierke, but which is less politically contaminated. In this vision the state is but one of many group personalities rather than the Sovereign Person that absorbs all. This approach was asserted by the 'Pluralists'.[144] For them, the real existence of groups is also the source of their legal personality, but the State does not absorb all legal persons within society, nor does it merge and devour individuals into the divine State Person. The state is merely one of many groups, which all have legal personality based on their actual existence. My suggestion to revisit realist theory is not an argument for reviving the old version nor the political interpretation given to Gierke's theory. Rather I aim to explore the old idea that legal personality emerges from 'real' existence so as to find leads for the development of a new, modern version of real personality theory.

b. Revisiting the realist theory of (international) legal personality

In 1926, John Dewey wrote a firm defence of fiction theory and made a decisive contribution to the end of the debate on legal personality, which had waged heavily since arguably the early 1880s when Gierke attacked fiction theorist (and founder of the historical school) Friedrich Carl von Savigny. With Von Savigny, adherent of an individualist theory of personality, the debate had shifted focus from the nature of legal personality to issues of attribution. One reason why Dewey turned against Frederick Maitland was because "his discussion [of legal personality] depends upon an assumption that there are properties which any unit must antecedently and inherently have in order to be a right-and-duty-bearing unit."[145] Maitland was indeed a propagator of the realist theory of legal personality. He translated parts of Otto von Gierke's *Das deutsche Genossenschaftsrecht* into English (as *Political Theories of the Middle Age*, 1900) and therewith introduced Gierke's realist theory into the Anglo-American legal discourse. As the title of the English translation reflects, Gierke's theory of law and state has German medieval roots. This means that it is a theory that "starts from the Whole, but ascribes an instrinsic value to every Partial Whole, down to and including the Individual." [146] In a way, this sounds very post-modern.

Gierke identified three ways in which the legal person can come into being. Next to explicit attribution (ie formal announcement) and implicit attribution of legal personality by the

[143] Friedmann, p. 236.
[144] David Runciman, *Pluralism and the Personality of the State* (Cambridge: CUP, 1997).
[145] See supra note 130, p. 657.
[146] Gierke, *Political Theories of the Middle Age* (1900) (translated and prefaced by Maitland), p. 7.

legal order,[147] he discerned a third option: *Persönlichkeit kraft Daseins* – legal personality which emerges from factual existence.[148] In this case, the basis of legal personality is pre-legal in nature; factual circumstances or particular capacities or properties of an entity determined the emergence of (its) legal personality. ILP is more than a legal relation, it is rooted in factual existence (*Dasein*), the factual existence and characteristics of the entity are the basis of its legal personality. What is this "pre-juristic being [*vorjuristischen Dasein*]," what are the qualities or capacities of the social reality from which legal personality emerges?

In Gierke's theory, legal personality emerges from social circumstances which he calls *Genossenschaft* [Fellowship]. This notion refers to the medieval conception of collective unity as 'plurality in unity.'[149] As such, it is a person in its own right. In other words, legal personality is the legal conception of this unity. Maitland explains in his introduction to *Political Theories of the Middle Age* :

> [W]hatever the Roman *universitas* may have been – and Dr Gierke is for pinning the Roman jurists to Savignianism – our German Fellowship [*Genossenshaft*] is no fiction, no symbol, no piece of the State's machinery, no collective name for individuals, but a living organism and a real person, with body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs as a man wills and acts by brain, mouth and hand. It is not a fictitious person; it is a *Gesammtperson*, and its will is a *Gesammtwille*; it is a group-person, and its will is a group-will.[150]

Genossenshaft is used to describe composed, super-individual entities as diverse as companies, cities, churches, unions, and so on. In Gierke's theory of legal personality corporation is declared as "*reale Gesammtperson nicht bloß rechtsfähig, sondern auch willens und handlungsfähig*".[151] The legal person that emerges from the social constellation is thus a real person constituted by, but more than, its members. It has its own capacity to bear rights and obligations, to act and to decide freely. As such, it has 'real' existence without having physical or material existence. Rights and obligations of the Group-persons are inherent to the nature of these persons, they do not lose them being part of the state. They have moral personality (being an organised group that can act and express a will) and legal personality.[152] Law applies to *Genossenshaften* as it applies to man, yet law creates neither.

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[147] Otto Gierke, *Deutsches Privatrecht, Erster Band. Allgemeiner Teil und Personenrecht* (1895), at 489-491.
[148] Ibidem, at 488: „Die Rechtsordnung kann die Anerkennung eines Verbandes als Körperschaft unmittelbar an das Dasein eines geeigneten Thatbestandes knüpfen, so dass die Körperschaften in ähnlicher Weise, wie der einzelne Mensch, durch die Geburt Person wird."
[149] "[A] 'unity-in-plurality' … is, a unity which is prior to, and in some senses determinant of, the individuality of a group's members; the whole comes before the parts." Runciman, supra note 144, p. 37.
[150] Gierke, *Political Theories of the Middle Age* (1900) xxv-xxvi (translated and prefaced by Maitland).
[151] Gierke, *Die Genossenschaftstheorie und die deutsche Rechtsprechung* (Berlin: Wiedmannsche Verlagsbuchhandlung, 1887), p. 603.
[152] See infra note 156.

In Gierke's theory, the non-state actors – they are what Gierke calls *Genossenshaften* – that have these capacities are indeed legal persons due to their actual *Dasein* and not due to the law of the state. Gierke approaches the legal personality of the state in the same way.[153] The factual existence of a state is the source of its (international) legal personality. The community of communities from which the legal personality of the state emerges, is an entity with a life and will of its own. In other words, there is ample room for group life within the state; neither individuals nor collective non-state entities are completely subsumed by the state and therewith lose their identity and autonomy. In this view the state *needs* the groups living within it, and without these individuals and collective entities will not be able to take shape. Hence, the real personality of the state (which generates from its community) precedes and gives birth to its (international) legal personality. State or non-state, the legal person is a conscious and willful metaphysical person, a super-individual being with a life, mind, and will of its own.[154]

Gierke's and Maitland's challenge to individualism in legal theory was connected to the rise of powerful collective entities such as commercial corporations and labour unions in the context of industrialization. Society was changing rapidly and they felt it should be possible to hold these new powerful actors to account. Others however used the realist theory to accomplish the contrary, that is: no regulation of companies by the state. This was one of the reasons for intense debate on corporate personality at the turn of the century.[155] In short, the realist position conceived of legal personality as rooted in social(-political) and moral life.

In *Moral personality and Legal Personality* (1903), Maitland shows how legal personality is indeed a theme that resides in "the borderland where ethical speculation marches with jurisprudence."[156] For a realist, moral personality and legal personality cannot be separated, "[f]or the morality of common sense the group is person, is right-and-duty bearing unit." Maitland quotes Dicey and explains that when men bind themselves to one another in an association or organised group, "they create a body, which *by no fiction of law, but by the very nature of things*, differs from the individuals of whom it is constituted."[157] Organised groups or collective entities then are 'persons', i.e. right-and-duty bearing units. To Maitland realist theory is progressive to the extent that it serves responsibility, whereas otherwise the "responsible right-and-duty-bearing unit"

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[153] "For, when all is said, there seems to be a genus of which State and Corporation are species. They seem to be permanently organized groups of men ; they seem to be group units; we seem to attribute acts and intents, rights and wrongs to these groups, to these units." Maitland, in Introduction to *Political Theories of the Middle Age*, p. ix
[154] O. Von Gierke, *Das Wesen der menschlichen Verbände* (1902), p. 24.
[155] See, e.g., M. J. Horwitz, The Transformation of American law, 1870-1960: the crisis of legal orthodoxy, p. 71-72.
[156] F.W. Maitland, Moral personality and Legal Personality, in D. Runciman and M. Ryan (eds.), *Maitland: State, Trust and Corporation*, *Cambridge Texts in the History of Political Thought* (2003), p. 62-74.
[157] Ibidem, p. 63.

would become an "irresponsible many." The law may fail to recognise a collective entity as a person, but "as a matter of moral sentiment, it does exist."[158]

Against this background, the present contribution seeks to make a substantiated call for reopening the personality theory debate. Such in particular as we are faced with an imminent crisis of legitimacy due to the situation in which *de facto* international powers live outside international law. Its aim is not to present a completely new theory, but to indicate how a revisit of the realist theory is worthwhile. What then should we take from the revisit of the old realist theory?

First, there should be some reflection on social reality as a source of legal personality, by way of a viable alternative to the current approach to ILP. The old realist theory shows how a non-purely legal foundation of legal personality offers the possibility of social and ethical grounding of the legal person. Let's discuss the possibilities and challenges of a *new* realist theory. Such a theory would be 'new' also because what we consider 'real' today differs greatly from the 'metaphysical realist' and organicist understandings which prevailed at the turn of the previous century. Leaving behind what some have called 'bad metaphysics', the idea that there is something *real* to international legal persons and that internationally operating NSAs fulfil that 'reality' is worth discussing. We will get to this in 4c.

Secondly, the 'old' realist theory described above may also be read as an attempt to make powerful actors, which up to then were barely visible to the law, bear responsibility. The realist theory challenged the liberal, individualist theory (in which ILP of a collective was conceived as a fiction) as it could not account well for the newly emerging collective entities. The quest for accountability and responsibility of entities which dispose of actual power on the international stage remains highly topical in our time.

Thirdly, if legal personality emerges from the "nature of things," what does this mean? It satisfies the common intuition that *legal* personality implies social, political and/or economic existence. But what underlying social constellation would or should give rise to legal personality? According to the old version of the realist theory, the common nature or essence of all legal persons - whether an individual or collective actor, and whether a state or NSA - can be found in *the capacity to will and to act*. In case of a collective entity, these pre-judicial capacities are born from what Gierke termed 'fellowship' among the group members, they require a group that is well-organised around a purpose and with a *'mind' or 'conscience' of its own*. Its 'reality' shows from its actions as one and independent of its members. In these postmodern and post-postmodern days,

[158] Ibidem, p. 68.

oneness or unity is a difficult concept. Even man is 'constituted' by fragments. This understanding in a way mirrors Gierke's observation a century ago on the existence of social unities: „*Ein unmittelbarer Beweis für das Dasein von sozialen Lebenseinheiten lässt sich nicht führen. Ist doch auch die individuelle Lebenseinheit nicht unmittelbar erweislich.*"[159] Legal personality by virtue of *Dasein* (being, real existence) raises questions with respect to the *Dasein* – from what kind of social existence does legal personality emerge? Which capacities have to exist for legal personality to develop? The emphasis on social existence or on the capacities of a social actor is still relevant and helpful today, be it in a new version which includes the capacity to be held responsible and accountable.

Finally, Gierke's realist theory of personality offers an approach to social actors that starts neither with the law nor with the state, but with the *reality* of the actor. It doesn't approach legal personality from the outside but from the inside, so to speak. State and NSAs have legal personality based on their factual existence and the latter actors are not created by the law nor by the state through the law. This however does not mean they are not bound by the law - on the contrary. But it does tell us something about the relationship between law and society which is worth exploring also at the international level. In the words of John Figgis, one of the British pluralists (who consider it in man's nature to associate and form Group-persons): "What we actually see in the world is not on the one hand the state, and on the other a mass of unrelated individuals; but a vast complex of gathered unions." This he described as a "*communitas communitatum.*"[160] In this pluralist version of realist theory, the state does not absorb all social actors and communities but it lives among them. This may be an interesting concept to contemplate with respect to the international community, which after all can no longer be modelled as an inter-state community and is in need for new conceptions and theory. In a 'community of communities' each has their own purpose - the international community, as well as the state and NSAs that are members of the international community – but all also work towards the purpose of the whole, which respects the purpose of the parts. This universal end is no longer God, but may be universal justice. Likewise it is interesting – though outside the scope of this contribution – to explore Gierke's view on the Rule of Law or *Rechtsstaat*,[161] and to examine how it may be useful for the conceptualisation of the IRoL.

c. The contours of a (debate on) new realist ILP theory

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[159] Otto Gierke, *Das Wesen der menschlichen Verbände* (1902), p. 19.
[160] John N. Figgis, *Churches in the Modern State* (1913), p. 47.
[161] See e.g., Runciman, p. 53.

We are in need of a new theory of ILP which embraces both state and NSAs. The lack of such a theory hinders international law practice and scholarship from the construction of NSAs as international legal persons. A new realist theory on the nature *in se* of the legal person would rely on the existence of a social reality behind both types of collective actors, the social substratum of the international legal person. Global developments as described in this chapter's first section arguably reinforce the relevance of real personality theory. An endogenous perspective on ILP, which starts from the idea that there is indeed *something real* to the international legal person, is however not very common in IL and IR literature. The mainstream approach is exogenous, i.e. the international legal system determines which entity has ILP. The (international) legal person has been "an inert person" around which philosophical, political and economic discussions have subsided.[162] A more ontological or essential approach to actors in international relations has long been unpopular and controversial. However, current ontological insights differ significantly from those earlier generation of real personality theory. Today, we have new views on what is 'real', in order to BE one does not need to exist physical or materially.

The progressive Interbellum scholars, for whom individuals were the only real persons, worked with a modern ontology of physicalism and firmly rejected any metaphysical realism. This prevented them from being 'realists' about corporate persons. States in particular are social constructions dependent fully on the individual to constitute them. The turn to methodological individualism – so influential for the ILP debate – was part of a more general orientation of pre-WWII liberal international law theory "to construe international law as a *scientifically* based, operative constraint on the conduct of foreign policy," as Koskenniemi has put it.[163] After the Second World War, the metaphysical realist approach was history. The ('fiction theory'-based) reductionist, non-metaphysical approach to legal personality of the (methodological) individualists existed side by side with the mainstream ILP conception which conceived of ILP as a legal fiction attached to states only. In other words, the social and moral grounding of ILP has long been a non-issue in IL scholarship as well. In the work of (only) a few scholars, the non-legal dimensions of legal personality are re-examined on the basis of the latest insights in what is 'real' today. Two different constructive approaches may be mentioned briefly here by way of setting the stage for a debate on a new version of realist theory of ILP.

Legal sociologist Gunther Teubner moves beyond the old individualism/collectivism debate thanks to a self-referential system theory approach. In Teubner's theory of legal

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[162] Gunther Teubner, "Enterprise Corporatism: New Industrial Policy and the "Essence" of the Legal Person", XXXVI *American Journal of Comparative Law* 1988, at 130. See also for exceptions to this general observation (note 3).
[163] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2002), at 411. Emphasis added.

personality, the social substratum of the legal person is conceived of as a 'collectivity,' i.e. "the self-description of a (usually formally) organized action system that brings about a cyclical linkage of self-referentially constituted system identity and action." The internal dynamics of the social substratum is conceived as "an autonomous communicative process with actual people simply being treated as part of this process' environment." In Teubner's vocabulary, the substratum of the legal person is an "autopoietic social system" which is a system of actions/communications that "reproduces itself by constantly producing from the network of its elements new communications/actions as elements." The capacity for action and reflexive communication is the qualifying characteristic of the social substratum of the legal person. Hence, the (international) legal person "is 'fictional' because it is not identical with the real organization but only with the semantics of its self-description." However, "it is '*real*' because this fiction takes on structural effect and orients social actions by binding them collectively."[164] The collectivity is more than an idea in the brain of people involved, the hard reality of the collectivity is constituted by communicative self-description in the action system. It produces moreover the qualifying capacity of collective action and constitution of self-referential identity.

Social constructivist Alexander Wendt resumed the discussion on personhood of states in international theory a few years ago.[165] Wendt too aimed to move beyond the old metaphysical metaphors and atomizing reduction of the state person, in order to find a conception of personhood that can stand the tests of the latest philosophical, political and social sciences insights. In this exploration of personhood focus is on the state, but this is a matter of choice rather than principle. Wendt's analysis of how states are socially constructed within the international system is an IR disciplinary choice. After all, IR literature and its political realism is a "states systemic project." Yet, he notes that a discourse on the social construction of other important (non-state) actors such as MNCs and NGOs might be equally needed to explain contemporary world politics.[166] Social constructivism as a method is not prescribing which actors to study.[167] International NSAs and international law as the structure in which they are embedded can be studied well from a social constructivist perspective too.[168]

We may learn something from Wendt's examination of the (psychological) personhood of the state about personhood of international actors more generally. Wendt identifies three conceptions of personhood: (1) being an intention system, (2) being an organism, and (3) the even thicker conception of having consciousness. The second and third sense are not required in

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[164] Gunther Teubner, at 138. Emphasis added.
[165] Alexander Wendt, The State as Person in International Theory, 30 *Review of International Studies* (2004), at 289-316.
[166] Wendt, State as Person, at 292; Wendt, Social Theory, at 9.
[167] Wendt, Social Theory, at 7-10.
[168] Wendt, Social Theory, at 9.

the rational actor model, which conceives of the person as an intentional – purposive or goal-directed – system. The state as intentional system, neither real nor fictitious. But the state is not the only global actor whose members see themselves as part of a group in pursuit of shared ends and which is institutionalised and hierarchical: "[m]ost of the important actors in contemporary world politics - states, MNCs, and most NGOs – have corporate intentionality."[169]

Today, NSAs are interacting increasingly with the ideational system called international law and through that interaction shape the international system as well as their own (social and legal) identity. Arguably, the current reproduction and transformation of the structures of international politics and law involves states as well as international NSAs.[170] The latter are slowly but surely being constituted not so much as an ignorable Other but as an Other with whom ideas – the ideational structure of international law – are shared. Albeit slowly, international NSAs, like MNCs, are internalizing international (human rights and environmental) norms and values. A social constructivism that is less state-centric is possible and necessary. This fundamental change of theory is worth to be examined. Here, I would like to point out that social constructivism allows for international NSAs to be conceived as *real* agents too. They too are self-organizing, constituted by internal social structures (real but non-material), possess intentionality and intrinsic motivational dispositions, and in the self-reproduction of their identity and interests they interact with the international legal system and other (state and non-state) actors (socialization).

Another approach is possible, which draws more on the idea of an ontological foundation of ILP. This would entail a modern conception of what the 'reality' of an entity should be for ILP to emerge; of which capacities the international actor should have for ILP to emerge. Gierke has offered the concept of 'action', a capacity that returns in Teubner's approach though in a less ontological context. Next to the capacity to act, Gierke identified the capacity to will something, hence the capacity to purposive action. Gierke conceptualized the collective entity with a mind and spirit of its own. In his day and age, these notions were loaded with Hegelian connotations and metaphysical realism. Wendt however shows on the basis of the latest insights that to use the word 'mind' no longer means the same as 100 years ago. If today organized groups work as intentional systems by using their 'mind', there is nothing physical about this qualification of social reality. A contemporary real personality theory may clarify when international NSAs qualify as international legal persons; when they are capable of operation at the international stage, within the international legal order; when they are intentional actors capable of purposive action and self-reflexive communication in terms of international law. It could be added - when they are

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[169] Wendt, State as Person, at 298.
[170] Wendt, Social Theory, at 310.

capable of taking responsibility for their international actions. *By 'taking' and 'making' international law, NSAs reproduce themselves as international legal persons through interaction with international law.*

Elsewhere, I have proposed the reconstitution of ILP of the individual and the collective self "as moral identity constituted in the dialectic relation of Self and Other(nes)s." I will not repeat myself here. At this point the proposition is to revive the ILP theory debate and to examine how a new generation realist theory may help us move beyond the state vs non-state dichotomy.

5. Conclusion

The conclusion to this chapter can be brief. The claim that NSAs have or should have international legal personality (ILP) for the sake of an international rule of law is ever more widely accepted. This claim in turn hinges on the – increasingly accepted – idea that any international actor with *factual* (social, economic or political) power should also have *legal* visibility. Such legal visibility can effectively be formalized through the tool of 'international legal personality'. These considerations have rekindled the debate on ILP. This chapter suggests that the prevailing 'fiction theory' on ILP is no longer fitting for the current state of affairs and that legal personality would need *grounding* in a social, political and/or economic reality. I have argued that it is worth to re-visit the 'real personality' or 'realist' theory on legal personality and to examine whether and how a new generation of this approach can be developed on the basis of contemporary scientific insights on what is 'real' when it comes to collective actors. If we can identify a set of (pre-legal) capacities required by a social reality in order for *legal* personality to emerge, we may be able to move beyond the current state - non-state dichotomy in ILP theory. In order to set the stage for the much-needed debate on ILP theory and the social grounding of legal personality, this chapter has touched upon the theories of Teubner and Wendt. Read together with the reconceptualisation of ILP as a stage of the ethical-moral identity of the individual or collective subject, these approaches suggest that the new realist theory debate need no longer be hindered by the (in)famous organicist legacy of Otto von Gierke, but may profit from the latest insights in philosophy, (social) psychology, sociology. It could be added that a modern version of a 'capacity approach', which includes the capacity for responsibility and accountability, could actually be quite helpful when it comes to the constitution of NSAs as legal persons in international law.