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Chapter 18: Towards Non-State Actors as Effective, Legitimate, and Accountable Standard-Setters

The three parts of this book have dealt with our lead questions on non-state standard-setting: How can the relevant actors and processes be described and mapped? By what authority do they set standards? And are the processes and their outcome, the standards, effective and legitimate?

The chapters comprised in this volume explore different facets of standard-setting, some looking at these questions from a more theoretical perspective, some discussing concrete case-studies in various fields. Given the diversity of actors and the diversity of standard-setting processes, no single set of necessary and sufficient conditions for guaranteeing the legitimacy, accountability, and effectiveness of non-state standard-setting could be identified. However, the importance of inclusiveness, transparency, and procedural safeguards has emerged as a common theme. Moreover, all chapters taken together have made abundantly clear that the phenomenon of non-state standard-setting forces us to question four boundaries which are used in legal, sociological, and political analysis: The boundary between law and non-law, between the public sphere and the private sphere, between public law and private law, and between international, national, and local law.

1. Actors and processes

1.1 The role of NGOs in standard-setting

The case studies in this book have illustrated how NGOs participate in global standard-setting. In a legal perspective, we can distinguish various types of standards and corresponding different types of NGO involvement. First, NGOs are engaged in the elaboration of ordinary inter-state international conventions (see the examples given in the introduction¹ and Lindsey Cameron (Chapter 5), on the role of the ICRC). Here NGO-involvement is largely informal. NGO forums are held in parallel to and separate from the intergovernmental standard-setting conferences, such as the Rio conference of 1992. So NGOs do not have any negotiating role whatsoever here. However, their direct lobbying at those conferences can be crucial.

The second type of standard-setting occurs within international organisations or quasi-organisations, in particular in the framework of the highly institutionalized multilateral environmental agreements. Here, the governmental bodies or conferences of the parties create secondary law for the implementation of the respective regimes. To most of these bodies, NGOs are accredited in formal procedures and thus enjoy an observer (or in the Council of Europe: ‘participatory’) status.² This legal

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¹ See Peters, Koechlin, and Fenner, Chapter 1, part 2.1.

² See, e.g., Art. 12 c) OECD-Convention (1960); Art. 13(2) Convention Establishing the WIPO (1967); Art. XI (7) CITES Treaty (1973); Art. 6(5) Vienna Convention on the Protection of the Ozone Layer (1985); Art. 11 (5) of the Montreal Protocol on Ozone Depletion (1987); Art. 15(6) Basel Convention on the Transboundary Movement of Hazardous Waste (1989); Art. V.2. WTO Agreement (1994); Art. 10 (5) Aarhus Convention (1998); Art. 22(7) UN Convention to Combat Desertification (UNCCD, 1994); Art. 23(5) Biodiversity Convention (1992); Art. 29(8)

status is an intermediate one between exclusion and full participation as law-co-makers. It entails various rights to be invited and to sit in meetings, to obtain information (agendas, drafts), speaking time, the allowance to distribute documents and the like.

The crucial legal feature of NGO-involvement in this type of standard-setting is that NGOs are, in all bodies, denied voting rights. They only have a voice. Among international lawyers, it is controversial whether NGOs have, as a matter of customary law, a general entitlement to participate as observers (and thus to be heard) within the law-generating international institutions.³ Such an NGO-right to be heard would come to bear in institutions which have no or only deficient special rules of procedures. We submit that a customary right of NGOs to participate in the international legal discourse does not yet exist, because practice and *opinio iuris* has not sufficiently matured. But NGOs already enjoy a legitimate expectation that – once an institution has admitted them – the participatory conditions will entail two core components: oral interventions and written submissions.⁴ Refusal of these rights must be specifically and concretely justified. In the current international legal system, the NGOs' voice is thus the functional equivalent to the formal law-making power which other actors (the international legal subjects) possess. Because of this legal function of NGOs' voice, there is a need to legally structure NGO-participation.

Finally, NGOs sometimes draft private texts or propose norms (often in conjunction with academics), such as codes of conduct and guidelines, interpretative treaty commentaries, or principles, in the hope that they will be adopted by other international actors, cited, and accepted as contributing to the corpus of international law.⁵ Examples are the numerous Rules of the International Law Association, the Helsinki Rules on the Use of Waters of International Rivers of 1966, the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights of 1997, the Montreal Principles on Women's Economic, Social and Cultural Rights of 2000, or the Princeton Principles on Universal Jurisdiction of 2001.

Overall, despite the multiple NGO activities and their often forceful presence, 'states retain a tight grip on the formal law-making processes'.⁶ Even in those areas where NGOs have had greatest impact, states control the agenda and the access to the law making arenas, in particular through the accreditation procedures.

1.2 The role of business in standard-setting

TNCs increasingly act as 'regulatory entrepreneurs' in various ways. In the elaboration of international conventions, business as business has no formalized role. It can only obtain an official observer or participatory status in international organisations or negotiating forums through the guise of NGOs, for example via the International Chamber of Commerce. Primarily, TNCs' role in inter-state law-making is limited to lobbying. This mainly happens on the national level, where TNCs influence the prior negotiating position of home states, and also subsequent implementation.⁷ The pressure of business interests is nowadays probably an indispensable motor of regulation.⁸

Cartagena Protocol on Biosafety (2000); Art. 7(6) UNFCCC (Framework Convention on Climate Change (1992); Art. 13(8) Kyoto Protocol (1997), and the secondary law, rules of procedures and guidelines concretizing the respective treaty provisions. See for the Organization of American States (OAS): Permanent Council of the OAS, Review of the Rules of Procedure for Civil Society Participation with the OAS, 31 March 2004, CP/CISC-106/04: The OAS and its different organs and sub-organisations establish general or special 'cooperative relations' or 'official working relations' with civil society organisations. See for the Council of Europe below note 71.

³ See in the affirmative Charnovitz, 'Nongovernmental Organizations', at 370; negatively Nguyen Quoc, Daillier and Pellet, *Droit international public*, 653.

⁴ Tully, *Corporations at International Law-Making*, 207, 233; also Lindblom, *Non-Governmental Organisations*, 526.

⁵ Boyle and Chinkin, *The Making of International Law*, 88-89, also for the examples.

⁶ *Ibid.*, at 95.

⁷ See on the participation of TNCs only with the acquiescence, support or permission of governments Tully, *Corporations at International Law-Making*, 304-305, 321, at 233.

⁸ Nowrot, *Normative Ordnungsstruktur*, at 235 and 237.

There are various further types of genuine business standard-setting: First, economic private actors are participating in the elaboration of the so-called ‘new *lex mercatoria*’.⁹ This body of law (or soft law) is being developed mainly by commercial arbitral tribunals which are installed by the economic actors themselves. The relevant standards build on economic usage and on model contracts and standard terms provided by private merchant associations, by the International Chamber of Commerce (ICC), the Hague Conference on Private International Law, UNIDROIT and various other UN agencies, such as IMO and UNCITRAL. The new law merchant thus develops in the interstices between intergovernmental organisations or agencies and private bodies, and oscillates between private and public, and between hard and soft law.

Second, firms elaborate technical, product, and professional standards. Third, they adopt company or multi stakeholder codes of conducts, notably in the field of labour, environment, and human rights (see Eva Kocher (Chapter 15) and Egle Svilpaite (Chapter 16)). A fourth type is ‘civil regulation’¹⁰ by TNCs and NGOs in ‘private-private-partnerships’, or within ‘trilateral’ public-private partnerships, composed of governmental actors, civil society organisations, and the business sector. We will for the moment retain the established terminology of ‘public-private’, although one of principal conclusions we draw is precisely that non-state actor involvement in standard-setting demonstrates the *problématique* of the underlying categories.¹¹ The classical example of trilateral standard-setting is the creation of labour standards within the International Labour Organisation. The governing body of this organisation, which dates from 1919, is composed by 28 government members, 14 employer members, and 14 worker members, with the member states nominating the non-government delegates. The ILO has been fairly successful in adopting global labour standards. However, these have to be formally ratified by governments as multilateral conventions. So the governments retain control of various steps of the process. Modern examples for ‘private-private’ standard-setting are the Forest Stewardship Council (FSC) standards (Stéphane Guéneau (Chapter 14)). Also, the Ethical Trade Initiative’s (ETI) ‘ETI Base Code of Workplace Standards’¹² has been elaborated by business in cooperation with various NGOs, such as Oxfam and Christian Aid. Finally, Rio Tinto’s and Shell’s human rights, social, and environmental standards with regard to business activity *inter alia* in Indonesia, Mongolia, and Nigeria were implicitly endorsed by Amnesty International. These and other forms of private-private and private-public standard-setting are achieved by regulatory framing and close supervision of transnational private standardisers by public authority, or through collaborative ‘standards-ventures’ between private and public actors.¹³

In a formal legal perspective, neither type of business self- and co-regulation produces ordinary hard law.¹⁴ However, corporate codes, technical standards, and various shades of hybrid regulation are arguably in some respects functionally equivalent to state or inter-state hard law. This will be briefly discussed below in part 2.2.

1.3 The remaining role of states in standard-setting

Although globalization has marginalised formal law as a steering mode, states and state-made law have displayed staying-power in global governance. This diagnosis must be nuanced by the observation that ‘the’ states do not form a homogenous group with identical attitudes vis-à-vis non-state standard-setting. Typically, developing states are more sceptical of global non-state standards, because of their real or suspected northern bias. Leaving aside this nuance, four points can be made.

First, only states (governments, acting directly or via international governmental organisations, see Steven Wheatley (Chapter 8)) ‘make’ formal international (treaty) law, while non-state actors

9 See from the abundant scholarship on the *lex mercatoria*, e.g., Berman and Kaufman, ‘The Law of International Commercial Transactions’, 221 et seq.; Weise, *Lex mercatoria*; de Ly, *International Business Law*; Osman, *Les principes généraux*; Stein, *Lex mercatoria*; Galgano, *Lex Mercatoria*; Cutler, *Private Power*.

10 Muchlinski, *Multinational Enterprises*, 550, with examples in the field of environmental protection at 549-556.

11 See below part 6.

12 <http://www.ethicaltrade.org>.

13 See, e.g., for (technical) standardization in the EU and EFTA: ‘General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association’ of 28 March 2003, OJ EC 2003/C 91/04, 7-11. In scholarship Mattli, ‘Public and Private Governance’, at 225.

14 See for the legal significance of corporate codes of conduct Lundblad, ‘Some Legal Dimensions’.

participate in international formal legal processes in a manner qualitatively and quantitatively different from governments. However, focusing the analysis on the exclusion of non-state actors from formal international law-making arguably ‘misses the political and social reality of their increased participation’ and the impact of that participation on subsequent state behaviour. ‘It would be myopic to insist on the classical view of states as the sole makers of international law; rather we must recognise the multi-layered, multi-partite nature of the international law-making enterprise.’¹⁵

Second, the states often perform a ‘formalizing’ role. State institutions progressively integrate informal, non-state made standards into the legal system. Such a formalization of non-state standards occurs, e.g., through references in judicial decisions or in codes.¹⁶

Third, states increasingly assume a mediator role in standard-setting. Where two groups of global players, namely TNCs and NGOs, typically have conflicting objectives, the state becomes less of an initiator or law-maker and more of a mediator between competing forces.¹⁷ Standard-setting within PPPs (among governments, business and civil society organisations) may be apt to neutralize or at least mitigate the danger of one-sided standards. PPP-standard-setting thus increases process- and output-legitimacy.

To conclude, despite the weakness of many states and the ‘failure’ of some¹⁸, states still remain the dominant political institutions worldwide. At the international level, they are recognized as the legitimate actors representing the population in their territories. At the domestic level, the state is the major frame within which processes of political and societal change take place. Finally, if states retain the monopoly on the legitimate force of force, they are the only actors to enforce law by coercive means. While non-state actors have become rule makers, this rule is then ‘flanked’ by governmental law enforcement.

2. The effectiveness of non-state standard-setting

One of our leading questions is whether non-state actors’ standards are effective. Here we must distinguish two levels: The process of standard-setting itself, and later compliance with the standards made by or in cooperation with non-state actors. The focus of this book is the first level, whereas compliance and enforcement issues are not our main theme. So the question is under what conditions and to which extent the involvement of non-state actors contributes the making of global standards, and under what conditions it inversely protracts, delays, distorts or even prevents their coming-into-being.

2.1 Causality, legitimacy, and the shadow of hierarchy

The effects of non-state-actor-input into formal law-making are difficult to determine, because the main channels of non-state actors-influence are informal. It can hardly be measured to what extent NGO- and TNC-lobbying in formal international law-making processes influenced governmental attitudes and voting and thus ultimately shaped the outcome. Notably NGOs have probably been more successful in agenda-setting than in actually impacting on the concrete results, i.e. the definite language and content of concrete standards. So they probably play their most important role during the first stage of standard-setting.

Overall, the impact of non-state actors on inter-governmental standard-setting processes, and also their capability to produce autonomous standards and to engage in co-regulation with governments, seems to depend on factors such as reputation, flexibility, receptivity to alternative perspectives,

¹⁵ Boyle and Chinkin, *The Making of International Law*, 97.

¹⁶ See for examples below part 2.2.

¹⁷ Boyle and Chinkin, *The Making of International Law*, 61.

¹⁸ The notion of the ‘failed state’ has been coined by Robert I. Rotberg and assumes that a state ceases to exist when it is no longer able to sustain the monopoly on the legitimate use of force within its borders. See Rotberg (ed.), *When States Fail*.

representativity, and reliability, in short, on factors which simultaneously contribute to their legitimacy. So effective standard-setting is in this regard conditioned on legitimacy (see on legitimacy below part 4).¹⁹

A well-known hypothesis is that effective standard-setting by non-state actors requires the 'shadow of hierarchy'.²⁰ Only if a credible threat of governmental, 'hierarchical' law-making exists, the non-state participants, who are situated in a non-hierarchical, 'horizontal' relationship, will agree on a standard.²¹ Otherwise, so the hypothesis, endless bargaining and no or merely suboptimal outcomes will result. The only way out would be to introduce majority-voting in standard-setting. But this is, in most if not all forums, unacceptable to the participants.

This hypothesis should probably be nuanced. First, insights gained through New Institutional Economics demonstrate that not merely hierarchy and organization, but property rights and transaction costs in specific social contexts structure the pattern and success of formal and informal institutions.²² Second, under the conditions of a privatized and often criminalized state, the presence of a hierarchical order may lead right into the dissolution of existing and effective standards, as the case of Zimbabwe shows.

In some settings, e.g. with regard to industrial self-regulation in various sectors, case studies have confirmed the 'shadow'-hypothesis. Industry self regulation works best within political systems that encourages it, and works poorly when the political system works against it. Virginia Haufler has concluded that much of the responsibility rests with government: 'International industry self-regulation has the potential to encourage significant improvements but only in concert with traditional political processes.'²³ This finding has important consequences for standard-setting and -implementation in weak or repressive states. While a legitimate state renders standards more effective by incorporating them into its accepted social order, standards in areas of precarious statehood must draw effectiveness from other sources, for instance, from a normative social order based on religion. Generally speaking, non-state actor standard-setting becomes more effective when it refers to a legitimate social and political order. If this legitimate social order is statehood, standard-setting seems to be most effective when it is embedded in state governance.

There is one functional equivalent to hierarchy: exclusivity and secrecy.²⁴ In the absence of hierarchy, standard-setting flourishes in small exclusive clubs of participants who do not have important conflicts of interest. Closeness and homogeneity facilitate norm-creation.²⁵ So in this regard, effectiveness and legitimacy (which calls for inclusiveness and transparency) are in tension, and trade-offs are inevitable.

2.2 *The legal effects of non-state standards in relation to 'hard' (inter-)state law*

As already pointed out, most non-state standards are, in a legal perspective, not in themselves legally binding, although they may be binding in a societal perspective. They are not enforceable by ordinary legal mechanisms, notably by courts. In the binary conception which clearly distinguishes law from non-law, the non-state standards (except the interstate treaties and conventions) must be counted as

¹⁹ The effectiveness of the standards once adopted seems to be a quite different matter. Non-state-made standards are not legally enforceable, except when they have been endorsed by states, or have been otherwise incorporated into the fabric of state-made law. However, on this level legitimacy plays as well: In the absence of legal enforcement measures, the crucial factor of effective standards-application is legitimacy.

²⁰ Scharpf, *Game Real Actors Play*, 204-05.

²¹ See also above part 1.3. on the role of the state in global standard-setting.

²² For seminal literature see North, *Institutions*; Ostrom, *Governing the Commons*.

²³ Haufler, *A Public Role*, at 121-122.

²⁴ Although secrecy and exclusion may serve as a functional equivalent to hierarchy, it is also a feature common to hierarchy itself. As Max Weber classically outlined, secrecy is one of the prime characteristics of bureaucratic hierarchies, serving to entrench the autonomy and power of the bureaucratic apparatus against other social and economic forces Weber, *Economy and Society*, vol. 3, chap. XI on bureaucracy.

²⁵ Closeness and homogeneity also foster compliance (which is not our issue), because a crucial motive of complying with formally non-binding rules is concern for reputation, which in turn is greatest in smaller, homogenous groups ('clubs').

non-law. In the continuum view, which accepts that there may be a grey zone between law and non-law, the non-state standards mostly lie on the ‘soft’ or less law-like end of the scale.

Nevertheless, non-state standards fulfil important normative functions, which can be mapped according to their relation to hard law. First, non-state standards fulfil a pre-law function. They are often adopted with view to the elaboration and preparation of future international law. Standards provide normative guidance, build mutual confidence, and concert societal and political attitudes. Both within nation states, and especially on the international scene, private sector experimentation in developing and implementing standards can create the basis for a (transnational) social consensus, which is the foundation upon which more appropriate regulation can be built.²⁶ Non-state standards are thereby pacemakers for subsequent hard law. The setting of non-state standards might thus be characterized as ‘bottom up’ norm formation, as opposed to ‘top down’ legislation.²⁷ The fact that the non-state actors are not linked to nation-states, but transcend boundaries, and potentially act globally, makes non-state standard-setting a natural tool for legal harmonization. Non-state-driven harmonization corresponds to the idea of subsidiarity. Arguably, it is more effective (and more legitimate – see on legitimacy below part 4) than top down harmonization (via formal inter-state covenants). Its effectiveness is due to the fact that non-state standards contribute to a competition between different national and international regulatory models. This competition fuels innovation and increases the probability for finding better normative arrangements.²⁸

Second, in situations where binding rules are unavailable or for other reasons inopportune, non-state standards can substitute legislation and thereby fulfil a para-law function. An example are the ‘para-legal’ labour standards analyzed by Eva Kocher in Chapter 15. The notion ‘para-law’ can be read as a parallel to the concept of para-statehood.²⁹ The latter stands for a type of domination where non-state actors – as individuals or as corporate groups – have acquired, often by illicit means, certain rights and duties from the core of the state’s administration (see Michael Miklaucic (Chapter 7)).

Third, non-state-made standards effectively complement hard law, by making it more concrete or by guiding its interpretation. Especially the operationability of inter-state treaties with their often broad, and vague language may benefit from such concretization. For instance, the Law of the Sea Convention of 1982 establishes the right of innocent passage (Art. 17), but does not say how wide or deep the navigable channel must be. The International Navigation Association (PIANC), which represents port, navigation, and shipping interests, sets the relevant standards for the shipping channels.³⁰ Further, ‘diagonal’ agreements between governments and firms (e.g. investment agreements) frequently refer to standards for products or for behaviour (e.g. in accounting or evaluation practices), to ‘best industry practice’ or to ‘prevailing commercial usage’, and thus incorporate these private standards. For instance, the International Financial Reporting Standards (IFRS), adopted by the International Accounting Standards Board (IASB),³¹ have been incorporated into a EU-Commission Regulation of 2003 whose annexes, which contain the standards, are being continuously amended.³² The typical legal consequence of these referreals and incorporations is that observance of the ‘private’ standards will give rise to a presumption of lawfulness. For instance, within the European Union, conformity with the technical standards elaborated under the so-called

²⁶ See for industrial standards Haufler, *A Public Role*, at 121.

²⁷ See Levit, ‘A Bottom-Up Approach’, 129 on the creation of standards in the finance sector: ‘The process starts with a relatively small, homogenous lawmaking group, reminiscent of a private club [...] that creates substantive rules, which are essentially organic norms emanating from the practices of the respective practitioners. [...] The lawmaking group also establishes procedural and remedial rules [...]. The informal, practice-based rules ultimately embed themselves in a more formal legal system and become law.’

²⁸ See for the area of international financial regulation Grote and Marauhn (eds.), *The Regulation of International Financial Market*, 317-318.

²⁹ Para-statehood (*Parastaatlichkeit*) as a concept has been developed by Trutz von Trotha, e.g. Trotha, ‘Die Zukunft liegt in Afrika’.

³⁰ Example from Lowe, ‘Corporations’, at 25.

³¹ The IASB is an independent, privately-funded accounting standard-setter based in London, UK. The Board members are private persons selected on account of their professional competence and practical experience. The IASB is committed to developing, in the public interest, a single set of high quality, understandable and enforceable global accounting standards that require transparent and comparable information in general purpose financial statements.

³² Commission Regulation (EC) No 1725/2003 of 29 September 2003 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council, OJ L 261 of 13 October 2003, 1.

'new approach' to technical standard-setting, triggers the presumption that the product is in conformity with the relevant European Directives and therefore allowed to circulate freely in the Common Market.³³ The same technique is used in national law. For example, the accounting standards of the DRSC (*Deutsche Rechnungslegungs Standards Committee*), a professional association, are referred to in § 342 cl. 2 of the German commercial code (*Handelsgesetzbuch*). Under this provision, the use of these standards for accounting establishes the legal presumption that the legally required accounting and book keeping standards have been observed.³⁴ The result of all these examples are 'mixed' regimes, in which non-state standards fulfil a 'law-plus' function.

3. The authority of non-state standard setters

With regard to new standards set by (or with substantial involvement of) non-state actors the question arises who has the authority to set standards. Given our premise that the power and thus also the authority of the state – the traditional prime locus of political authority – is waning under the pressures of globalisation, the issue is how standard-setting authority is generated and enforced within the increasing complexity of policy arenas. As pointed out in the introduction, the term 'authority' is ambivalent.³⁵ Authority can denote, *inter alia*, both the power and the right to rule.³⁶ In the following, we will not mean by 'authority' the mere capacity to enforce obedience (i.e. naked power), but the right (or title) to legitimately influence action, opinion, or belief. Even the latter type of authority has different facets: We can distinguish formal authority, i.e. the authority of actors who are endowed with authority by right, from *de facto* authority, i.e. actors who merely claim to be endowed with authority, who endow themselves with a mantle of legitimacy to justify their actions.³⁷ So authority – as we understand it – always encompasses at least a claim to legitimacy. But authority, thus associated with (real or usurped) legitimacy, needs more than legitimacy: '[O]nly those who have real power can, in normal circumstances, have legitimate political authority.'³⁸

The plethora of new coalitions and policy-networks constitute new loci of authority in that sense, which are at least in part private.³⁹ Hall and Biersteker have described the emergence of private authority within a threefold typology: market, moral, and illicit authority.⁴⁰ This typology allows a nuanced understanding of the transformative forces behind the shifting relationship between public and private authority, with market authority capturing the effects of globalisation, and moral authority⁴¹ encapsulating epistemic and normative shifts. Both market and moral authority have to some extent translated into regulatory authority, which is now shared with the state.⁴² The third,

³³ Röthel, 'Lex mercatoria', at 759.

³⁴ German *Handelsgesetzbuch*, provision as amended and in force since 1 May 1998 (BGBl. 1998 I, 784).

³⁵ Peters, Koechlin and Fenner, Chapter 1, part 3.6.

³⁶ *The Oxford English Dictionary*, 798.

³⁷ Cf. Raz, 'Introduction', at 3. Raz uses the terms 'legitimate' and '*de facto* authority'. This conceptualisation differs from Wheatley's distinction between epistemic authority and practical authority (see Wheatley (Chapter 8)). In Raz' terms, 'practical authority' would encompass both legitimate authority as well as *de facto* authority, which merely claims a right to legitimacy (on this point see also Barker, *Legitimizing Identities*, in particular Chapter 5 on rebels and vigilantes).

³⁸ Raz, 'Introduction', at 3.

³⁹ Cf. Cutler, *Private Power and Global Authority*, at 2: The 'new transnational legal order' and 'privatized lawmaking' is 'transforming relations of power and authority in the global political economy.'

⁴⁰ Hall and Biersteker (eds.), *The Emergence of Private Authority*, at 9.

⁴¹ Different subtypes of private moral authority can be identified: expertise, neutrality, or normative superiority. Moral authority has accrued notably to NGOs in all three subtypes: on account of their expertise, their neutrality, and their laudable objectives.

⁴² Hall and Biersteker (eds.), *The Emergence of Private Authority*, 209-210.

probably most original of these types is 'illicit' authority, denoting what other authors have termed the criminalisation or the privatisation of the state.⁴³

The new loci of authority seem to respond directly to problems raised by inadequate standard-setting capacity and resources of the actors (and authorities) involved. Whatever shapes and forms such processes take, the contextuality of the right to rule (by setting standards) as well as the capability to rule matters. Private actors are increasingly involved in norm-setting activities in formerly public domains (see for instance in this volume Dan Assaf (Chapter 3), Egle Svilpaite (Chapter 16) or Marcus Schaper (Chapter 11)), whereas the state assumes greater involvement in formerly private spheres (for instance Stéphane Guéneau (Chapter 14), Ulrike Wanitzek (Chapter 17) or Peter Hägel (Chapter 13)). Maybe more pertinently, the acquisition of authority by both state and non-state actors are not autonomous processes. They feed off and respond to each other and thus mutually inform and implicitly or explicitly link up 'public' and the 'private' standards in many different ways. This phenomenon has always been observable⁴⁴, but is especially visible in new areas of regulation (for case studies see Lucy Koechlin and Richard Calland, Chapter 4, and Lindsey Cameron, Chapter 5). However, it can be tentatively asserted that neither the source nor the scope of the authority of the actors involved allows any generic predictions on the effectiveness of the norms generated. In the following sections, some relevant insights drawn from the contributions in this volume on factors defining the authority and effectiveness of new standards shall be discussed.

Firstly, although all the contemporary patterns of rule-making discussed here are highly uneven in terms of the 'hardness' (i.e. their degree of formalisation and of enforceability), one common denominator can be identified: Their logics are cooperative rather than adversarial. More precisely, there is a decline in hierarchical relations and a shift towards more synergetic relationships between public and private actors.⁴⁵ However, this holds true only for many governance and rule-making processes in advanced democracies, and with regard to rules and standards on issues which are of interest to the North (such as for instance environmental or social regulation). The cooperative mode of governance does not necessarily prevail in many countries of the South. On the contrary, one characteristic of so-called weak states is precisely that conflicts over the legitimacy and effectiveness of authorities are frequently addressed through adversarial and down-right violent means. In other words, although partnership, dialogue and multi-stakeholder engagement may be key features of new standard-setting authority, they are by no means the only defining feature or process. More scholarly analysis is needed on other, seemingly illicit forms of standard-setting, capturing the authority of actors hidden in a sphere that Michael Miklaucic (Chapter 7) pointedly termed the 'dark matter', or what Till Förster (Chapter 12) calls 'statehood beyond the state'.

Secondly, with regard to the problem of authority, the contributions in this volume demonstrate two things: No standard-setting actors were discerned whose actions and representations can be termed wholly illegitimate, i.e. who operate solely through naked coercion. Although brute force and violence may well be one method of securing compliance and realising certain (mostly economic) objectives, even the illicit actors examined cloth themselves in a mantle of legitimacy ('*de facto* authority', as defined above), by providing either ideological alternatives and/or concrete output to the population. This mantle is not merely symbolic. Even in situations of violent conflicts, the claims to legitimacy are instrumental to the compliance that such actors attain (and vice versa), for the simple reason that all forms of power (even subjugation, the most naked form of exercising power) are at least facilitated by a minimal level of acceptance. This holds true for such diverse actors such as rebels, which usually apply a mixture of ideological as well as coercive methods to secure compliance⁴⁶ (see the case study

⁴³ See Bayart, Ellis and Hibou, *The Criminalization*; Mbembe, *On Private Indirect Government*. See from a more policy oriented perspective the work by the World Bank Institute on state capture, seminally laid out in Hellman, Jones and Kaufmann, *Seize the State*.

⁴⁴ For the development of the modern state shaped by the interaction and friction between public and private (economic) interests see the classic study by Schumpeter, *History of Economic Analysis*.

⁴⁵ For further elaboration see Knill and Lehmkühl, 'Private Actors and the State'; Peters, 'Governance'.

⁴⁶ On this point Barker, *Legitimizing Identities*, at 89 is particularly clear by elaborating that 'rebels legitimate themselves as vigorously as do rulers. [...] Nor is such legitimation restricted to those rebels who challenge existing government in its entirety by aiming for control of the state. Those vigilantes who seek by coercive direct action against other subjects or citizens to appropriate some of the functions of government by compelling others to act in accordance with their own political, religious, cultural or moral beliefs, will engage in a corresponding legitimation of themselves as the proper exercisers, in a bespoke manner, of governmental power.' See also Hall and Biersteker

of the CPN(M) in Michael Miklaucic, Chapter 7); as well as for perfectly legal ones such as international organisations or NGOs, whose right and ability to make authoritative decisions is derived from international institutional settings and processes and from the immediate necessity of providing order and basic services (see for instance Dieter Neubert (Chapter 2)).⁴⁷

The preceding – by no means ground-breaking point – that the exercise of power is usually bolstered by claims to legitimacy (and thus constitutes authority) needs to be modified by a further observation. In most of the processes examined in this book, the authority of the actors is contingent not only on (existing or emerging) rules and processes, or even on their immediate problem-solving or coercive capacity, but also on structures that are beyond the immediate influence of these actors. In other words, the nature of their authority is informed by the patterns of globalisation as well as localisation. In many cases, the power of actors to set and enforce standards is decisively shaped by their relative ability to exert influence over patterns of global economic and political distribution. Susan Strange has developed the concept of ‘structural power’ to analyse this phenomenon. Structural power is the power to influence the patterns of the global political economy and, mediated through this global influence, also the structures within which national polities and people have to operate.⁴⁸ Structural power is not a monolithic force, nor is it masterminded by a single, unified group of actors. Rather, it consists of key spheres that fundamentally transcend and transform the private-public divide. According to Susan Strange, these are the ability to influence the provision of security, goods and services, finance and credit, and finally knowledge. Although the concept of structural power was developed to explain relative power shifts between nations, it also offers very useful insights into the dynamics of the authority between state and non-state actors. As for instance Marcus Schaper’s contribution (Chapter 11) shows, the *de facto* authority of private and public transdomestic regulation depends less on the formal legitimacy of the actors (although that is also a factor) but far more on their market authority. In this case, interestingly, the structural power (i.e. their dominance in the financial market of the recipient countries) exerted by financial enterprises from non-OECD countries subverts the authority that new ‘Northern’ norms in environmental regulation can unfold in Southern countries. Conversely, the *de facto* authority of certain international actors may emanate directly from their key position in providing finance, credit, aid as well as knowledge (not least in terms of post-conflict paradigms) to recipient countries. Both examples highlight that the arenas of shaping authority have indeed undergone massive changes. The same could be demonstrated with regard to illicit actors, for example warlords who derive their *de facto* authority from their proximity to international markets (both legal and illegal) which provide the resources to finance their activities.

What needs further exploration, then, is the legalisation of illicit actors in official positions. A pertinent example is provided by the phenomenon of warlords, who, judged by local standards may or may not enjoy social acceptance and recognition, but certainly violate international human rights standards by exercising armed control over territories. They conduct extensive (and mostly illegal) economic activities within these territories. Although they are clearly illicit actors that act in opposition or in parallel to the state, they are frequently co-opted into formal public functions. Due to their *de facto* authority within the national territory of the state, warlords are included in formal political institutions, for instance through their appointment as ministers. The underlying rationale of such inclusion is, firstly, to extend the state’s control over its own territory via the warlords, and, secondly, to tame their illicit power. This happens in many post-conflict countries, the most well-documented case being Afghanistan, whose cabinet has included known warlords. Such practices are at least tacitly condoned by the international community. They are distinct from the criminalisation of the state or state capture, which denote informal processes of the appropriation of the state and the state’s resources by private illicit actors. Rather, they constitute the reverse side: private illicit actors

(eds.), *The Emergence of Private Authority*, at 16 on the social legitimation of illicit authority (i.e. violative of domestic or international legal norms).

⁴⁷ The different facets of the nature of authority become clear in Steven Lukes’ definition of authority as a ‘distinctive mode of securing compliance which combines in a peculiar way power over others and the exercise of reason.’ (Lukes, S. 1990, ‘Perspectives on Authority’, 205). Although authority plainly involves a network of control mechanisms, such as (the threat of) coercion, force, manipulation etc., ‘reason is plainly involved: authority offers a reason and operates through reasoning.’ (ibid. 205). This would correspond to Hall and Biersteker’s understanding of moral authority.

⁴⁸ A first outline of the concept of structural power can be found in Strange, ‘The Persistent Myth’, 121 et seq.

are co-opted by the state, thus avoiding an armed confrontation with and legal sanctioning of the warlords.

Although the national and international political reasoning behind these processes is well understood, the effects of such formally legitimised boundary crossing between legal and illegal are seriously underproblematised. Potentially, repercussions on the legitimacy of the state are to be expected. Popular perceptions might be that the public interest is betrayed by caving in to powerful individuals, providing them with a formal mantle of legitimacy and, moreover, endowing them with formal authority and access to state resources on top of their *de facto* authority. This hypothesis also invites further empirical research on factors shaping the social recognition of actors and standards. At this point it is important to observe that not only is the distinction between public and private at best blurred and *in extremis* redundant,⁴⁹ but conventional distinctions need to be reconceptualised – for instance global and local factors, or structural and cultural factors, as Till Förster demonstrates in Chapter 12. It will require deeper and probably more innovative analysis to capture the economic and political structures constraining and enabling specific forms of authority.

Thirdly, several chapters turn to an increasingly pertinent question, namely the formalisation of *de facto* authority exercised by non-state actors, in particular through the introduction and implementation of accountability and transparency principles that allow some degree of democratic control. For instance, Monica Blagescu and Robert Lloyd (Chapter 10) argue persuasively for the introduction of not only cross-sectoral, but also measurable accountability standards for the very reason that international actors – independent of the sector of origin – exercise *de facto* and *de iure* authority. From a different theoretical perspective, Steven Wheatley (Chapter 8) and Marcus Schaper (Chapter 11) come to the same conclusion, namely the *de facto* authority of certain standard-setters (and the standards themselves) needs to be legitimised and rendered accountable through transparent decision-making or their deliberation in acclaimed international bodies.

What is striking, fourthly, is the degree to which the relationship between authority, legitimacy and effectiveness has loosened. The key conclusions of the chapters in this volume show at least indicatively that the legitimacy and authority of the actors themselves is at best a necessary, but by no means a sufficient condition of effective norms. Although most chapters touch upon this problem, the actual effect of the new norms and standards is extremely uneven. Two different phenomena need to be distinguished: the first is the situation where the actors may be endowed with formal authority but not with sufficient real power. Most pertinently, this is the case with many public institutions which lack capacity, expertise or resources to both develop and implement adequate norms (for instance strained or dismantled public institutions, see Marcus Schaper (Chapter 11) or in areas of great technological complexity, such as critical security infrastructure (see Dan Assaf, Chapter 3). Without necessarily claiming that the authority of the state as such is in decline, we cannot ignore that public institutions are faced with massive governance challenges. The resolution of complex problems requires the kind of new approaches and resources witnessed in initiatives such as EITI (see Lucy Köchlin and Richard Calland (Chapter 4)). We shall turn further down to the impact of such processes on the authority of the standard-setting actors involved. Just highlighting one aspect, the impact of such processes on the effectiveness of public institutions is *a priori* open: it may bolster their credibility, expertise as well as endowments through the structured and formalised exchange processes (see for instance Eva Kocher (Chapter 15) or Lucy Köchlin and Richard Calland (Chapter 4); or it may weaken them further by diverging authority to other, non-state or international actors (see again Marcus Schaper (Chapter 11)).

Fifth, a lateral theme of many of the chapters is the issue of control and accountability of standard-setting actors – not just the ‘how’, but also the ‘who’. The time-honoured question of political science, namely ‘*cuis custodet custodes?*’, has lost some its salience, for the custodians have become hidden or invisible, they have disappeared behind abstract and convoluted configurations of contractual and factual power-sharing arrangements, as Dan Assaf shows in an exemplary and highly pertinent area (Chapter 3). The question has mutated to who is exercising authority, and whether there is one denotable authority that can be identified and which is both able to enforce compliance as well as render account. Given the tangled interdependencies of the public and private actors in key policy making arenas, no straightforward answers can be supplied here. More empirical inquiries are needed to unravel these interrelationships.

⁴⁹ The example of warlords provides another neat illustration of the tangled relationship between public and private.

Sixth, it can be argued that many standard-setting processes in hitherto unregulated areas have been initiated without any real intention of having any effect, but purely for the sake of window-dressing. This is observable in all types of self-regulatory as well as in multi-stakeholder initiatives (even in governmental regulatory activities, but this is not our prime concern). The reason is that actors need to be seen 'to do' something when faced with public pressures and demands by their stakeholders. Julia Black's analysis (Chapter 9) of the trilemmas that regulatory regimes face when confronted with conflictual accountability demands is insightful and innovative in its endeavour to penetrate the underlying rationales of standard-setting authorities. More obviously, such dilemmas exist in the private sector, where enterprises have undergone a steep learning curve in dealing with and responding to accountability and transparency demands by the public or by certain constituencies, especially with regard to the impact of their activities in environmental or social terms. In this case, actors both from the public and private sphere seek to re-assert their authority (or more precisely: assert their authority in new arenas) by demonstrating their capacity to respond adequately to these concerns, as the discourse on Corporate Social Responsibility or standards of corporate governance reveals succinctly. The debates within this discourse on the 'real', underlying intentions indicate that the global public has become very suspicious about claims that such actors make: They may have the authority to introduce, for instance, disclosure systems, but do they actually have the will or incentive to enforce these standards? A prime example is provided by public and private accountability standards, such as the ones the Global Accountability Project evaluates and compares (see Monica Blagescu and Robert Lloyd, Chapter 10): Most actors fall short of the standards they implicitly or explicitly claim to defend. This shows the need for understanding more clearly the underlying dynamics driving these processes. One example that may support the case for a more thorough analysis of the actors, the sectors they are embedded in, and their underlying motives is provided by the Extractive Industry Transparency Initiative. As Lucy Koechlin and Richard Calland (Chapter 4) observe, the standard-setting process of EITI is unique and remarkable for tackling a sensitive and complex topic, and for involving actors from all sectors and across the globe. Indeed, this is arguably an exemplary case of a new type of cooperative, cross-sectoral, inclusive standard-setting. The achievement of consensus-building among very diverse actors over issues on which there are bitter debate and deeply adversarial positions has been notable. However, even the initial impetus (and the resources at the disposal) of the initiative may not be sufficient to sustain its credibility, especially around the three central issues: the effective implementation by the governments, the validation by the corporations, and the control by civil society. Here we neatly fall back into classic divisions between the sectors, i.e. between the spheres of (legitimate) authority as well as the *de facto* power of the respective actors. In spite of the commitment to a common process and objectives, the involved actors are defined by their own, sector specific rationales. In other words, although the multi-stakeholder initiative manages to mediate deep-seated divisions between actors, the logics informing the actions of the participating actors (i.e. with regard to the actual implementation of and compliance with the principles) may ultimately be stronger than the common objective. In other words, gathering all the relevant, legitimate and effective authorities around a table may not be sufficient to actually generate effective, 'authoritative' norms. These processes, however, are yet so fresh and underresearched, that it is too early to conclusively discern decisive factors shaping the authority of norms generated in this way, beyond the tentative conclusions offered in this volume.

4. The legitimacy of non-state standard-setting

Legitimacy is essential for non-state-made standards, because the less enforceable rules or standards are, the more they depend on legitimacy for being voluntarily complied with.

4.1 *Social and normative legitimacy*

As pointed out in the introduction to this book,⁵⁰ ‘legitimacy’ is on the one hand a social concept (to be legitimate here means to be in fact accepted or recognized), and on the other hand a normative concept (to be legitimate here means to be worthy of being recognised). Legitimacy as a social concept can be measured empirically, whereas legitimacy as a normative concept is assessed on the basis of a value judgment. Both concepts are analytically independent from each other. For instance, if a (hypothetical) TNCs’ code of conduct for a production site in India recommends the use of child labour, this is in social terms legitimate, when all the employees (or other relevant communities) support it. The recommendation of child labour is however normatively illegitimate when measured at the yardstick of the International Convention on the Rights of the Child.

The normative legitimacy of non-state actors and the standards they make depends on the metric or yardstick that is applied. There are basically three types of yardsticks: Moral, legal, and even factual ones. Depending on the yardstick or metric we apply, a non-state standard is normatively legitimate if it satisfies our moral judgment, conforms to positive law, or finally when it is socially accepted⁵¹ and/or brings about beneficial effects in reality (‘output-legitimacy’).⁵² These metrics are not entirely independent, but feed off each other, can compensate each other, or conflict with one another. Therefore commonsense judgments on normative legitimacy often combine them. For instance, a standard that has been adopted in ‘fair’ procedures, including participation and publicity, gains both legal and moral legitimacy from this. Or, to give another example, one requirement for NGO-accreditation with ECOSOC is that it is of ‘recognized standing within the particular field of its competence’.⁵³ So here factual acceptance is a criterion for formal accreditation, which in turn conveys legal legitimacy to an NGO. ‘Overall’ normative legitimacy is a matter of degree. A standard is not only legitimate or illegitimate, but it may be more or less legitimate (morally, legalistically, or factually, or all taken together).

Legitimacy (both normative and social) is first and foremost a relational category. The general anthropological basis is the flexibility of man and his many possibilities to socialise, and in extension to constitute communities and societies. He needs a social order that provides orientation and reliability in everyday interactions. Social regulation and obligations, however, have to be reasonable because there are always possible alternatives to an existing social order. One such reason can be the basic assumptions of a coherent worldview as it is embedded in religious belief. A social order based on such unquestionable convictions is convincing and, at times, even compelling. It appears as a legitimate social order to those who share the assumptions that underpin it. A social order is not (socially) legitimate because it provides orientation or because it reduces uncertainty in everyday life – that could be done by any regulation. It is legitimate because it meets the life-worldly understanding of those who follow that order. There are many possible legitimate social orders with a normativity of their own. If, for instance, actors believe in the basic principle of representation, they would only take democratic orders as legitimate. But if they see principles of reciprocity and segmentary organisation as the fundamental basis of society, legitimacy would be judged on the balance of goods and services rendered to each actor (see Till Förster (Chapter 12)). Law which is based on the legitimate order of a democratic state is, in an anthropological perspective, only one possibility among many. Normative orders can also superimpose each other, as it was almost always the case under colonial domination.⁵⁴ What we are facing today in processes of globalisation is to some extent similar: One understanding of legitimacy, the modern concept of democratic legitimacy, seems to dominate all others. This will be discussed in the next section.

⁵⁰ See Peters, Köchlin and Fenner, Chapter 1, part 3.4.

⁵¹ The fact of social acceptance does not only constitute legitimacy in the sociological sense, but may also be an indicator of normative legitimacy under the premise that popular attitudes must be taken seriously.

⁵² So effectiveness is not always in tension with legitimacy, but in turn contributes to output-legitimacy.

⁵³ UN ECOSOC, *Consultative Relationship between the United Nations and Non-Governmental Organizations* (UN Doc A/RES/1996/31) (resolution passed at the 49th plenary meeting of 25 July 1996), para. 9.

⁵⁴ For a contemporary case study see in this volume Wanitzek, Chapter 17.

4.2 *Democracy, transparency, and inclusiveness*

Today, it is generally assumed – and at least verbally supported even by totalitarian governments – that democratic procedures, coupled with safeguards for the protection of basic human rights, are the best guarantee to secure the overall legitimacy of standards which guide and structure peoples' lives and thus affect their needs, interests, and rights. Both state and non-state standard-setting should therefore be – if possible – democratic. But democratic legitimacy (which is frequently criticized as an empty signifier) is neither a necessary nor a sufficient condition of legitimacy. Diverging notions of legitimacy may be more relevant for non-state actors that are often embedded in local societal contexts and cultures (see Ulrike Wanitzek (Chapter 17)). The presence of different types of legitimacy in a particular context of contact then refers to the interaction of different societies in processes of globalisation.

Another example of only thinly democratic legitimacy is the traditional mode of inter-state law-making, as it evolved in an era of monarchies. The basic legitimacy norm of traditional international law (notably international treaties and customary international law) has not been democracy, but state sovereignty. States, the law-makers, were considered as legitimate *per se*, and therefore the states' consent, expressed by their government, was deemed a sufficient basis of legitimacy for international law. In the modern 'democratic' reading of that mechanism, states are considered to represent their citizens. In that view, state sovereignty means also popular sovereignty. However, this equation does not reflect global reality, where undemocratic states participate in international law-making, and where some states have so little bargaining power that their consent is not free and informed. In reality, then, international law-making does not very well correspond to the democratic ideal.

Against this background, the objection that non-state standard-setting is undemocratic and thus *per se* unjustified is unpersuasive on three grounds. First, as just pointed out, it disregards the fact that many states are undemocratic as well, but are still allowed to participate in international standard-setting on an equal footing with democratic states. Second, as long as standards are only 'soft law' and not enforceable, their impact is less serious, and therefore they need less democratic credentials. Third, as long as non-state actors only have voice in standard-setting, but not a vote, their contribution is less decisive, and therefore their own legitimation need not satisfy the strictest standards. So the lack of formal democratic credentials of NGOs, technical experts, professional associations, TNCs, and various public-private or private-private partnerships does not constitute an absolute factor of illegitimacy of their standard-setting activity. It might be compensated by other forms of accountability (absent democratic elections). The accountability problems of non-state actor standard-setting will be discussed below (part 5).

Besides (and as a part of) the democratic deficit of non-state law making, its exclusivity and intransparency deserve special consideration. A broad participation of potentially affected groups increases the likelihood that the resulting norms will ultimately safeguard or enable the egalitarian enjoyment of needs, interests, and rights. Inclusive processes thereby contribute to the legitimacy of the resulting rules. The involvement of civil society organisations in standard-setting is therefore a prime means to make those standards more legitimate.

The partial secrecy of non-state standard-setting creates a legitimacy-problem, because without information, potentially affected persons can not hold the standard setters accountable. Accountability is an element of legitimacy, because it forces standard setters to respond to the needs and interests of individuals (see on accountability below part 5). So transparent standard-setting is apt to contribute to the legitimacy of standards. This means that agendas, proposals, votes in committees, minutes of sessions, and drafts for standards should be generally publicised. Refusals to publish or to grant open access should be based on concrete grounds of privacy, third party interests, or overriding public interests (such as security). The onus must be on the refusing body. However, opening up of the standard-setting fora will make standard-setting more difficult, because the striking of certain compromises and package deals are more difficult in public. So, as already pointed out, some legitimacy-gains will have to be traded off against the efficiency of standard-making.

The creation of technical standards (for products, services, banking, accounting etc.) by professionals and experts, eventually in collaboration with selected government representatives, seems at first sight particularly undemocratic: This is not democracy, but technocracy. The standard-setting bodies have a very limited membership. Smaller firms have little influence, and consumers are almost completely excluded. Larger firms use the standards as a means to 'endorse' the composition and formats or of

their own products. Finally, technical standard-setting depends on private sector funding. This creates a conflict of interest which also taints the legitimacy of the standards. Therefore, attempts to improve the legitimacy of technical standard-setting aim precisely at inclusiveness and more transparency.⁵⁵ The trend is to combine the input of a smaller group of experts with broad consultation processes. In fact, most current technical standard-setting comprises detailed procedural safeguards, which have been partly influenced by legal instruments, partly by the ethics of the engineering and other professions, and which have emerged through a global process of normative borrowing between the public and private spheres at various levels. According to Harm Schepel⁵⁶, these procedures provide at a minimum for the elaboration of draft standards in technical committees with a balance of represented interests (manufacturers, consumers, social partners, public authorities), a requirement of consensus on the committee before the draft goes to a round of public notice and comment or consultation,⁵⁷ with the obligation on the committee to take received comments into account, and a ratification vote, again with the requirement of consensus rather than mere majority, among the constituency of the standards body, and the obligation to review standards periodically.

To sum up: The general legitimacy issue of non-state standard-setting is that its legitimacy flows neither from state sovereignty (as manifested in state consent) nor from popular sovereignty or democracy. But this problem can be mitigated to some extent, if not remedied, by procedural integrity, transparency, inclusive deliberations, a good knowledge base, and ethos. We will now turn to two types of non-state actors specifically.

4.3 *The legitimacy of NGO-standard-setting*

As political actors, NGOs enjoy normative legitimacy under the three yardsticks mentioned above. They possess legalist legitimacy when their actions refer to international law, or by accreditation. They enjoy moral legitimacy due to their aims, mission and values, and due to the credibility of their laudable aspirations. Their legitimacy derived from acceptance is visible in a large membership and broad donorship. These factors vary with the type of NGO. For activist or service NGOs performing disaster relief, or direct environmental action, effective performance of their tasks is an important source of legitimacy. Advocacy NGOs can in theory also enjoy output legitimacy with the caveat that here drawing causality and attributing tangible success is very difficult. The probably more important legitimacy factor of advocacy NGOs is therefore credibility.

How does NGO participation in standard-setting contribute to the legitimacy of the processes and their outcome? NGOs furnish information, offer expertise, vocalize interests, and often act as opposition (we will come back to this below). All this improves the quality of debates and of texts. These functions can be fulfilled by NGOs because and as long as they are independent.⁵⁸ Thus, the involvement of independent NGOs in standard-setting is apt to increase the legitimacy of standard-setting procedures, and the standards themselves.

However, the input of NGO in global standard-setting might also be illegitimate on several accounts. The most popular criticism is that NGOs do not enjoy any democratic mandate by (global) citizens, but are self-appointed. However, the democratic function of NGOs is not to be representatives in a parliamentary sense. In contrast, NGOs pursue single issues or special interests. They speak (or claim to speak) for minorities, for vulnerable groups, or for otherwise voiceless entities, such as nature. In most cases, NGOs have been founded precisely in order to counter the will of the majority, and to act

⁵⁵ See for the EU and EFTA the 'General Guidelines for the Cooperation between CEN, CENELEC and ETSI and the European Commission and the European Free Trade Association' of March 2003 (above note 13).

⁵⁶ Schepel, *The Constitution of Private Governance*, at 6.

⁵⁷ Two examples: The International Organization of Securities Commissions (IOSCO), a forum for coordinating approaches to securities regulation has introduced the 'IOSCO Consultation Policy and Procedure', published by the IOSCO's Executive Committee in April 2005, accessible via <http://www.iosco.org>. Art. 5.10 of the Charter of the EU's CESR (Committee of European Securities Regulators) states: 'The Committee will use the appropriate processes to consult (both *ex ante* and *ex post*) market participants, consumers, and end users which may include, inter alia: concept releases, consultative papers, public hearings and roundtables, written and Internet consultations, public discourse and summary of comments, national and/or European focused consultations. The Committee will make a public statement of its consultation practices.'

⁵⁸ Cf. CoE, *Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum* (November 2002) para. 10: NGO must be free to take positions contrary to stated government policies.

as opposition. A democratic mandate by a global citizenry would not serve, but actually run counter to this function.

This functionality requires to give NGOs a voice, but not necessarily a vote in the standard-setting processes. Voice is the modus of deliberation. Voice is legitimate, because its impact on the outcome of the standard-setting process is informal and less weighty. It correspondingly needs less formal legitimacy, but is sufficiently justified by the reputational and moral legitimacy. Unsurprisingly, it is precisely a feature of pluralist law-making processes on the national or supranational level to offer interest groups the opportunity to participate and give input into the process without requiring any democratic mandate.⁵⁹ NGO-vote, in contrast, would not be legitimate, first, because of the NGOs' lacking democratic mandate. Second, NGOs' typical selectivity of interests and one-issue-character makes them, unlike governments, which pursue and balance a host of competing interests, unfit for package deals or compromises in standard-setting. Put differently, NGOs are structurally ill-suited to participate in the governance modus of bargaining. Granting them a vote would therefore hamper the process and thus decrease its functional legitimacy.

The legitimacy of NGO voice does not require representativity in terms of a democratic mandate conferred by a (more or less virtual) global society.⁶⁰ The NGO voices will complement, and contradict each other, and will thus contribute to pluralist global deliberations, not to a parliamentary democracy. However, these deliberations are not self-evidently fully legitimate. Who is authorized to define the interests and weigh them, if this does not happen in a formal democratic process? Moreover, besides the usual prevalence of better-organised, and more powerful interest groups, the geographical imbalance (dominance of 'northern' NGOs) decreases the legitimacy of the global deliberative process. All things considered, it can still be said that as long as NGO-participation in global standard-setting is limited to voice and does not include a vote, the legitimacy-gains of NGO-involvement clearly outweigh the legitimacy problems.

A related democratic legitimacy problem is that many NGOs lack an internal democratic structure. The ECOSOC guidelines, which have in practice been the most influential model for participatory schemes with other UN bodies and for organisations outside the UN, postulate that consultative relations can only be established with NGOs having 'a democratically adopted constitution'.⁶¹ However, this requirement is not enforced by the ECOSOC's accreditation committee. In reality, only a handful of more than 2.700 NGOs currently accredited with ECOSOC can be said to be democratic.⁶² The newer Council of Europe 'Principles on the Status of NGOs in Europe' state that while the management of an NGO must be in accordance with its statutes and the law, 'NGOs are otherwise sovereign in determining the arrangements for pursuing their objectives'.⁶³ According to the Explanatory Memorandum to these Principles, the internal structure is 'entirely a matter for the NGO itself'.⁶⁴ The Principles thus do not require NGOs' internal democracy for participation in the Council of Europe.

The leniency with regard to the internal structure of NGOs, and the rejection of any internal democracy requirement can be defended with two arguments. First, there are viable substitutes for internal democratic control. Donors 'vote' with their check-book, and members can – unlike the citizens of a state – easily realize their exit-option and thereby bring their opinions on the NGO-policies to bear. Second, numerous non-democratic states also have the right to vote on international standards. Why should requirements for NGOs be stricter? The formalist answer is that states are the direct addressees of international law, and are obliged to implement and enforce it. Therefore, so the argument goes, they have a legitimate interest in influencing those standards, and should be entitled to co-determine them, independently of their internal government structure. In contrast, NGOs are no international legal persons, therefore no legal duties arise for them from international law, and therefore NGOs do not have an intrinsic legitimate interest in shaping the standards that will bind

⁵⁹ See for law-making in the EU: 'Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission', COM (2002), 704 final, Communication from the Commission of 11 December 2002.

⁶⁰ Oberthür, *Participation of Non-Governmental Organisations*, at??; Rebasti, 'Beyond Consultative Status', at 43.

⁶¹ UN ECOSOC 1996, *Consultative Relationship* (above note 53), para. 10.

⁶² Kamminga, 'What Makes an NGO "Legitimate"', at 186.

⁶³ CoE 2002, *Fundamental Principles* (above note 58), para. 45.

⁶⁴ CoE 2002, *Fundamental Principles Explanatory Memorandum* (above note 58), para. 33.

others, not them. However, this 'state-privilege' in standard-setting is premised on the idea that the state is analogous to a natural person, and as such entitled to self-determination which translates into participation in rule making. This analogical premise is problematic, because states are no unitary actors, and do not enjoy rights their own sake, which would be morally comparable to natural persons' fundamental rights to political participation. Therefore, the formalist answer given above is unsatisfactory. It follows that NGOs should not be treated stricter than states. Their participation in standard-setting is (more or less) legitimate, largely independent of their internal structure.

A different legitimacy problem is the blurring of the societal and market sphere through a commercialisation of NGOs. NGOs may *de facto* become professional service agencies.⁶⁵ More importantly, broad accreditation rules of international organisations potentially allow TNCs to masquerade as NGOs and thus participate in standard-setting. For instance, the ICC (International Chamber of Commerce) can have itself represented by firms, which resulted in waste traders participating as ICC members in negotiations on the Basle Convention on the Transboundary Movements of Hazardous Waste, and producers of ozone-depleting substances representing the ICC in issues relating to the Montreal Protocol. Also, TNCs have been involved in *Codex alimentarius* standard-setting where they seek to use the Codex to legitimize standards, definitions, and the composition of their own products.⁶⁶ Another line is blurring: 'Quangos' (quasi-governmental organizations) are emerging, and ECOSOC increasingly accredits NGOs which are sponsored and controlled by government and that are thus not independent.⁶⁷ This governmentalisation is most relevant for service organisations.⁶⁸ For instance, a considerable amount of governmental development aid is delivered via NGOs. It is not entirely clear that this policy leads to efficiency gains. In some cases, reliance by governments on NGOs may here mask the inactivity of governments, and actually weaken output legitimacy, especially when NGOs *de facto* become part of national bureaucracies. More important is the abuse of the NGO-garb by governments, especially in the human rights field. Numerous NGOs, e.g. Chinese para-state mass organisations in the Commission on Human Rights, only serve their state of origin or registration by constantly praising and imitating it general or country-specific debates. They thus form a 'servile society at the UN'.⁶⁹

The probably most seriously legitimacy-problem of NGOs as a group is the dominance of the north in all international organisations where NGOs are involved in standard-setting and -implementation. NGOs originating from or based in the rich industrial countries have a far disproportional impact in global standard-setting. And universal NGOs, such as Amnesty, mostly do not have governance mechanisms to ensure that the make-up of the executive is geographically representative of the organisation as a whole.

In order to improve the legitimacy factors of inclusiveness and broad participation, measures to counteract the skewed impact of NGOs from the North are needed. Additional financial and technical support must be given to southern NGOs. In contrast to such targeted capacity building, quota systems seem problematic, because they tend to hinder the bottom-up emergence of NGOs for new items and thereby run counter to the NGO-involvement's early warning- and oppositional function.

Intensified monitoring, evaluations, streamlining, and the formalization of the existing accreditation procedures by governments risk to endanger the NGOs independence, which is their primary element of legitimacy. It is therefore even argued that accreditation (i.e. the conferral of an 'observer' or 'participatory' status within international organisations) is an outdated paradigm which should altogether be given up.⁷⁰ However, if only for practical reasons, there must be some channelling of NGO involvement in global standard-setting, otherwise the system would collapse. It is therefore necessary to maintain accreditation in principle. In order to cut back abuses and illegitimate political considerations, the task should be removed further from the governments (of which bodies such as the ECOSOC committee on NGOs are composed of), and instead entrusted to the secretariats of

⁶⁵ For instance, AI has been criticised for a 'trade with human rights violations', because the Danish section of AI sells to investors information on the human rights situation in potential host countries.

⁶⁶ All three examples from Krut, *Globalization and Civil Society*, at 24.

⁶⁷ United Nations 2004, *We the Peoples: Civil Society, the United Nations and Global Governance, Report of the Panel of Eminent Persons on United Nations-Civil Society Relations* ('Cardoso Report'), A/58/817 (11 June 2004), para. 127.

⁶⁸ See for the complementary process of the privatization of the state below part 6.

⁶⁹ De Frouville, 'Domesticating Civil Society', at 73.

⁷⁰ Noortmann, 'Who Really Needs Art. 71?', at 118.

international organisations which are more distanced from governments.⁷¹ This ‘depolitisation’ of the accreditation procedure was one of the main proposals of the Cardoso report on UN-civil society relations,⁷² but did not meet approval in the General Assembly.⁷³

Next, more emphasis should be laid on self-policing, which would not only improve the legitimacy, but also the accountability of NGOs.⁷⁴ Accreditation and self-regulation need not be mutually exclusive, but could be combined in varying degrees.⁷⁵ Sectoral NGO codes of conduct can be devised for different areas. An example is the Code of Good Practice for relief and development agencies.⁷⁶

Finally, coalition building is a means to strengthen the legitimacy of NGO input in standard-setting, because this increases the diversity, the social acceptance, and the effectiveness of NGOs. An example is the ‘Coalition for an International Criminal Court’ which had a great impact on the elaboration and adoption of the Rome Statute of the International Criminal Court.

4.4 The legitimacy of business involvement in standard-setting

We have seen that business participates in global standard-setting through companies, branch associations, or through professionals and experts. The basis of legitimacy of this standard-setting activity is not, as usually for private actors, their private autonomy and consent. Standards have a general scope. They address and bind not only the norm-creators themselves (like a contract), but third parties, which are not the authors of these norms. The actors do not only regulate themselves (their own future action), but intend to regulate other (mainly business) actors, who have not participated in the standard-setting themselves. Therefore consent alone can not form the legitimacy-basis for the standards.

An additional basis of legitimacy could be delegation by governments. If the states had permissibly delegated the standard-setting authority to private actors, these standards would be presumably legitimate, because of the overall legitimacy and authority of states to produce norms. However, is the extensive and highly dynamic and private standard-setting we witness really merely a delegated exercise? The delegation-perspective is just the beginning, not the end of the question for the basis of legitimacy of non-state, especially genuinely private, standard-setting.

In a more practical perspective, it can be said that the involvement of business in standard-setting is apt to increase the effectiveness of the processes, and thus their output-legitimacy. Especially in the highly complex context of global economy, national governments lack the information and the capacity to regulate issues which transcend the nation-state. The involvement of global business actors might compensate for this loss of regulatory capacity. Business actors bring in their expertise and their skills to design economically viable solutions. In fact, governmental standard-setting has arguably become dependent upon the economic data and technical solutions offered by firms. Further, the involvement of TNCs in the setting of standards creates a sense of ownership and therefore facilitates their later implementation. Finally, their more formalized inclusion could eliminate the informal attempts to influence global standard-setting and governance processes, such as the tobacco industry’s campaign against the UN and WHO.⁷⁷

On the other hand, business’ involvement can also make standard-setting less effective, because it protracts, delays or disorients standards, or may offset initiatives by others. But the most obvious danger of the participation of TNCs in standard-setting is that this amounts to making the fox guard the henhouse. TNCs are primarily profit-driven, and their novel role as ‘corporate citizens’ is at best a

⁷¹ See CoE, *Participatory Status for International Non-governmental Organisations with the Council of Europe* (Res. (2003) 8 of 19 November 2003) (adopted by the Committee of Ministers at the 861st meeting of the Ministers’ Deputies), paras 12-14: The Decision to grant participatory status is taken by the Secretary General with a no-objection procedure by governments.

⁷² Cardoso report (above note 67), paras. 120-128 and proposal 19.

⁷³ General Assembly Plenary Debates of 4th and 5th Oct. 2004, UN Doc. GA/10268 and GA/10270.

⁷⁴ See on accountability problems of NGOs below part 5.6.

⁷⁵ Rebasti, ‘Beyond Consultative Status’, 47.

⁷⁶ ‘People in Aid: Code of Good Practice in the Management and Support of Aid Personnel’ (2003), elaborated by relief and development NGOs. See on the self-policing of humanitarian NGOs also below part 5.6.

⁷⁷ See WHO, *Tobacco Company Strategies to Undermine Tobacco Control Activities at the World Health Organisation: Report of the Committee of Experts on Tobacco Industry Documents*, Geneva, July 2000.

secondary one. Firms do not *per se* pursue any however defined (global) public interest, but first of all seek to make money. As UNICEF Executive Director Carol Bellamy pointed out in response to the then UN Secretary General Kofi Annan's far reaching proposals to engage the United Nations more with business: '[I]t is dangerous to assume that the goals of the private sector are somehow synonymous with those of the United Nations, because they most emphatically are not.'⁷⁸ TNCs are interested in cooperating with international institutions in standard-setting not for the common good, but because global standards will minimize trade barriers resulting from national regulation, because they hope to influence global standards in their favour, gain prestige ('bluewash'), and finally because they can use the standard-setting forums to directly sponsor their own products. TNCs also seek to embed 'best practices' to squeeze out competitors, which blurs the line between agreements on standards among firms and unfair anti-competitive understandings.

Nevertheless, even corporate profit-driven activity may have beneficial spill-over effects for public: It satisfies consumer needs, gives employment, and increases wealth. It is therefore also in the public interest not to subject business to standards that kill off their incentive to make profit. Also, the dangers of TNCs involvement in standard-setting, notably the danger of capture by profit interests, is to some extent mitigated by the fact the global business is by no means a monolithical block with uniform objectives. For instance during the negotiations of the Kyoto Protocol, which was quite intensely lobbied by business, the energy sector and the insurance sector had opposing interests,⁷⁹ which meant that their antagonist inputs contributed to a more balanced solution.

All considered, there still is the real danger that international standard-setting is unduly commercialized through business involvement. A remedy might be public-private-private-standard-setting, in which NGO-involvement might compensate for legitimacy deficits engendered by marketisation, to which we turn now.

4.5 The legitimacy of trilateral standard-setting in PPPs

One way to enhance the legitimacy of standard-setting is to make sure that the process of developing and implementing standards is a shared endeavour among (inter-)governmental institutions, business, and NGOs.⁸⁰ Hence trilateral PPPs might constitute standard-setting forums in which governmental, NGO-, and business-contributions could outweigh each others' deficiencies. Notably international organisations and NGOs can mutually derive legitimacy from each other. The NGO allegiance gives an aura of independence and credibility while the affiliation to an international organisation gives its reports weight and authority. However, a number of cases where companies or even governments 'borrowed creditability' from NGOs has led to criticism. Legitimacy is gained through joint standard-setting only when the parties remain independent from one another and sufficiently distant.⁸¹

Finally, even if PPP-rule making may be more inclusive than purely (inter-)governmental standard-setting, is still suffers from the lack of formal accountability.⁸² Generally, PPPs tend to be rather intransparent and selective. One of the major legitimacy-problems of PPP-activity is probably the choice of relevant stakeholders, and the weighting of the stakeholders who should be involved in standard-setting and -implementation. And as far as the effectiveness or output-legitimacy of the PPP-standard-setting is concerned, PPPs standard-setting can result in mere problem-shifting. Also, it may lead to lowest common denominator, and it may exclude other stakeholders.⁸³

All things considered, and given the fact that states are as yet the only formal representative of citizens, are still – as a group – the most powerful global actors, and are (in most areas of the world) important repositories of political, social, and cultural identity, global standard-setting must remain, in order to maintain a sufficient level of legitimacy, linked to states. The ultimate standard-setting responsibility should not be transferred to non-state actors. However, the involvement of non-state

⁷⁸ Carol Bellamy, 'Public, Private, and Civil Society', Speech of 16 April 1999.

⁷⁹ Nowrot, *Normative Ordnungsstruktur*, 235 with further references.

⁸⁰ Haufler, *A Public Role*, 119; Muchlinski, *Multinational Enterprises*, 550; Boyle and Chinkin, *The Making of International Law*, 92.

⁸¹ Crane and Matten, *Business Ethics*, 374.

⁸² Dingwerth, 'The Democratic Legitimacy', 78.

⁸³ Börzel and Risse, 'Public-Private Partnerships', 210-211.

Actors is an important additional source of legitimacy. It should consequently be broadened, structured, and to some extent formalized.

5. The accountability of non-state standard-setters

Accountability⁸⁴ is – as legitimacy – a relational concept which is socially and discursively constituted. As Julia Black (Chapter 9) demonstrates, regulatory regimes are not passive recipients but active participants in the accountability discourses.

5.1 *Functional accountability*

Accountability serves three interrelated functions: to safeguard interests, to prevent the concentration of power, and to enhance learning and effectiveness.⁸⁵ Notably Monica Blagescu and Robert Lloyd (Chapter 10) emphasise the third function and insist on accountability as a transformative process which is beneficial to the actors themselves. Accountability mechanisms are therefore functional when they provide sufficient information for the forum about the behaviour of accountable actor, when they offer enough incentives for actor to commit itself, to refrain from abuse and to be responsive, and when they allow for enough feedback, responsiveness, and learning. By fulfilling these three functions, accountability schemes enhance legitimacy (see above part 4).

The ‘One World Trust’ Report of 2003⁸⁶ identified eight ‘core dimensions’ of accountability: Member control, procedures for appointment of senior staff, compliance mechanisms, evaluation processes, external stakeholder consultation, complaint mechanisms, corporate social responsibility, and access to information. Building on this report and on the Global Accountability Index, Monica Blagescu and Robert Lloyd (Chapter 10) boil those dimensions down to four necessary components of a functioning accountability scheme: transparency, participation, evaluation, and complaint and response. Each component is itself strengthened through its interaction with its others, and meaningful accountability only results when all are effective. According to the survey of One World Trust and according to Monica Blagescu and Robert Lloyd (Chapter 10), all three types of global non-state actors, international organisations, TNCs, and NGOs do not score significantly differently on those accountability parameters. Other chapters as well have revealed serious accountability gaps in non-state standard-setting (see notably Steven Wheatley (Chapter 8) and Dan Assaf (Chapter 3)). They also demonstrate that there is no one-fits-all accountability mechanism for the various kinds of global non-state actors. However, parallel problems can be identified, and maybe common principles and designs could be envisaged as a response.

5.2 *Accountability for what?*

The first element of accountability are the (meta-)standards to which an accountable standard-setting actor must conform (‘Accountability for what?’, in the words of Dan Assaf (Chapter 3)). Potential relevant standards for global non-state actors are public international law (notably human rights treaties), soft law, or finally domestic law.

With regard to international organisations, a major accountability gap lies in the fact that the organisations are not a party to international human rights covenants, and therefore not subject to the respective contractual compliance and enforcement mechanisms. Intensified international organisations’ standards and enforcement measures, especially UN sanctions, have in the recent years endangered human rights, especially social rights to food or access to medicine, or procedural rights to a fair trial. But the UN Security Council, the World Bank, the WTO, or the NATO can not be held

⁸⁴ See for the notion of accountability Peters, Koechlin, and Fenner, Chapter 1, part 3.5.

⁸⁵ Cf. Bovens, ‘Analysing and Assessing Accountability’, at 462.

⁸⁶ Kovach, Nelligan, and Burall, *Power without Accountability?* (see Table at 3).

accountable via the ordinary human rights complaint procedures for violations of such rights. This has created an accountability problem which is only recently being tackled. As far as TNCs and NGOs are concerned, public international law does not apply to them, because these actors are not formally recognized as international legal persons. Hence, international human rights covenants do not directly and in themselves constitute a standard of accountability for these actors. So were here we have a similar accountability gap as in international organisations.

Of course, TNCs and NGOs are 'chartered' under the law of a specific state, and are therefore accountable under the standards of the relevant domestic law. However, especially TNCs may evade regulation. Also, the national standards are diverse, do not necessarily live up to the international standards, and therefore do not constitute a consistent and even accountability regime. Against the background of numerous reproaches of human rights violations by TNCs, especially in developing states (e.g. the use of forced labour in Myanmar, or the support of the Apartheid regime in former South Africa), 'soft' international human rights standards applicable to TNCs have been adopted by the OECD⁸⁷ and the UN.⁸⁸ Finally, firms have committed themselves to codes of conduct in the fields of environment, human rights, and labour (see notably Eva Kocher (Chapter 15) and Egle Svilpaite (Chapter 16)). For NGOs, self-regulation is only slowly emerging as an element of accountability (see Lindsey Cameron (Chapter 5) and below⁸⁹). Overall, it seems as if certain, cross-cutting standards of accountability have already been articulated in transnational civil society, even where there is no applicable international law.⁹⁰

5.3 Accountability to whom?

The most important accountability controversies relates to the accountability forum, i.e. to the question: Who is entitled to hold power-wielders accountable? Here the reproach of an 'accountability mismatch' is salient.⁹¹ It is claimed by many that while non-state actors are not un-accountable, the problem is that their accountability exists vis-à-vis the wrong constituencies, or/and that it is skewed towards the most powerful stakeholders. This disagreement about the proper accountability forum is at least in part rooted in diverging paradigms of accountability. Two principal models have been identified:⁹² 'Delegated accountability' to the 'shareholders' (i.e. to the source of power or the delegating body) as opposed to 'participatory accountability' to 'stakeholders' (a term to which we will revert in a minute). These two models of accountability require responsiveness to different groups ('constituencies'). Arguably, an effective accountability system should combine elements from both: delegated and participatory accountability.⁹³

According to Steven Wheatley (Chapter 8), the concept of accountability has expanded in recent years to include *inter alia* the idea that governments should pursue the wishes or needs of their citizens – accountability as 'responsiveness'. Increasingly, accountability is seen as a 'dialogical activity', requiring officials to 'answer, explain and justify, while those holding them to account engage in questioning, assessing and criticising.' The hypothetical communicative community of an international governance regime – 'those affected' – have the right to participate in decision-making processes, directly or through representatives. Engagement with international civil society actors, 'we the peoples' representatives', is understood to provide some for of legitimacy for the exercise of political authority, linking political institutions with the wider public in the process of collective will-formation to ensure that relevant interests and perspectives are included in decision-making processes, in particular those of hitherto marginalized or excluded groups.

⁸⁷ OECD *Guidelines for Multinational Enterprises* (DAFFE/IME/WPG (2000) 15/FINAL).

⁸⁸ UN ECOSOC Sub-Commission on the Promotion and Protection of Human Rights, *Norms of the Responsibilities of Transnational Corporations and Other Business Enterprises* of 13 August 2003 (UN-Doc. E/CN.4/Sub.2/2003//12/Rev. 2).

⁸⁹ Part 5.5.

⁹⁰ Grant and Keohane, 'Accountability and Abuses', 35.

⁹¹ Levit, 'A Bottom-Up Approach', 200 for the sector of financial standard-setting.

⁹² Grant and Keohane, 'Accountability and Abuses', esp. at 31.

⁹³ *Ibid.*, at 42.

Other chapters in this book which touch accountability have likewise abandoned the traditional narrow idea of accountability which exists only vis-à-vis the source of power or ‘shareholder’. All – if only implicitly – assume that the global standard-setting actors are accountable to a broader set of both internal and external stakeholders. ‘Stakeholders’ are all those who are or might be affected by the standards set by the actor, be it an international organization, a TNC or an NGO.⁹⁴ Individuals or groups are affected when they are benefitted or harmed by the standards, in particular when their rights are violated. As already mentioned, Steven Wheatley submits that international organisations must not only be accountable to their member states’ governments, but also to global civil society (see on international organisations’ stakeholders also below part 5.5.). TNCs are not only accountable to their shareholders, but also employees, customers, business partners, and societies in which the companies operate. Finally, NGOs are accountable not only to their funders and states of incorporation, but also to their beneficiaries.

However, all actors must perform a stakeholders analysis: Who are the relevant stakeholders? And what weight should their concerns be accorded? For normative and practical reasons, it is necessary to assess and to prioritise the stakeholders and their inevitably competing demands. First, because of the different types and degrees of affectedness, stakeholders literally have very different ‘stakes’, and it does not seem fair to grant each of them an identical say. Second, the circle of stakeholders is potentially infinite, when ‘affectedness’ is not limited by certain requirements of intensity or directness. If all stakeholders are taken into account, standard-setting would be killed by an accountability paralysis. So here a reasonable balance between the need for adequate input and the need for swift decision-making must be struck. An example are the EU-principles on consultation in the European law-making process: Here the EU-Commission, in determining the relevant parties for consultation, is bound to ensure ‘adequate coverage’ of ‘those affected by a policy, those who will be involved in the implementation of the policy, or bodies that have stated objectives giving them an interest in the policy’. The Commission should also take into account factors such as the need for specific experience, expertise, or technical knowledge, a proper balance of social and economic bodies, and specific target groups, such as ethnic minorities.⁹⁵

To sum up, there are real tensions not only among different claims communities (as Julia Black (Chapter 9) elaborates), but also among the different models of accountability. The ‘pluralist’ solution to the accountability problem of competing accountability forums is to allow each constituency to challenge decisions, also in standard-setting procedures, but not to formally veto them.⁹⁶ This proposal fits well to the conferral of voice, but not of vote to non-state actors, as we suggested in the discussion on their legitimacy.

5.4 The sanctions

The third element of accountability are the sanctions or disempowerment mechanisms. These may be legal, political, financial, or reputational. They may be formalised (fines, disciplinary measures, civil remedies, penal sanctions), or merely informal, such as pressuring to resign.

The most common and most effective political sanction, namely democratic elections, are lacking on the global plane, and global elections by a global citizenry are unfeasible. This is a central accountability (and thus legitimacy) problem of non-state global standard-setting, and of global governance generally. But could the lack of the political sanction of global elections be compensated for by legal (more precisely: judicial) sanctions in form of complaint mechanisms against standards? Would the accountability of non-state standard setters be increased by creating enforceable rights for individuals and firms against those standards? We doubt that, because both types of sanctions differ in important respects. Accountability through complaints functions – as opposed to accountability through elections – only *ex post*, not *ex ante*, it is necessarily rights-based and can not take into

⁹⁴ Seminal for the ‘stakeholder theory’ of the firm: Freeman, *Strategic Management*, at 46. See for a definition of TNCs’ stakeholders para. 22 of the ECOSOC Sub-Commission norms on human rights responsibilities of TNCs (above note 88).

⁹⁵ ‘Towards a reinforced culture of consultation and dialogue – General principles and minimum standards for consultation of interested parties by the Commission’, COM (2002), 704 final, Communication from the Commission of 11 Dec. 2002 at 11-12, and 19 on the definition of the target group(s) in a consultation process.

⁹⁶ Krisch, ‘The Pluralism of Global Administrative Law’, at 249.

account other interests without a legal basis, and it concerns individual cases, not general policies. Complaints are therefore hardly a functional equivalent to democratic elections or referendums, and cannot substitute those participatory devices.

5.5 Specific accountability problems of international organisations

International Organisations are in the traditional, state-centred view, accountable to their member states (as their 'shareholders') only. One problem in this context is that some organisations do not grant equal rights to member states (the most conspicuous example being the veto-power of the five permanent security council members and the ponderation of votes in the Bretton Woods Institutions). A related problem is that even organisations whose members have formally equal voting rights, practice informal decision-making (e.g. in the notorious WTO 'green rooms') which effectively marginalizes or completely excludes less powerful states. In this traditional perspective, the third accountability problem of international organisations is the 'runaway' or '*Zauberlehrling*'-phenomenon, i.e. the danger that an organisation escapes control by the member states and acquires too much institutional and bureaucratic autonomy. This can happen on account of 'mission creep' (dynamic expansion of competencies) and/or too long chains of responsibility. A slightly different problem is that of capture (e.g. the World Bank by the 'global capital'), which also distances the organisation from its rightful 'shareholders'.

A deeper problem exists, at least in the eyes of cosmopolitan critics. These critics emphasize that the ultimate accountability forum for international organisations should be the (global) citizens, not states. The traditional argument that citizens are represented by their nation states, and should therefore be entirely 'mediated' by their states in the international arena, is – in the eyes of cosmopolists – flawed on two grounds. First, the lines of accountability to the citizens are too long and indirect to allow for effective accountability. Second, many member states of international organisations are not democratic, and can therefore not rightfully claim to act for their citizens. In Chapter 8, Steven Wheatley points out that in fact most international organisations have introduced informal mechanisms to engage (to some extent) with external actors, including international civil society organisations and those potentially affected by their policy decisions. Accessible websites are the clearest manifestation of this.

Besides the problem of the proper accountability forum for international organisations, other accountability aspects deserve examination. An academic report of the International Law Association (ILA) recommended the following rules and practices to secure what it called the 'first level' of accountability of international organisations: Transparency, participatory decision-making process, access to information, a well-functioning international civil service, sound financial management, reporting and evaluation. These principles are at the same time principles of good governance. Additionally, the ILA-report highlighted the principle of good faith, constitutionality and institutional balance, supervision and control, the principle of stating the reason for a particular course of action, procedural regularity, objectivity and impartiality, and due diligence.⁹⁷ It is noteworthy that these recommendations correspond to the more general requirements of accountability applicable to all actors, as identified above (part 5.1). As already mentioned, some empirical research has investigated to what extent selected international organisations fulfil these requirements. Contrary to popular opinion, international organisations are relatively transparent, in particular when compared to TNCs and NGOs.⁹⁸ Good information disclosure policies appear to be related to the amount of external pressure that has been applied to an organisation. The World Bank and WTO for example have been targeted by protesters and have consequently produced useful information disclosure statements.

This finding is a good reason for demanding further formalization of NGO participation, and for the integration of national parliaments into the standard-setting activities of international organisations as a means for strengthening their accountability.⁹⁹ However, increasing NGO-participation in international institutions also causes opportunity costs. Unless the value of outreach, inclusiveness,

⁹⁷ ILA 2004, *Accountability of International Organisations*, Final Report, Part One, Berlin.

⁹⁸ Kovach, Nelligan, and Burall, *Power without Accountability*, at 31-32 on the basis of a case study of selected international organisations.

⁹⁹ Rebasti, 'Beyond Consultative Status', 69-70.

and participation exceeds these costs, global governance would be weakened, not strengthened.¹⁰⁰ It is therefore indispensable that the participation modes become more focused, streamlined, and eventually selective.

5.6 Specific accountability problems of NGOs

NGOs are legally accountable to their 'chartering' governments, and also reputational and financial accountability for NGOs exists. As they operate in a market for donors and depend on private funders, they could not exist without social acceptance, anyway. However, especially financial accountability as a source of legitimacy is ambiguous. It plays for NGOs which advocate 'sexy' issues, or those which attract potent, notably industrial donors, and these are not necessarily the most urgent ones.

Only to a limited extent, NGOs satisfy the cross-cutting principles of transparency, participation, evaluation, and complaint and response. They are thus only weakly accountable along those lines. Especially NGO transparency is often restricted in important areas. As a group, they provide less information about their activities than international organisations and TNCs.¹⁰¹ Notably the beneficiaries are rarely informed about how the money is spent.

As far as the accountability forum is concerned, many NGOs have a too broad and undefined constituency, which precludes accountability vis-à-vis that constituency. For instance, many NGOs make broad claims to speak on behalf of 'the oppressed', 'the excluded', or 'youth and nature'. These NGOs cannot refer back to their 'constituency' for guidance. The beneficiaries cannot agree or disagree with certain actions or language on behalf of them. Even more importantly, there is no clear way to resolve differences in views between two NGOs that each claim to 'represent' an equally broad constituency.¹⁰²

Self-policing is not well developed with NGOs. It seems most advanced for humanitarian NGOs, which had to face criticism of their response to the Rwandan genocide. They developed several mechanisms of accountability: a code of conduct, a humanitarian charter, a set of technical standards, and a 'quasi-ombudsman' called the Humanitarian Accountability Project (HAP), a learning network for sharing the lessons learnt from humanitarian operations, and other mechanisms.¹⁰³

Specific guidance for NGO-accountability can be gathered from the influential ECOSOC resolution of 1996,¹⁰⁴ and from the more recent principles and rules of the Council of Europe.¹⁰⁵ The ECOSOC states as one principle to be applied in the establishment of consultative relations that the accredited NGOs shall have 'a representative structure and possess appropriate mechanisms of accountability to its members, who shall exercise effective control over its policies and actions through the exercise of voting rights or other appropriate democratic and transparent decision-making processes.'¹⁰⁶ In reality, however, many NGOs are accredited which do not confirm to this principle.

The Council of Europe's principles state that NGOs 'structures for management and decision-making should be sensitive to the different interests of members, users, beneficiaries, boards, supervisory authorities, staff and founders'.¹⁰⁷ The Principles also contain provisions on 'transparency and accountability', which hold that NGOs should generally have their accounts audited by an institution or person independent of their management.¹⁰⁸ According to the explanatory report to those fundamental principles, it is 'good practice' to submit an annual report on accounts and activities.¹⁰⁹

However, many formal accountability requirements create additional costs for NGOs, which disproportionately burden NGOs from the global south. This fact is all the more important as the

¹⁰⁰ Cf. Cardoso Report (above note 67), para. 25.

¹⁰¹ Kovach, Nelligan and Burall, *Power without Accountability?*, at 33.

¹⁰² Krut, *Globalization and Civil Society*, at 25.

¹⁰³ Further references in Slim, 'By what Authority?'

¹⁰⁴ UN ECOSOC 1996, *Consultative Relationship* (above note 53).

¹⁰⁵ CoE, *Fundamental Principles on the Status of Non-governmental Organisations in Europe and Explanatory Memorandum* (November 2002).

¹⁰⁶ UN ECOSOC 1996, *Consultative Relationship* (above note 53), para. 12.

¹⁰⁷ CoE 2002, *Fundamental Principles* (above note 58), para. 46.

¹⁰⁸ *Ibid.*, paras 60-65.

¹⁰⁹ CoE 2002, *Fundamental Principles, Explanatory Memorandum* (above note 58), paras. 66-68.

underrepresentation of the southern NGOs is currently one of the main legitimacy problems of NGO-involvement in global governance. So here the different factors of legitimacy must be balanced.

5.7 Specific accountability problems of TNCs

As already mentioned, firms now generally assume a (limited) accountability vis-à-vis external stakeholders. This extension of the accountability forum is justified, because firms have become political actors. In times of liberalization and privatization, they often perform functions which have previously been considered as 'public'. Their business activity touches upon the interests and rights not only of employees, but also of consumers, tax-payers, contractors, and of other groups affected by business operations. However, the extension so far remains an abstract matter of principle. The precise degree and form of accountability vis-à-vis those broader groups of stakeholders depends entirely on the national laws and practices, and varies from company to company. Global accountability standards in this regard are only in *statu nascendi*. Thus, the OECD Principles of Corporate Governance of 2004 ask for 'disclosure and transparency'.¹¹⁰ They also mention stakeholders (without defining them), and notably employee participation, but refer back to the 'laws and practices of corporate governance systems'.¹¹¹

So the main accountability mechanism for industry comes down to the threat of governmental regulation. Problems therefore rather result from a lack of governmental regulation than from the irresponsibility of TNCs.¹¹² This is serious with regard to those global TNCs operating in weak or failing states. It also creates an accountability deficit for those companies which operate transnationally and which can therefore relatively easily escape national regulation.

Due to the weaker legal accountability of firms acting on the global level, market and reputational accountability becomes all the more important. But reputational accountability seems to hold well mainly for firms which depend on brand name products. It is doubtful whether consumption choices really function as 'purchase votes' and effective sanction. A limiting factor is that the people who are most directly negatively affected by the activities of a TNC are often not the same people who are able to exert their consumer power. Moreover, boycotts require considerable consumer awareness and presuppose a real choice of products.¹¹³

Business has, in collaboration with international organisations and NGOs, made important progress towards accountability through self-policing. For instance, the Global Reporting Initiative (GRI), founded in 1997, is a multistakeholder initiative which seeks to provide a framework, i.e. the 'Sustainability Reporting Guidelines' for sustainability reporting, which that can be used by business any size, sector, or location.¹¹⁴ At the World Economic Forum of 2003, representatives of the most important global TNCs adopted a Framework for Action in which they called on business leaders to 'develop a graduated program for external reporting.'¹¹⁵

Also, the Global Compact,¹¹⁶ initially conceived by UN Secretary General as a learning platform for global business, has matured into a rudimentary accountability regime for TNCs.¹¹⁷ Since 2003, firms participating in the Global Compact are expected to demonstrate their commitment to the Global Compact by 'Communications on Progress' in which the outcomes are measured using as much as possible indicators such as the GRI guidelines.¹¹⁸ A more formalised complaint procedure for handling complaints on 'systematic or egregious abuse of the Global Compact's overall aims and principles'

¹¹⁰ OECD 2004, *OECD Principles of Corporate Governance*, Principle V. See in scholarship on transparency and disclosure as a crucial strategy to enhance TNC accountability Backer, 'From Moral Obligation to International Law'.

¹¹¹ *OECD Principles* (above note 110), Principle IV with annotation at 47.

¹¹² Haufler, *A Public Role*, 119.

¹¹³ Kovach, Nelligan and Bural, *Power without Accountability?*, 15-16.

¹¹⁴ <http://www.globalreporting.org>. See also the ICC's 'Business Charter for Sustainable Development'.

¹¹⁵ World Economic Forum, *Global Corporate Citizenship: The Leadership Challenge for CDEOs and Boards* (2003), Part II: A Framework for Action, Principle 4 (Transparency).

¹¹⁶ <http://www.globalcompact.org>.

¹¹⁷ Nowrot, 'The New Governance Structure'.

¹¹⁸ UN GC, *Policy for 'Communications on Progress'*, as of 13 March 2008.

was introduced in 2005.¹¹⁹ Another example are the ‘Equator Principles’, a financial industry benchmark for determining, assessing and managing social and environmental risk in project financing, adopted by financial institutions in 2006. One of the principles concerns consultation and dialogue. The banks that have committed themselves to the Equator principles pledge not to provide loans to projects where the borrower, the respective government, has not ‘consulted with affected communities in a structured and culturally appropriate way’.¹²⁰

Specific accountability issues may arise for public-private partnerships. Dan Assaf (Chapter 3) argues that public-private partnerships in the protection of critical information infrastructure (CII) seriously lack accountability. Accountability is, according to Assaf, directly related to the degree of similarity of objectives and goals among the partners in a PPP. However, in the CII sector, the objectives typically diverge because of certain underlying characteristics of that sector. Because most of the CII is entirely owned by the private sector (telecommunication, cyber technology, etc.), the principal objective for the public sector to enter into a PPP with the private sector is to obtain and share information with the owners of the CII, information which it could otherwise not lay its hands on. However, sharing information with the public sector and, especially, with other private partners in the PPP may often involve revealing critical trade secrets and other privileged company information. Consequently, the private sector shies away from this particular objective of the PPP arrangement and its interests are thus directly opposite to those of the public sector in this particular PPP. Even legal measures to encourage the private sector to share more information (by excluding information shared in the CII PPPs from the Freedom of Information Act in the US) did not resolve this problem.

To conclude this section, the accountability of non-state actors in standard-setting is problematic not only on a technical level, but raises deep questions of the proper structure of global governance.

6. The public and the private

The distinction of public and private and the way how this dichotomy is linked to the state has informed Western political practice since antiquity. It has also been a key issue for the academic analysis of society, politics and law. But what the contributions to this book show is that it is increasingly difficult to assign actors to either side – except when one reduces their respective positions exclusively to their official institutional affiliations. In ongoing practices of standard-setting, though, one may easily rely on false assumptions if one looks exclusively at institutional affinities. The findings thus question the grand dichotomies that stand behind the state versus non-state distinction, in particular the public – private divide. What we witness is that there are more and more actors whose agendas are neither determined by public nor by private ties and obligations; they follow mixed agendas. This is sometimes and very broadly attributed to the growing interconnectedness of actors in a globalizing world where processes of standard-setting are no longer dominated by states and their agencies.¹²¹

¹¹⁹ See the ‘Note on Integrity Measures’ of 29 June 2005. Despite apparent quasi-judicial features of the complaint mechanism (e.g. the complaint will be forwarded to the participating company concerned, requesting written comments), the Global Compact Office stresses that it ‘will not involve itself in any way in claims of a legal nature’. The office may, in its sole discretion, offer good offices, ask the regional office to assist with the resolution of the complaint, refer the complaint to one of the UN entities guarding the Global Compact principles, and reserves the right to remove the incriminated company from the list of participants in the Global Compact. (Attachment 1 to the report by the Global Compact Office ‘The Global Compact’s Next Phase’ of 6th Sept. 2005, part 4).

¹²⁰ *Equator Principles*, Principle 5: ‘Consultation and Disclosure’. The principle also states that for projects with significant adverse impact on affected communities, that consultation must ‘ensure their free, prior and informed consultation and facilitate their informed participation, as a means to establish, to the satisfaction of the [borrowing financial institution], whether a project has been adequately incorporated affected communities’ concerns.’. <http://www.equator-principles.com>.

¹²¹ A theorist who argues that processes of globalisation will inevitably lead to such a new political order is Martin Albrow (Albrow, *The Global Age*, in particular Chapter 8).

6.1 *Is public versus private an appropriate descriptive category?*

Most of the case-studies in this book have confirmed the hypothesis that fundamental transformations in global governance have enhanced the significance of the private sphere in the creation and enforcement of standards which regulate behaviour in more than one state.¹²² They also make clear that standard-setting is no longer organized along the lines of state versus non-state actors. The formation of standards and norms takes place in spheres where the state and its institutions and representatives are dominant, but there are more and more spheres where other actors dominate. This is obvious when one looks at countries and regions outside the Western world, as the examples from Africa in this book show. Dieter Neubert (Chapter 2) describes how new social actors emerged in the colonial and post-colonial history of the continent, and he analyses their growing significance in the negotiation of standards. In particular the many international, national and local NGOs have an influence on such processes that can hardly be overestimated. This shift in processes of standard-setting is a general tendency that might be less obvious in highly developed Western democracies but nonetheless points at a worldwide change in how societies maintain a social and normative order and how they relate to other societies and to international institutions such as the UN and its bodies.

From a general conceptual point of view, this book's chapters all point at a similar set of questions: What is the future of standard-setting, if public institutions and in particular the state will no longer be the dominant actors in the making of standards? And, from a more theoretical point of view: Is the usual distinction between public and private still useful as an analytic category when the actors participating in processes of standard-setting do not maintain that distinction? The dichotomy might well be misleading if one looks, for instance, at how Eva Kocher (Chapter 15) and Egle Svilpaite (Chapter 16) describe and analyze the relation of private business to the public sector as highly ambivalent, expecting regulation from the state and simultaneously distrusting it because of its apparent difficulties to cope with local practices. In addition, many 'private' actors such as the already mentioned NGOs and at times even companies claim that they act more in the 'public' interest than the state. The state, however, is sometimes seized by private stakeholders and represents their particular interests.¹²³ Many African countries could serve as an illustration of such a privatization of the state, and Myanmar, where the state has become the booty of the military, would also be a case in point.

This debate is informed by inherent, but often hidden understandings of public and private as a basic dichotomy in Western thought. For the purpose of our inquiries, we will reduce the many existing and often competing notions of the 'public' and the 'private' to only two models. Model I is based on the assumption that the state as a centralized, unified and potent institution represents the public interest and thus is the only sphere that can legitimately claim to be a public actor. This model in the end goes back to the early modern notion of sovereignty, where the 'public' power of a (more or less) legitimate institution rules over 'private' individuals and associations. This understanding of public and private is also at the root of the modern notion of the state as already implicitly conceived in the Peace Treaties of Westphalia from 1648. Private actors are thus all actors – be they corporate or individual – that do not engage in such processes of standard-setting on behalf of the state as the only possible public institution. All other institutions, for instance NGOs, by definition remain private institutions that cannot and do not pursue public interests. This understanding also informs our modern conception of state administration as public and the market economy as private.

Model II, the other model, is based on the accessibility to ongoing processes of societal self-determination and thereby to processes of standard-setting. This model assumes that it is the right of all competent members of society to participate as citizens in such processes. Societal (including legal) norms and standards are thus the outcome of participatory engagement that is both independent of the state and of the private as opposite to the state. The public realm in this sense is embedded in another sphere – the public sphere where the state is an actor among others that then would belong to civil society. The public sphere is thus distinct from the state, and precisely because of its independence it guarantees the accessibility to processes of standard-setting. It is only with such an understanding of

¹²² See Cutler, *Private Power and Global Authority*, at 1 for commercial law.

¹²³ A well known metaphor for the privatisation of the state is 'the politics of the belly', coined by Jean-François Bayart in his landmark publication 'The State in Africa' (Bayart, *The State in Africa*). Another metaphor is the 'criminalization of the state' as analyzed by Bayart and others (Bayart, Ellis and Hibou, *The Criminalization*).

the public that some actors, as for instance international human rights NGOs, can claim to act on behalf of the public interest.

Both models embrace different notions of the political community. While in model I, the state is the dominant if not the only political community, model II takes it that a political community grows out of a participatory process and has no clear cut boundaries. While in the first model, standards are mainly set by legitimate representatives within the realm of the state, the second adopts another much more fluent view. Social norms and standards are negotiated and at times sanctioned in the public sphere. There is another difference between the two models. The first, sovereignty-focused model distinguishes unambiguously between the rulers and the ruled, while the second model sees processes of societal self-determination, including political decision making and the setting of social norms and standards, much more as open to anyone who wants to engage in what can be called political action. There is no clear cut distinction between those who rule and those who are ruled, as both can and sometimes have to adopt varying positions in such processes. However, the chances of participatory engagement are almost always unevenly distributed among the possible actors – which does not necessarily mean that the state again comes in as the dominant actor. It depends on the situation that frames the actions and may lead to novel practices of negotiating norms and standards, as the contribution of Michael Miklaucic (Chapter 7) shows. There are situations where the state re-emerges as the dominant actor in processes of standard-setting, while it may remain marginal in other situations – in particular when other, non-state actors have proven to be more efficient. Steven Wheatley (Chapter 8) illustrates this in his analysis of examples from history and today's globalizing world.

The question that arises from this discussion is: Have the situations in which norms and standards are usually debated and generated changed? And how and to what degree has this affected the chances of state and non-state actors to engage in such processes? To answer these questions, one needs to look closer at where the actors have their social background and from where they claim their legitimacy. In Chapter 17, Ulrike Wanitzek analyses how local, national and international standards of child fosterage interact. What is striking in this context is that local norms of kinship relations directly relate to practices that are, on one hand, subject to regulations by the national laws of Tanzania and, on the other hand, by that of other nations. The link is often the migration of kin to distant, mostly European countries. What has changed is the degree of interrelatedness or, as theorists of globalization tend to put it, the 'flows' that link actors with different normative backgrounds. It raises the awareness for the specificities of one's own society and thus leads into a highly ambivalent situation: The more the actors know about others' standards, the more they become aware of their own – and, in situations of questioned identity, stick to them. This interplay of local, regional, and global levels has been termed as 'glocalisation' by Roland Robertson and later by many other theorists of globalisation.¹²⁴ The growing interrelatedness of actors at local, regional and global levels is, however, not a new phenomenon, and its conceptualization as glocalisation can hardly claim to be highly original. But it is useful since most of us still think in terms of different spatial levels of societal integration.

Ulrike Wanitzek's example has immediate relevance for individual actors. But as a conceptual pattern that leads empirical enquiries, the opposition of local versus global is as slippery as public versus private. The question where to situate an actor, i.e. more on the global or more on the local side, will always remain a question of how to weigh background, means and ends. Is it safe to say that a NGO is local because it only operates in a particular city in a particular country when it refers to international standards of human rights or when its funds come from elsewhere? Again, the distinction of local versus global is based on a preconception of how actors relate to a specific background, to each other, and how this affects the processes of negotiation of social norms and standards.

If one takes a spatial differentiation of social and cultural affiliation as an appropriate conceptualization of today's world, it would be a truism to claim that situations in which norms and standards are produced and shaped have changed – since there simply is more need for regulation. But the growing significance of non-state actors in such processes is only indirectly linked to processes of globalisation. It is more linked to the fact that the growing interconnectedness brings more actors together that have a different understanding of public and private. The different understandings of public and private become more apparent in processes of globalisation, but they are not caused by it. This takes us back to the former argument. The blurring of the public and the private, as it is often

¹²⁴ Robertson, *Globalization*, 173 et seq.

called, is a challenge to our theoretical conceptualization of processes of standard-setting and how we translate it into empirical enquiry.

6.2 Why do we continue to use the distinction of public versus private?

If the distinction of public and private is already conceptually blurred, the more it is when it comes to analysis of real situations on the ground. Let us look at one such situation. Many NGOs arguing for 'universal human rights' standards aim at the implementation and respect of these human rights in a particular place belonging to a particular country, say in some outlying province in a state that is hardly capable of controlling this place and that enjoys only limited legitimacy among its own population out there. First, violations of human rights may be committed by the state and its administration, even if the state's administration is disintegrating rapidly. But frequently, they are also committed by private actors, although these are not formally bound by human rights conventions which directly bind only the contracting states. In addition, TNCs based outside this particular country may also play an important part since they are likely to replace the state's fading monopoly of violence by private military companies that they again may hire locally or somewhere else (Lindsey Cameron (Chapter 5)). The situation is becoming increasingly complex with the number of actors present in the place.

At first sight and according to model I, the international NGOs would be private actors because they are clearly and overtly acting against the state to which the province belongs if they monitor violations that are committed by the local administration. The administration would then be the public arena where such violations should be persecuted – even if the judiciary system is not working properly. Of course, the NGOs will then argue that the state in this country does not represent the public interest at all because it has been appropriated by a small and privileged group of people who privatized the state and who have no legitimacy to talk for the population. They would thus base their argument on the second model of the public sphere. The understanding of who is a private and a public actor differs enormously.

However, one might argue that at least the understanding of who is a state and who is a non-state actor will be coherent and easy to cope with. But again, the situation may soon look much more complicated than at first sight. The state in whose province the violations take place may see the activities of the NGOs as an outsider's intervention and may redefine the NGOs' presence in terms of foreign domination – one that is in the end guided by the interest of another state, the US for instance. Let us then assume that TNCs (which are 'private' actors in model I) have agreed on human right standards under the umbrella of binding international legal norms and let us assume too, that these companies actually try to respect such standards. They would thus implement public standards – though as private actors. If then the local administration is still seen as the extension of a privatized state – one that is mainly based on neo-patrimonial reciprocal obligations between individuals within formally public institutions, it leads to a complete blurring of what is private and public and who is a state and a non-state actor. Simultaneously, one could claim that many of these non-state actors are also indebted to the public sphere, i.e. to the discussions and debates that shape the understanding of how a society should cope with its own future. In the end, because of the state as one of the primary spheres of political practice, the NGOs are also related to the state – or more precisely to several states. The interaction between TNCs and NGOs could also serve as an example: The NGOs may be based in a certain country but oblige the company to subscribe to the human right standards that these particular NGOs try to implement worldwide. Even if, say, the NGOs are not present in the country where the company operates, it would thus have an impact as a public actor – through a private company.

One may argue that this blurring is more a conceptual than a practical problem, but what is more important is that the distinction shifts as the actors apply it to a specific situation. In the end, it could be argued that all actors in such a field are more or less 'private' and thus non-state actors since it is virtually impossible to draw a clear line between the state and the private interests that its representatives may pursue. Again, the best known examples come from Africa, where the state was sometimes privatized by politicians as a source of private rents: 'Public' officials were acting on

private agendas, thus turning the state into a shadow of other interests.¹²⁵ In cases such as Mobutu's Zaire, the state and its institutions became a means for private economic and often illicit enterprises.¹²⁶ As a system, the shadow state was often imposed by politicians together with other non-state actors. Shadow states often maintain an official system of governance, law and 'public' institutions as a façade hiding the other, private agenda of those who are in power. Though states as the former Zaire and Sierra Leone seem to be extreme cases, the tendencies are more widespread than Western scholars usually assume.

But the challenge lies elsewhere, because the controversy leads into multifaceted arguments about how to analyze and judge the complex settings of state and statehood that led to the formulation of the concept. First, one needs to keep in mind that not all external actors labeled as 'private' according to model I are necessarily companies that have a straightforward profit making agenda. Many of them could be NGOs and international networks that seek to introduce and maintain certain standards of, say, education and public health.¹²⁷ They are 'public' actors according to model II and often follow agendas that they have discussed at the international level with other NGOs and with other states, and it is not rare that they coordinate their actions in a given country. Such networks actually may modify the ways a shadow state provides access to its territory and how it governs its resources, for instance by environmental standards demanded by the north. Simultaneously, the very same networks may undermine the ability of such states to enforce their own policies, be they hidden private agendas or not.

The point is that the same mode of interaction between the state and non-state actors can be conceptualized and evaluated according to different, opposing moral norms. If the influence comes from NGOs and other actors that follow international standards and agreements, we tend to see their influence as benevolent, coming from what we would then call 'global civil society'¹²⁸ – otherwise, we would perhaps talk of an erosion of statehood and finally conclude that the process has led to the formation of a shadow state. In other words: The evaluation is normative. It is again a judgment according to our Western understanding of state and statehood, describing other states as deficient if they are not adopting the same institutions, procedures, goals and moral norms as ours.

This apparent contradiction is informed by the two models outlined above and by the identification of the state with the public. Obviously, this dichotomy leads us into conceptual difficulties. So why, then, do we still think in terms of public versus private and state versus non-state? We believe the answer lies first in the moral normativity of what we have so far called the public sphere and in the undifferentiated character of the dichotomy itself.

The short answer to the first point is what anthropologists call 'culture'. We are living a culture of legitimate domination, i.e. we assume that a particular understanding of legitimate domination is valid for us and other actors and we expect such attitudes from our co-citizens and, more generally, from all contemporaries. And by doing so, many anthropologists would add, we are taking for granted what actually is a precarious achievement. We who are used to the idea that the state is or at least should be the privileged sphere where we, as citizens, make decisions that are meant to apply equally to everyone in the society will maintain a normative understanding of the state as long as it can claim legitimacy through, among other things, the representation of the will of the majority. If one looks at society *per se*, it does not matter much if the theory of the state is based on the notion of contract or on the supremacy of the state as an institution as long as it can successfully claim legitimacy. We extend our understanding to other states unless we have convincing evidence that these other states do not

¹²⁵ The concept of the shadow state was first introduced by William Reno in his seminal work on 'Corruption and State Politics in Sierra Leone' (Reno, *Corruption and State Politics*). Though developed with regard to West Africa, the concept also applies to many other regions, for instance to many successor states of the former Soviet Union in Central Asia and even to some southern parts of Italy. See, among others, Wolch, *The Shadow State*; Beissinger and Young (eds.), *Beyond State Crisis?*.

¹²⁶ See the more general introduction of Jean-François Bayart, Stephen Ellis and Béatrice Hibou to *The Criminalization of the State in Africa* (Bayart, Ellis and Hibou, *The Criminalization*, in particular 18-31). On Mobutu's Zaire, see Leslie, *Zaire*.

¹²⁷ In Africa, education and public health are often the two sectors that need public standards more than any other sector of governance. Compare Sutton and Arnove (eds.), *Civil Society or Shadow State?*, at 1.

¹²⁸ We are aware that the concept of civil society does not fit to all countries and states because it implies a shared understanding of the public sphere among all participating actors, which cannot be taken for granted. See with regard to Africa Comaroff and Comaroff, *Civil Society and the Political Imagination*. We will come back to this in a moment.

fulfill our own criteria of legitimacy and participation. All those are convictions that are deeply rooted in our culture.

But what does it mean then ‘to live a culture’? Is our understanding of state and non-state, of private and public simply rooted in culture? To some extent, we learn this understanding and the moral norms on which it is based when we are brought up. But that argument does not suffice to explain the continuity of such basic cultural convictions. We could acquire other convictions, which is precisely what many human rights organizations hope for when they engage in a country. The other argument is that, once a social order is established, it has a value of its own because it provides predictability in situations of uncertainty. But again, we would argue that this is not enough to explain the persistence of basic cultural convictions as the equation of state and public. There are other social and political orders that would also provide predictability – and the neo-patrimonial order of the shadow state in Africa does so, too. There is a need for another explanation – one that shows why it is useful for us to maintain the distinction of state versus non-state.

6.3 Is it useful to maintain the distinction of state versus non-state actors?

There are certainly situations where the distinction between state and non-state actors, regardless of which model informs the distinction, is not of great help to understand how actors relate their practices to each other. In particular when the agendas aim, on all sides, at the same and at times hidden interests and goals, it does not matter much if a particular actor belongs to the state as an institution or if he is, in western normative terms, a non-state, private actor. If, say, the actors all seek a dominant position in a security market – which is not unusual under conditions of precarious statehood –, their practices and interactions are often not significantly affected by their institutional backgrounds.¹²⁹ In such cases, it can be more useful to analyze the implicit understanding of the respective motives and intentions of the actors from a purely emic perspective, i.e. from their local point of view. This makes sense because social reality is made up of actors’ points of view, i.e. how they conceptualize and think about the situation that they have to cope with. The security standards that such actors may agree on often only cover a limited space, and they also may not last very long. In addition, they may remain questionable in the eyes of international actors who may also be present in the area and who follow their own, internationally recognized standards. But more often than not, such local security standards are the only reliable basis for further conflict transformation (see Till Förster (Chapter 12)).

Analyzing such processes of standard-setting mainly or even exclusively from the (local) actors’ points of view is a classical anthropological approach. As all anthropological approaches, it tries to avoid any normative understanding of what happens on the ground – which means that the analysis does not introduce a state versus non-state dichotomy if the actors do not think in such terms. Though such an approach is certainly appropriate for basic research, and we would insist that it is actually needed for such a purpose, it also has its limits.

First, there is the methodological question to what degree a non-local scholar – and in particular a scholar who, as almost all scholars, has gone through a Western type of education –, will be able to transcend his own conceptualizations of state versus non-state, of public versus private and other, related dichotomies. The answer that anthropology has for this question is clear and brief: no. Any scholarly analysis has to take the understanding of the scholar and also that of the audience that they address into account.¹³⁰ The latter are, so to say, the concepts into which the analysis has to translate the local understandings of such processes of standard-setting. In other words, it would not help very much to know about local concepts as long as we cannot relate them to our own understandings of such phenomena.

Beside this epistemological argument, there is another argument that is perhaps more important in the context of this book: it is about the presence of statehood in areas and social spaces where the state, as an institution, is more or less absent. To understand this apparently paradox situation, we have to go a

¹²⁹ William Reno has provided more than one account of such situations in his book on ‘Warlord Politics and African States’ (Reno, *Warlord Politics*). On the concept of security markets and its economic significance see Mehler, ‘Oligopolies of Violence’.

¹³⁰ This was the major topic of the so-called ‘Writing Culture Debate’ in the 1980s. See Clifford and Marcus (eds.), *Writing Culture*.

bit into the theory of state and statehood. Since Thomas Hobbes published his *Leviathan* in 1651, it is often claimed that a monopoly of force is a necessity for any social order because of the violent nature of man. But more so since Max Weber held his influential lecture at Munich University in the winter of 1918/19, immediately after the end of World War I, the modern, definition of the state as ‘...a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory’¹³¹ has become the standard understanding of the state in the social sciences.

If an institution that claims to be a state does not fulfill this one condition, we assume that it has ceased to be a state. Or we would rate states as states along this line, i.e. how successfully they claim a monopoly of force within their territories.¹³² Though it incorporated other factors, too, the debate of weak and failed states still privileges this aspect. Because of the lack of a monopoly of force, it is argued, a failed state is no longer able to perform basic functions such as education, security, public health, or governance.¹³³ Hence, such states are seen as deficient with regard to the modern state as we know and experience it from day to day.

However, if we focus more on the process of the formation of the state and on its flipside, the disintegration of the state, than on the conclusive outcome, we would have to look more deeply into how people interact to shape that entity of the state as an institution of society. This perspective introduces another understanding of state and statehood, one that differentiates, as Joel Migdal has written, between ‘(1) the image of a coherent, controlling organization in a territory ... , and (2) the actual practices of its multiple parts.’¹³⁴ Migdal explicitly speaks of an ‘image’ of the state as central organisation. He does so because an image provides an integrated character to what it depicts – or more precisely, to what it pretends to depict. In this case, Migdal writes, building on Edward Shils, it is persuasive because it invites the actors to see the state not as an amalgam of numerous institutions and practices but as an integrated, powerful and, perhaps more important than anything else, as an autonomous entity.¹³⁵ It means that actors may still have this image in mind when they act in precarious situations and even if they act in ways that contradict this image, as we will show later. Images are simultaneously figures of thought and representation. In addition, images may serve as residues of habitual memories because they maintain a certain constellation that helps the actors to reconstruct former experiences.¹³⁶ In other words: Even if the state as an institution is no longer what we, in our normative understanding, expect it to be, statehood may still exist. It is bound to practices that the actors often still engage in, though there is no institution that would force them to do so.

If we adopt this differentiation between the state as an imagined institution and statehood as the reinforcing and sometimes also contradictory practices that shape this institution, we still maintain the factual normativity of the state but also acknowledge the agency of non-state actors. It is this interaction that we need to address more deeply.

¹³¹ ‘Staat ist diejenige menschliche Gemeinschaft, welche innerhalb eines bestimmten Gebietes ... das *Monopol legitimer physischer Gewalt* für sich (mit Erfolg) beansprucht.’ Weber, ‘Politik als Beruf’, 506 (english transl. Gerth and Wright Mills, *From Max Weber*, 78). See for the concept of state in international law the Montevideo Convention on the Rights and Duties of States of 26 December 1933, 165 LNTS 25, Art. 1: ‘The state as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states.’ In scholarship Crawford, *The Creation of States* (statehood requiring a defined territory, permanent population, and effective government).

¹³² A well known example is the Failed States Index, first published by Foreign Policy in 2005. See also the critique by Peter Riedlberger, ‘Gescheiterte Staaten oder gescheiterte Statistik?’ Accessible online via <http://www.heise.de/>.

¹³³ The critique of the failed state concept is nearly as old as the concept itself. See for the original concept Rotberg (ed.), *When States Fail*, and for a recent discussion Chomsky, *Failed States*. The critique comes from several sides, see, among others, Bøås and Jennings, “‘Failed States’ and “‘State Failure’”. They argue that the label of ‘failed state’ is mainly applied to states that seem to be a threat to Western interests while other states that show a similar weakness in the execution of the monopoly of violence and a similar prevalence of informal, neo-patrimonial structures are still not classified as ‘failed’. For a similar assessment from another perspective see Hill ‘Beyond the Other?’.

¹³⁴ Migdal, *State in Society*, at 16.

¹³⁵ Shils, *Center and Periphery*.

¹³⁶ The debate on images and memory is complex and multi-faceted. Of particular help with regard to the imagination of the state as a societal institution is Paul Connerton (Connerton, *How Societies Remember*).

6.4 *Is there a conceptual alternative?*

Many social scientists see the current debate on state and non-state actors as standard setters as a conceptual challenge. Statehood may exist where the state is no longer present, and state actors may follow private agendas. But does this lead to another, novel formation of actors that does no longer follow the lines of state versus non-state?

Of course, one may refrain from any conceptualization and adopt a less theorized attitude by claiming that a thorough description of the actors and their respective agendas would do, too. Such a descriptive approach is certainly needed as a reliable basis for any further research, but it still calls for an appropriate theory – at least in the sense of a reflective stance on our own, scholarly enquiry. In fact, there are several theoretical attempts to cope with the complexity of the present blurring of the state – non-state divide. Probably one of the best known is Hannah Arendt's distinction of the public, the private, and the social.¹³⁷ She argued that, while societies in the past could afford to rely on a binary distinction of public and private, today's societies have to acknowledge the rise of a third sphere, that of the social. This third sphere, she argues, is composed of autonomous public spheres or domains (in the plural), where actors may best express their political ideas and aims. One may link the post-modern rise of the term 'civil society' to what Hannah Arendt already analyzed decades earlier. The more recent differentiation between an all embracing 'public sphere' and distinct 'publics' can also help to clarify this spectrum of interrelated actors.¹³⁸ In this model, the public sphere is still the overarching realm where all members of society are invited to have their say on issues that will apply to everyone in society. Ideally, this public sphere incorporates the state which will then cast the outcome of the debates on norms and standards into an appropriate legislation. Publics (in the plural), on the other hand, also crystallize around shared interests and norms, but unlike the former, they do not or cannot claim authority for the entire society.¹³⁹ Their basis is collective – that is also why they are not fully private –, but they address questions of limited relevance to the entire society. However, in the process of standard-setting, their answers to these questions may later become valid for all members of society, but then, they would need to pass through the public sphere.

We believe that such a tripartite conceptualization may serve as an appropriate conceptual tool for further investigations into the processes of standard-setting. It has the advantage of being overt to empirical questions as, for instance: To what degree are such publics open to new members? How do they negotiate the norms that they share? How do they introduce their norms into the public sphere? On the other hand, it still acknowledges the normative ideas that, in Western history, are associated with the state.

One remark, however, has to address the relationship of such publics to the state. It is clear that our shared understanding of how a state should be part of 'the public' is affected by 'the publics' and how they engage in the processes of standard-setting. But that also holds true the other way round: The engagement of non-state actors in processes of standard-setting transforms them, too. The more they relate to such processes, the more they will be subject to them. It is not only the state that is transforming itself through such processes, the other, non-state actors also do so and will increasingly act like state actors.

6.5 *Transnational law and global legal pluralism*

In a legal perspective, the diagnosis that non-state standard-setting erodes the public-private-split does not only relate to the two distinct branches of law, namely public and private law, which are both state-made law to a large extent. It also, and more importantly, points to the fact that private entities no longer only make contracts which bind the (private) parties, but enact (or participate in the making of) general rules which potentially bind third actors.

¹³⁷ Arendt, *The Human Condition*; in particular part III 'Action', and part IV 'The Vita Activa and the Modern Age'.

¹³⁸ See mainly Wolfe, 'Public and Private in Theory and Practice'.

¹³⁹ All kinds of voluntary associations such as self-help groups, social movements, unions, parties, religious communities, but also ethnic, linguistic and other groups who base their identities on cultural difference may constitute such publics.

Especially technical standards, including the financial standards as treated in this book by Peter Hägel (Chapter 13), are almost never either wholly public or wholly private.¹⁴⁰ The relevant standardization bodies are sometimes public agencies, some are private trade associations, and most are something in-between, locked together, and locked into the public sphere, by cooperation agreements, contract, membership in umbrella organisations, accreditation arrangements, and memoranda of understanding. Even where public authorities set product standards themselves, they have to rely on ‘private’ expertise. Conversely, even where standards are made by private bodies, they protect health and safety or other ‘public’ values.¹⁴¹ Finally, these ‘private’ standards deploy an extremely strong compliance pull, which resembles ‘public’ authority and enforceability.¹⁴²

The result of this intermingling is what we might call ‘transnational law’. This term was coined already in the 1950 by Philip Jessup ‘to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories’.¹⁴³ Transnational law, as we understand it in Jessup’s tradition, is not necessarily an ‘autonomous’ third legal order ‘beyond’ domestic and public international law, but is a mixture of private and public, of national and international, of hard and soft law, whose hybridity, complexity, and irregularity seems to be the adequate response to the regulatory demands of our time. A theoretical framework to situate and explain the possibility of transnational law, and of ‘interlegality’, as Boaventura de Sousa Santos calls it,¹⁴⁴ is global legal pluralism. Legal pluralism has been defined as a ‘a situation in which two or more legal systems coexist in the same social field.’¹⁴⁵ This concept implies that law does not consist solely in the coercive commands of a sovereign power, but is constructed constantly through the contest among various communities. Pluralism thus accepts the existence of law without hierarchy, and presupposes legal relationships in which competing normative claims or interpretations are not ‘killed off’.¹⁴⁶ Applied to the global sphere, legal pluralism assumes that the norms articulated by international, transnational, and epistemic communities are likewise ‘law’, because they influence both policy decisions and categories of thought over time.¹⁴⁷ In this perspective, non-state actors form such ‘law-generating communities’. Gunter Teubner has explained this phenomenon as a result of globalization in the language of systems theory as follows: The globalization of law has created ‘a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states.’ The new norms ‘claim worldwide validity independently of the law of the nation-states and in relative distance of the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation.’¹⁴⁸ Crucially, globalization has broken the ‘hierarchical frame of the national constitution which represents the historical unity of law and state’. The difference between a highly globalized economy and weakly globalized politics has pressed for ‘the emergence of a global law that has no legislation, no political constitution and no politically ordered hierarchy of norms which could keep the paradox of self-validation latent. This makes it necessary to rethink the traditional doctrine of sources of law. When the frame of rule hierarchy, with constitutionally legitimated political legislation at its top breaks under the pressures of globalization, then the new frame which replaces it can only be heterarchical. It decentres political law-making,

¹⁴⁰ See on financial standards Augsberg, *Rechtssetzung zwischen Staat und Gesellschaft*.

¹⁴¹ Schepel, *The Constitution of Private Governance*, at 4.

¹⁴² See Röthel, ‘Lex mercatoria’, at 759, on technical standards within the EU.

¹⁴³ Jessup, *Transnational Law*, at 2. See in recent scholarship Tietje and Nowrot, ‘Laying Conceptual Ghosts of the Past to Rest’. The authors highlight four structural features of transnational (economic) law: deterritorialization of regulation, vanishing distinction between legally binding ‘hard’ norms and rules that are in the strict sense non-legally binding, expansion of actors, and bottom-up norm formation.

¹⁴⁴ De Sousa Santos defines ‘interlegality’ as ‘the intersection of different legal orders’. ‘Interlegality is the phenomenological counterpart of legal pluralism, and a key concept in a postmodern conception of law.’ De Sousa Santos, *Toward a New Common Sense*, at 473.

¹⁴⁵ Merry, ‘Legal Pluralism’, at 870. See also Griffiths, ‘What is Legal Pluralism’, at 2, defining legal pluralism as ‘that state of affairs, for any social field, in which behaviour pursuant to more than one legal order occurs.’

¹⁴⁶ Berman, ‘A Pluralist Approach’, at 304.

¹⁴⁷ *Ibid.*, at 327.

¹⁴⁸ Teubner (ed.), *Global Law without a State*, at xiii.

moves it away from its privileged place at the top of the norm-hierarchy and puts it on an equal footing with other types of social law-making.¹⁴⁹

Global legal pluralism implies that a single public world order is not only not feasible, but not even desirable. The problem is of course that such a pluralism, and the broad concept of ‘law’ going with it, does not provide a yardstick for determining which norm should prevail in the event of conflicts. And it does not answer the question who should decide these conflicts.

7. Agenda for future research

Our research on non-state standard-setting has raised a host of follow-up questions of legal doctrine and policy. For instance: Do or should non-state standard setters enjoy international legal personality? Is their emerging right to participation in law-formation a functional equivalent to legal personality? What are the precise legal implications of the non-state actors legitimate expectation to have a ‘voice’ in the standard-setting processes? Is there a good-faith obligation for governments to duly take into account the input of NGOs? Are NGOs entitled to an answer? And what consequences can we draw for the structuring the consultation process in standard-setting? Which institutions should channel notably NGO-involvement in global standard-setting, and what should be the role of the United Nations or other international organisations in that regard? How can the accreditation procedures be depolitized?

Another set of legal questions relates to delegation. Is the delegation of standard-setting authority to non-state actors permissible? How tight would governmental control have to be in order to speak meaningfully of delegated, as opposed to autonomous, standard-setting? How far may such delegation go? Maybe only implementing or coordinating regulation, but not fully novel rule making can be delegated. Ultimately, non-state standard-setting raises the theoretical question of the nature and the functions of law in a differentiated and novel societal context.¹⁵⁰

On the empirical research agenda, equally interesting questions have emerged. On the one hand, it could be investigated under which conditions non-state standards are really pacemakers for subsequent ‘hard’ law. On the other hand, if the normative commitments of communities matter more than the formal status of these commitments, then empirical study is needed whether these statements are treated as binding in actual practice and by whom.¹⁵¹ As Till Förster’s contribution (Chapter 12) shows maybe most poignantly, the deeper understanding of how the social recognition of standards is generated goes far beyond a neat typology of sources of authority. Especially in societies of precarious or contested statehood – arguably large parts of the international community – the authority of private as well as public standards is informed by a web of culture and trust. Here, it is not merely the social desirability of regulation that influences the recognition and acceptance of such standards. Equally pertinently, social practices are shaped by the factual environment (levels of poverty, insecurity, vulnerability, violence, etc) and hence the practical relevance of standards. However, these processes are more often than not highly contextualised micro-processes; far richer empirical studies are needed to draw generalisable conclusions on the conditions that shape the normative commitment of communities. This is a question of high empirical validity, in that factors informing such recognition need to be pinpointed on all levels: the conditions informing the recognition of standards on an international level right down to the local level, as well as the conditions which allow relevant local standards to percolate up to the national level.

A further empirical question is whether the pluralisation of standard-setting actors and processes is continuing, or whether it has most recently started to revert, as Peter Hägel’s Chapter 13 suggests. Indeed, the question of reversibility has been addressed at an early stage in the literature on private standard-setting, discussing the conditions under which the reversibility of specific types of private

¹⁴⁹ Ibid., at xiii-xiv.

¹⁵⁰ See for an excellent doctrinal analysis in the context of German law Bachmann, *Grundlagen ziviler Regelsetzung*.

¹⁵¹ See in this sense also Berman, ‘A Pluralist Approach’, at 323.

authority is likely.¹⁵² Given that the pluralisation of actors as well as standards is shaped by globalisation processes and hence mirrors all its complexities, disjunctures and contradictions, the question of reversibility still provides a rich agenda for future research. Saliiently, it is context-specific whether this reversibility fosters or threatens social order and democratic accountability.

Another question arising from the contributions to this book is to what degree the internationalization of processes of standard-setting and the standards that they generate contributes to the emergence of a novel societal sphere that cross-cuts existing societies. Social scientists over the past two decades have sought to understand how individuals link to each other across national borders. Another question that arose from such studies is how individual actors relate to groups that cut across frontiers, both geographical and social. Participation in such groups means at least partially to subscribe to their social norms and standards – regardless of whether they are constituted by the ongoing interaction of the actors or if they already existed and are then adopted by one side or the other.

If one looks at the processes of standard-setting, two empirical questions arise: One focuses on the fact that the interaction as such brings actors from different geographical and social origins together and obliges them to respect the other's viewpoint, thus fostering the emergence of shared norms and standards. This process is often addressed in studies of globalization. In a somewhat affirmative attitude, it is often stated that such processes are characterized by the absence of a centre – actors from everywhere in the world can participate in such processes. At first sight, the observable facts seem to confirm the assumption that they all have equal opportunities to participate and to articulate their own ideas. No one who participates in such processes would then be able to dominate the others to an extent that would allow him to impose his own standards on the others. On the other hand, it is also obvious that such a conceptualization of the flows of ideas and the debates on their significance for the constitution of norms and standards ignores more or less the fact that there is often an uneven balance of power in global interactions, too. The empirical question thus can be stated very clearly: Under the conditions of a globalising world, to what degree is the constitution of norms and standards subject to differences of power of the stakeholders? In other words: To what extent can one side or the other actually impose his own normative ideas on others and then declare that they are generally valid? This is a question that suggests a deeper analysis of the political economy of processes of standard-setting.

The second question focuses more on the social side of processes of standard-setting. In social theory, it is assumed that a certain repertoire of basic assumptions, convictions and social norms is necessary to integrate individuals and groups into a society. If this is true – and there are good reasons for such an assumption –, it is possible to argue that the mere existence of processes of standard-setting that cross-cut local, national and international boundaries is in itself a major cause for the emergence of what is often called a transnational social space. In this perspective, agency is no longer on the actors' side. They are much more subject to the processes that are governed by structural forces. The latter may remain invisible to the actors, but that does not mean that they do not exist. In the end, this second strand of inquiry would address the question if, again under the conditions of a globalizing world, such processes of standards setting are informed by social agency at all or if they follow a systemic logic of economic forces.

A further pertinent empirical question is one addressed from different standpoints by Monica Blagescu and Robert Lloyd (Chapter 10) on the one hand, and Julia Black (Chapter 9) on the other, namely the question of how far accountability principles can be generalised across sectors and actors. Whereas the former authors postulate the desirability and indeed the democratic necessity of generalised standards, the latter points to the contradictory demands and constituencies that actors (in this case: regulatory bodies) can be faced with. In other words, a problem which is both undertheorised as well as empirically open is whether formalised and operationalised accountability mechanisms do indeed lead to increased transparency and public inclusion, or whether inversely the diverse constraints under which such actors operate make the effectiveness of organisational responses far more intractable and contingent. This is a tentative hypothesis which the conclusions of Lucy Koechlin and Richard Calland (Chapter 4) with regard to the EITI-process support, but which would deserve further scrutiny. The blurring of licit and illicit standards and actors has been well documented in our contributions. However, most of the examples and case studies focus on either clearly legal activities (such as environmental regulation) or clearly illegal activities (such as conducted by rebels and insurgents). In

¹⁵² For a systematic discussion see Hall and Biersteker (eds.), *The Emergence of Private Authority*, 213-217, in particular Table 7 at 218.

this context, an under-researched area is the phenomenon of illicit actors which are formally legitimised through their recognition by relevant state bodies. Michael Miklaucic (Chapter 7) attempts a typology of factors informing illicit actors, with the explicit objective of a more nuanced understanding of how to solicit their transformation from illicit actors to licit actors.

Other issues that need further exploration are the conditions under which sources of legitimacy can be shifted from the private to the public sphere and anchored in a democratic and accountable space. This research agenda extends from private international standards to standard-setting by illicit actors.

On a theoretical level, such processes raise questions with regard to state building and state formation. Can the legitimacy of illicit actors be transformed by 'whitewashing' them through political acceptance and institutional inclusion? And what effect does this have on the credibility and legitimacy of the state? And lastly, and for our purposes perhaps most pertinently, which standards are bolstered by this phenomenon – does it truly neutralise the illicit power of these private actors and strengthen the territorial control of the state; or is not the reverse more likely, namely the official anchoring of private illicit interests within the realm of the public sphere, which is hence subverted both in terms of public authority as well as legitimacy? We believe that only a thorough rethinking of social and political analysis can answer this question.

The processes of standard-setting examined in this book point at a well known but nonetheless lingering problem of social analysis, the interaction of micro and macro-perspectives. Some of the actors are, as the findings clearly demonstrate, acting at a very local level. Sometimes it is an ethnic group that does not count for more than a few percent of a country's population, sometimes a quarter of a city where local standards and social norms are sustained by a limited number of actors. On the other hand, there are states as the most important actors at the international level, and even truly global actors such as the WTO. Many of these actors are linked through standard-setting processes, and it is obvious that they may operate simultaneously at more than one level. An NGO trying to implement apparently universal standards of, say, accountability in a certain state or region nonetheless has to face the diverging local social norms on the ground. It then may adopt a language, often a local language – understood in a very wide sense of the term – which the other actors in the place will understand. But adopting another language may mean to adopt their ideas too, implicitly tolerating other standards. It appears to be a mere problem of political communication that has to be solved as the case arises. Even if only perceived as an ordinary problem of political communication, in the end it points at a structural predicament that arises in many processes of standard-setting of our time, the micro-macro dilemma.

Many of the actors thus have to cope with a problem which is also familiar to social scientists: The interaction of the micro and macro level is pointing at an emergent social context created through the already mentioned processes of globalisation. In other words: The whole of the ongoing interactions between the levels is more than the sum of individual encounters of actors. Every actor, regardless of state or non-state actor, needs to be understood in the context of the networks and obligations in which he is embedded, but that is not enough to address the novel social context that links the micro to the macro level through the agency of the actors.

From our perspective, the methodological challenge can be cast in two main questions: Can micro level analysis contribute to the understanding of macro processes of standard-setting and vice versa? And what does this mean from a disciplinary perspective? The disciplines present in this book all have their methodological focuses which allow them to look more closely at one or the other level. They also focus more on the types of actors which may be more relevant to the level they are analysing. These perspectives generate different methodological approaches and make use of different methods. Suffice it to compare Dieter Neubert's (Chapter 2) and Egle Svilpaite's (Chapter 16) contributions to realize how different the methodologies can be. But in the end, we, as scholars, will be obliged to bring these approaches together – or to develop a range of linked and integrated methodological approaches that will allow us move to move our understanding of standard-setting beyond the established dualism of macro versus micro. Of course, there are attempts from the various disciplines¹⁵³ but there is not enough interdisciplinary discussion on how to integrate them to cope

¹⁵³ In sociology, the work of Anthony Giddens and in particular his theory of structuration is probably the best known attempt to overcome the usual micro-macro bifurcation (Giddens, *The Constitution of Society*). In political science, Heinz Eulau has argued for an intensive study of what he calls micro-macro dilemmas (Eulau, *Micro-Macro Dilemmas*).

with the complexity of processes of standard-setting in the 21st century. So if there is one thing this study demonstrates, it is the need for continuing interdisciplinary dialogue and for new forms of interdisciplinary research on standard-setting.

References

- Albrow, M. 1997, *The Global Age: State and Society beyond Modernity*, Stanford University Press.
- Arendt, H. 1958, *The Human Condition*, University of Chicago Press.
- Augsberg, S. 2003, *Rechtssetzung zwischen Staat und Gesellschaft – Möglichkeiten differenzierter Steuerung des Kapitalmarkts*, Berlin, Duncker & Humblot.
- Bachmann, G. 2006, *Grundlagen ziviler Regelungsetzung*, Tübingen, Mohr Siebeck.
- Backer L. 2008, 'From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations', *Georgetown Journal of International Law*, vol. 39, 101-142.
- Barker, R. 2001, *Legitimizing Identities – The Self-Presentation of Rulers and Subjects*, Cambridge University Press.
- Bayart, J. F., Ellis, St. and Hibou, B. (eds.) 1999, *The Criminalization of the State in Africa*, Oxford, James Currey.
- Bayart, J.-F. 1993, *The State in Africa*, London, Longman.
- Beissinger, M. R. and Young, C. (eds.) 2002, *Beyond State Crisis? Post-Colonial Africa and Post-Soviet Eurasia in Comparative Perspective*, Washington D.C., Woodrow Wilson Center Press.
- Berman, P. 2007, 'A Pluralist Approach to International Law', *Yale Journal of International Law*, vol. 32, 301-329.
- Berman H. and Kaufman, C. 1978, 'The Law of International Commercial Transactions (Lex mercatoria)', *Harvard International Law Journal*, vol. 19, 221-278.
- Bøås, M. and Jennings, K. 2007, "'Failed States" and "State Failure": Threats or Opportunities?', *Globalizations*, vol. 4., no. 4, 475-485.
- Börzel, T. A. and Risse, T. 2005, 'Public-Private Partnerships: Effective and Legitimate Tools of International Governance?' in E. Grande and L.W. Pauly (eds.), *Complex Sovereignty: Reconstituting Political Authority in the 21st Century*, University of Toronto Press, 195-216.
- Bovens, M. 2007, 'Analysing and Assessing Accountability: A Conceptual Framework', *European Law Journal*, vol. 13, no. 4, 447-468.
- Boyle, A. and Chinkin, Ch. 2007, *The Making of International Law*, Oxford University Press.
- Charnovitz, S. 2006, 'Nongovernmental Organizations and International Law', *American Journal of International Law*, vol. 100, no. 2, 348-372.
- Chomsky, N. 2006, *Failed States: The Abuse of Power and the Assault on Democracy*, New York, Metropolitan Books.
- Clifford, J. and Marcus, G. (eds.) 1986, *Writing Culture: The Poetics and Politics of Ethnography*, Berkeley, University of California Press.
- Comaroff, J. and Comaroff, J. (eds.) 1999, *Civil Society and the Political Imagination in Africa*, Chicago University Press.
- Connerton, P. 1989, *How Societies Remember*, Cambridge University Press.
- Crane, A. and Matten, D. 2004, *Business Ethics – A European Perspective: Managing Corporate Citizenship and Sustainability in the Age of Globalization*, Oxford University Press.
- Crawford, J. 2006, *The Creation of States*, 2nd edn, Cambridge University Press 2006.
- Cutler, C. A. 2003, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, Cambridge University Press.
- De Frouville, O. 2008, 'Domesticating Civil Society at the UN' in P-M. Dupuy and L. Vierucci (eds.), *NGOs in International Law: Efficiency and Flexibility*, Northampton, E. Elgar Publ., 71-115.
- De Ly, F. 1992, *International Business Law and Lex Mercatoria*, Amsterdam, North Holland.
- De Sousa Santos, B. 1995, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition*, London, Routledge.
- Dingwerth, K. 2005, 'The Democratic Legitimacy of Public-Private Rule Making: What Can We Learn from the World Commission on Dams', *Global Governance*, vol. 11, 65-83.
- Eulau, H. 1996, *Micro-Macro Dilemmas in Political Science*, Normann, University of Oklahoma Press.

- Freeman, E. 1984, *Strategic Management: A Stakeholder Approach*, Boston, Pitman.
- Galgano, F. 2001, *Lex Mercatoria*, Bologna, Società editrice Il Mulino.
- Giddens, A. 1986, *The Constitution of Society: Outline of the Theory of Structuration*, Berkeley, University of California Press.
- Grant, R. and Keohane, R. 2005, 'Accountability and Abuses of Power in World Politics', *American Political Science Review*, vol. 99, 29-44.
- Griffiths, J. 1986, 'What is Legal Pluralism', *Journal of Legal Pluralism and Inofficial Law*, vol. 24, 1-50.
- Grote, R. and Marauhn, T. (eds.) 2006, *The Regulation of International Financial Markets: Perspectives for Reform*, Cambridge University Press.
- Hall, R. B. and Biersteker, T. J. (eds.) 2002, *The Emergence of Private Authority in Global Global Governance*, Cambridge University Press.
- Haufler, V. 2001, *A Public Role for the Private Sector: Industry Self-regulation in a Global Economy*, Washington D.C., Carnegie Endowment for International Peace.
- Hellman, J., Jones, G. and Kaufmann, D. 2000, 'Seize the State, Seize the Day: State Capture, Corruption, and Influence in Transition Economies', *World Bank Policy Research Working Paper* 2444, September 2000.
- Hill, J. 2005, 'Beyond the Other? A Post-Colonial Critique of the Failed State Thesis', *African Identities*, vol. 3, no. 2, 139-154.
- Jessup, Ph. C. 1956, *Transnational Law*, New Haven, Yale University Press.
- Kamminga, M. T. 2007, 'What Makes an NGO "Legitimate" in the Eyes of States?' in Vedder (ed.), 175-195.
- Knill, Ch. and Lehmkuhl, D. 2002, 'Private Actors and the State: Internationalization and Changing Patterns of Governance', *Governance*, vol. 15, 41-63.
- Kovach, H., Nelligan, C. and Burall, S. 2003, *Power without Accountability?*, London, One World Trust.
- Krisch, N. 2006, 'The Pluralism of Global Administrative Law', *European Journal of International Law*, vol. 17, 247-278.
- Krut, R. 1997, *Globalization and Civil Society: NGO Influence in International Decision-Making*, Geneva, United Nations Research Institute for Social Development.
- Leslie, W. J. 1993, *Zaire: Continuity and Political Change in an Oppressive State*, Boulder, Westview Press.
- Levit, J. 2005, 'A Bottom-Up Approach to International Law-Making: The Tale of Three Trade Finance Instruments', *Yale Journal of International Law*, vol. 30, 125-209.
- Lindblom, A.-K. 2005, *Non-Governmental Organisations in International Law*, Cambridge University Press.
- Lowe, V. 2004, 'Corporations as International Actors and International Lawmakers', *Italian Yearbook of International Law*, vol. 14, 23-38.
- Lukes, S. 1990, 'Perspectives on Authority' in J. Raz (ed.), *Authority*, Oxford, Basil Blackwell, 203-217.
- Lundblad, C. 2005, 'Some Legal Dimensions of Corporate Codes of Conduct' in R. Mullerat (ed.), *Corporate Social Responsibility: The Corporate Governance of the 21st Century*, The Hague, Kluwer Law International.
- Mattli, W. 2003, 'Public and Private Governance in Setting International Standards' in M. Kahler and D. A. Lake (eds.), *Governance in a Global Economy*, Princeton University Press.
- Mbembe, A. 2002, *On Private Indirect Government*, Dakar, CODESRIA.
- Mehler, A. 2004, 'Oligopolies of Violence in Africa South of the Sahara', *Nord-Süd Aktuell*, vol. 18, no. 3, 539-548.
- Merry, S. E. 1988, 'Legal Pluralism', *Law and Society Review*, vol. 22, 869-896.
- Migdal, J. S. 2001, *State in Society: Studying how States and Societies Transform and Constitute one Another*, Cambridge University Press.
- Muchlinski, P. 2007, *Multinational Enterprises and the Law*, 2nd edn, Oxford University Press.
- Nguyen Quoc, D., Daillier, P. and Pellet, A. 2002, *Droit international public*, Paris, L.G.D.J..
- Noortmann, M. 2004, 'Who Really Needs Art. 71?' in W. P. Heere (ed.), *From Government to Governance: The Growing Impact of Non-state Actors on the International and European Legal*

- System, Proceedings of the Sixth Hague Joint Conference held in The Hague, the Netherlands, 3-5 July 2003*, The Hague, T.M.C. Asser Press, 113-120.
- North, D. J. 1990, *Institutions, Institutional Change and Economic Performance*, New York, Cambridge University Press.
- Nowrot, K. 2005, 'The New Governance Structure of the Global Compact: Transforming a "Learning Network" into a Federalized and Parliamentarized Transnational Regulatory Regime', *Beiträge zum Transnationalen Wirtschaftsrecht*, vol. 47, 5-50.
- Nowrot, K. 2006, *Normative Ordnungsstruktur und private Wirkungsmacht: Konsequenzen der Beteiligung transnationaler Unternehmen an den Rechtssetzungsprozessen im internationalen Wirtschaftssystem*, Berlin, Berliner Wissenschaftsverlag.
- Oberthür, S. et al. 2002, *Participation of Non-Governmental Organisations in International Environmental Co-operation: Legal Basis and Practical Experience*, Berlin, Schmidt.
- Osman, F. 1992, *Les principes généraux de la lex mercatoria*, Paris, L.G.D.J.
- Ostrom, E. 1990, *Governing the Commons*, Cambridge University Press.
- The Oxford English Dictionary* 1989, prepared by Simpson and Weiner, 2nd edn, Oxford, Clarendon Press.
- Peters, B. G. 2005, 'Governance: A Garbage Can Perspective' in E. Grande and L. Pauly (eds.), *Complex Sovereignty: Reconstituting Political Authority in the Twenty-First Century*, University of Toronto Press, 68-92.
- Raz, J. 1990, 'Introduction' in J. Raz (ed.), *Authority*, Oxford, Basil Blackwell, 1-19.
- Rebasti, E. 2008, 'Beyond Consultative Status: Which Legal Framework for an Enhanced Interaction between NGOs and Intergovernmental Organizations?' in P.-M. Dupuy and L. Vierucci (eds.), *NGOs in International Law: Efficiency and Flexibility*, Northampton, E. Elgar Publ., 21-70.
- Reno, W. 1995, *Corruption and State Politics in Sierra Leone*, Cambridge University Press.
- Reno, W. 1998, *Warlord Politics and African States*, Boulder, Lynne Rienner.
- Robertson, R. 1992, *Globalization: Social Theory and Global Culture*, London, Sage.
- Röthel, A. 2007, 'Lex mercatoria, lex sportiva, lex technica', *Juristen-Zeitung*, vol. 62, 755-763.
- Rotberg, R. I. (ed.) 2004, *When States Fail: Causes and Consequences*, Princeton University Press.
- Scharpf, F. 1997, *Game Real Actors Play: Actor-Centered Institutionalism in Policy Research*, Boulder, Westview Press.
- Schumpeter, J. 1975 [1942], *History of Economic Analysis. Capitalism, Socialism and Democracy*, New York, Harper.
- Schepel, H. 2005, *The Constitution of Private Governance: Product Standards in the Regulation of Integrating Markets*, Oxford, Hart Publishing.
- Shils, E. 1975, *Center and Periphery: Essays in Macrosociology*, University of Chicago Press.
- Slim, H. 2002, 'By What Authority? The Legitimacy and Accountability of Non-Governmental Organisations', *The International Council on Human Rights Policy International Meeting on Global Trends and Human Rights – Before and After 11 September*, Geneva, January 2002 (available at <http://www.jha.ac/articles/a082.htm>).
- Stein, U. 1995, *Lex mercatoria – Realität und Theorie*, Frankfurt am Main, Vittorio Klostermann.
- Strange, S. 1987, 'The Persistent Myth of the Lost Hegemony' in R. Tooze and Ch. May (eds.) 2002, *Authority and Markets – Susan Strange's Writings on International Political Economy*, Basingstoke, Palgrave Macmillan, 121-140.
- Sutton, M. and Arnove, R. F. (eds.) 2004, *Civil Society or Shadow State? State/NGO Relations in Education*, Greenwich, Information Age Publishing.
- Teubner, G. (ed.) 1997, *Global Law without a State*, Aldershot etc., Dartmouth.
- Tietje, Ch. and Nowrot, K. 2006, 'Laying Conceptual Ghosts of the Past to Rest: The Rise of Philipp Jessup's "Transnational Law" in the Regulatory Governance of the International Economic System' in Ch. Tietje, G. Kraft and R. Sethe (eds.), *Beiträge zum Transnationalen Wirtschaftsrecht*, vol. 50, 17-43.
- Tietje, Ch., Brouder, A. and Nowrot, K. (eds.) 2006, *Philip Jessup's Transnational Law Revisited – on the Occasion of the 50th Anniversary of its Publication*, Halle/Saale, Universität Wittenberg, 17-43.
- Trotha, T. v. 2000, 'Die Zukunft liegt in Afrika. Vom Zerfall des Staates, von der Vorherrschaft der konzentrischen Ordnung und vom Aufstieg der Parastaatlichkeit', *Leviathan*, vol. 28, 253-279.
- Tully, S. 2007, *Corporations and International Law-Making*, Boston and Leiden, Martinus Nijhoff.

Weber, M. 1985 [1922], *Wirtschaft und Gesellschaft*, Tübingen, Mohr (engl. transl. Weber, M. 1976, *Economy and Society* (ed. by G. Roth and C. Wittich), New York, Bedminster Press 1968).

Weber, M. 1988, 'Politik als Beruf' in J. Winckelmann (ed.), *Gesammelte Politische Schriften*, 5th edn, Tübingen, Mohr, 505-561 (engl. transl. 'Politics as a Vocation' in H. H. Gerth and C. Wright Mills (transl. and ed. 1946), *From Max Weber: Essays in Sociology*, New York, Oxford University Press, 77-128).

Weise, P.-F. 1990, *Lex mercatoria, Materielles Recht vor der internationalen Handelsschiedsgerichtsbarkeit*, Frankfurt am Main, Lang.

Wolch, J. 1990, *The Shadow State: Government and Voluntary Sector in Transition*, New York, The Foundation Center.

Wolfe, A. 1997, 'Public and Private in Theory and Practice: Some Implications on an Uncertain Boundary' in J. Weintraub and K. Kumar (eds.), *Public and Private in Thought and Practice*, University of Chicago Press, 182-203.