

# Contents

*List of Contributors* .....xiii

1. Introduction ..... 1  
*Math Noortmann, Cedric Ryngaert, August Reinisch*

## Part I

2. Non-State Actors and the Social Practice of  
International Law ..... 11  
*Jean d'Aspremont*

2.1 Epistemological Considerations: Non-State Actors  
and the Argumentative Practice of International Law ..... 12

2.2 Two Types of Social Practice and Two Types  
of Engagement by Non-State Actors..... 14

2.3 Social Practice of Non-State Actors for the  
Sake of Law-Ascertainment..... 16

2.4 The Social Practice by Non-State Actors in  
General Legal Theory ..... 18

2.5 Which Non-State Actors for which Social  
Practice in International Law? ..... 20

2.6 Concluding Remarks: the Politics of Definition  
and the Definition of Politics..... 30

3. Non-State Actors in International Law in  
Policy Perspective ..... 33  
*Eisuke Suzuki*

3.1 Introduction ..... 33

3.2 Non-State Actors in Context: Multiple  
Affiliations and Complex Layers of  
Decision Processes ..... 35

3.3 Non-State Actors and Specialised Agencies  
of the United Nations ..... 37

3.4 Non-State Actors and Civil Society ..... 39

3.5 Non-State Actors' Activities in the Major  
Value Processes..... 40

    Power ..... 40

    Wealth..... 42

    Enlightenment ..... 42

    Skills..... 43

	Affection .....	43
	Rectitude .....	43
	Wellbeing.....	44
	Respect.....	44
3.6	Policy for Non-State Actors' Participation in Decision-Making.....	44
3.7	Recent Trends of Non-State Actors as Authoritative Decision-Makers .....	46
3.7.1	General Framework for Participation .....	46
3.7.2	The Need for Functional Analysis .....	47
	The Intelligence Function .....	48
	The Promotion Function .....	49
	The Prescribing Function.....	50
	The Invoking Function.....	51
	The Application Function.....	52
	The Terminating Function .....	53
	The Appraising Function.....	53
3.8	For the Future .....	53
3.8.1	Bridging the Gap Between Vertical Internal Processes of Decision with the Horizontal International Process of Decision.....	54
3.8.2	Civil Society's Access to Official International Decision-making Processes.....	55
4.	Transnational Law: Philip Jessup's Legacy and Beyond.....	57
	<i>Math Noortmann</i>	
4.1	Introduction .....	57
4.2	Jessup's Understanding of Transnational Law and the Non-State Actor in It .....	60
4.2.1	Jessup's Conception of 'International Law'.....	60
4.2.2	Jessup and Non-State Actors .....	63
4.3	'Transnationalized Legal Traditionalism' .....	64
4.4	The Transnational Legal Process Approach.....	66
4.5	Transnational Law: What it is and How it Works .....	68
4.5.1	Transnational Agreements .....	70
4.5.2	Transnational Custom.....	71
4.5.3	Transnational Jurisprudence.....	72
4.6	Concluding Reflections .....	73
<b>Part II</b>		
5.	Non-State Actors and the Use of Force .....	77
	<i>Christian Henderson</i>	
5.1	Introduction .....	77
5.2	Non-State Actors and the Regulation of the Internal Use of Force .....	78

5.3	The Regulation of the International Use of Force Against Non-State Actors.....	80
5.3.1	Action Taken or Authorised by the UN Security Council.....	81
5.3.2	Unilateral Action by States and Regional Organisations.....	83
	Overcoming the Sovereignty Barrier: Attribution to the Host State.....	88
	The Sovereignty Barrier and Self-defence Restricted to the Targeting of Non-State Actors Located Upon a Host State's Territory.....	90
5.4	Conclusion.....	96
6.	Non-State Actors Under International Humanitarian Law.....	97
	<i>Hans-Joachim Heintze and Charlotte Lülf</i>	
6.1	Introduction.....	97
6.2	The Red Cross and Red Crescent Movement.....	98
6.2.1	The International Committee of the Red Cross.....	98
	Status of the International Committee of the Red Cross.....	99
	General Role of the ICRC During Armed Conflicts.....	100
	Special Focus of the ICRC.....	101
6.2.2	The International Federation of the Red Cross.....	104
6.2.3	National Societies of the Red Cross and Red Crescent.....	105
6.3	Aid Outside of the Movement—Other Non-Governmental Organisations and their Status Under International Humanitarian Law.....	106
6.3.1	Humanitarian Aid Organisations.....	106
	Humanitarian Aid Organisations and Armed Conflicts.....	106
	Humanitarian Aid Organisations Under International Humanitarian Law.....	108
6.3.2	Human Rights Organisations.....	110
6.4	Conclusion.....	111
7.	Non-State Actors and Human Rights.....	113
	<i>Manfred Nowak and Karolina Miriam Januszewski</i>	
7.1	Reassessing Some Myths about International Law and Human Rights.....	113
7.1.1	Dismantling Obstacle No 1—International Law is All About States—The Subject of International Law as a Haunting Phantom.....	118
7.1.2	Dismantling Obstacle No 2—The Axiomatic State-Centrism in Human Rights Law.....	124

7.2	The Significance of Human Rights as a Reaction to Real Life Challenges.....	125
7.2.1	The Meaning of Human Rights—A Quest for Human Dignity, Equality and Justice.....	125
7.2.2	Human Rights as ‘All-round’ Protection .....	129
7.3	The Public/Private Divide as a <i>Bête Noire</i> .....	132
7.4	David vs Goliath—The Issue of Power Imbalance and Human Rights.....	135
7.5	The Reluctance to Enforce Human Rights Against Non-State Actors .....	137
7.5.1	International Law Addressing Threats to Human Rights from Non-State Actors .....	137
7.5.2	The State as the Primary Guardian of Human Rights; or How Locke’s Wish Came True .....	140
7.5.3	Enforcing Human Rights Against Non-State Actors on the National Level.....	147
7.6	The Rarity of Direct Horizontal Human Rights Obligations Under International Law.....	151
7.7	Human Rights in the Corporate World .....	154
7.8	Holding International Organisations Accountable for Human Rights Violations .....	156
7.9	Conclusion: How can Non-State Actors be Held Accountable for their Violation of International Human Rights?.....	159
8.	State Responsibility and Non-State Actors.....	163
	<i>Cedric Ryngaert</i>	
8.1	Introduction.....	163
8.2	Attribution of Conduct on the Basis of the Exercise of Elements of Governmental Authority by Non-State Actors.....	165
8.3	Attribution of Conduct on the Basis of Instructions or Control.....	168
8.4	Attribution of Conduct of an Insurrectional or Other Movement to the State .....	174
8.5	Due Diligence/Failure to Prevent .....	177
8.6	Concluding Observations .....	181

### Part III

9.	International Governmental Organisations as Non-State Actors .....	185
	<i>Ramses A Wessel</i>	
9.1	Introduction.....	185
9.2	The Changing Nature of International Organisations: From State Actors to Non-State Actors? .....	187

9.3	International Decisions and Law-Making.....	191
9.4	Autonomy of International Organisations: The Role of 'Independent' Organs .....	195
9.5	Conclusion: From 'State Actors' to Non-State Actors? .....	201
10.	Non-Governmental Organisations: Recognition, Roles, Rights and Responsibilities.....	205
	<i>Math Noortmann</i>	
10.1	Introduction.....	205
10.2	NGOs' International Legal Personality: the Politics of Recognition.....	207
10.3	NGO Roles: A Socio-Political-Legal Approach.....	212
10.4	Institutional, Conventional and Human Rights.....	216
10.5	NGO Responsibility and Accountability.....	219
10.6	Conclusion .....	223
11.	Multinational Corporations in International Law .....	225
	<i>Jan Wouters and Anna-Luise Chané</i>	
11.1	Introduction.....	225
11.2	Definition .....	226
11.3	International Legal Personality.....	228
11.4	Rights Under International Law .....	230
11.4.1	International Human Rights Law .....	230
11.4.2	International Investment Law.....	234
11.5	Obligations Under International Law.....	236
11.5.1	International Human Rights Law .....	236
	UN Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises With Regard to Human Rights .....	239
	Guiding Principles on Business and Human Rights.....	240
	Human Rights Council Resolution 26/9 .....	242
	OECD Guidelines for Multinational Enterprises .....	243
	ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy .....	244
	Global Compact.....	245
	Self-regulation .....	245
	Enforcement.....	246
11.5.2	International Environmental Law .....	248
11.5.3	International Criminal Law.....	249
11.6	Conclusion .....	250

12.	Investors .....	253
	<i>August Reinisch</i>	
12.1	Introduction .....	253
12.2	The Specific Nature of Investment Arbitration.....	253
12.2.1	Diplomatic Protection.....	254
12.2.2	Investment Disputes Espoused by Home States .....	255
12.2.3	The Evolution of Modern ISDS—From Contract to Treaty Arbitration.....	256
12.2.4	Modern ISDS.....	258
12.3	The Impact of ISDS on the Position of the Investor in International Law.....	259
12.4	The Contribution of Investors to the Development of General International Law and of International Investment Law in Particular .....	262
12.4.1	Investors as Driving Forces of the Shaping of Investment Law .....	264
12.4.2	States Reshaping Investment Law .....	268
12.5	Conclusion.....	271
13.	Armed Opposition Groups.....	273
	<i>Jordan J Paust</i>	
13.1	Introduction .....	273
13.2	Non-State Armed Opposition Groups with Formal Status .....	274
13.2.1	Types of Status.....	274
Nation.....		274
Peoples .....		275
Tribe .....		278
Belligerent.....		279
Insurgent.....		280
13.3	Types of Armed Conflict in which they Participate .....	283
13.3.1	Armed Conflicts of an International Character .....	283
13.3.2	Armed Conflicts not of an International Character .....	284
The Nature of Such an Armed Conflict.....		284
War Against al Qaeda as Such is not Legally Possible.....		285
13.4	Non-State Armed Opposition Groups Lacking Formal Acceptable Status.....	286
13.4.1	Terrorist Groups .....	286
13.4.2	Mercenaries.....	287

13.4.3	Pirates .....	288
13.4.4	Brigands and Banditti.....	288
13.4.5	Organised Criminal Groups .....	289
13.4.6	Self-Defence and Organised Armed Groups.....	291
	Defence Against Non-State Actor	
	Armed Attacks .....	291
	Defence Against State Complicitors in	
	Non-State Actor Armed Attacks.....	292
13.5	Conclusion.....	292

#### Part IV

14.	Non-State Actors in International Relations: Actors, Processes, and an Agenda for Multifaceted Dialogue .....	295
	<i>Markus Kornprobst</i>	
14.1	Introduction .....	295
14.2	Intra-State War .....	297
14.3	International Terrorism.....	301
14.4	Arms Control .....	303
14.5	Global Economy .....	306
14.6	Human Rights.....	311
14.7	Global Environment.....	314
14.8	Global Polity.....	317
14.9	Conclusion.....	320
15.	Non-State Actors and Soft Power .....	323
	<i>Alan Chong</i>	
15.1	Introduction .....	323
15.2	Non-State Actors Vis-à-Vis the Nation-State.....	324
15.3	Non-State Actors Lean Towards Soft Power .....	327
15.4	Non-State Actors Operate within Global Information Space .....	330
15.5	The Soft Power of Publicising Unethical Practices.....	331
15.6	The Soft Power of Legal Manoeuvres .....	336
15.7	The Soft Power of Developmental and Grassroots Disaster Relief .....	339
15.8	Conclusion: Non-State Actor Soft Power, Its Foibles, and Acting in Spite of the Nation-State.....	342
16.	Non-State Actors and Globalisation: A Paradigm for a Decentred World?.....	345
	<i>Barrie Axford</i>	
16.1	Introduction .....	345
16.2	Exemplifying 'New' Geographies of Governance.....	346
16.3	Globalisation as a Transformative Motif.....	350

xii Contents

16.4	NSAs in the Vertebrate Global System.....	354
16.5	NSAs in the Mixed Global System: A Pause for Breath.....	361
16.6	NSAs in the Cellular Global System.....	363
16.7	Conclusion.....	366
17.	Concluding Observations .....	369
	<i>Cedric Ryngaert, Math Noortmann and August Reinisch</i>	
	<i>Select Bibliography</i> .....	377
	<i>Index</i> .....	399