

# International Humanitarian Law Without the State?

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## 1 Introduction

What would international law look like in a world without states – or with states being non-dominant? How would it be formed and who would be its protagonists? And would that world be a better place?

To think about international law without states might seem like a ludicrous idea. After all, inter-national is often interpreted to mean “inter-state”, and for many people, any law without the state seems impossible to think. However, the state has been around for only a few hundred years, and yet there have been norms between political communities – whether we call that international “law” or not – for much longer.

International law without the state could mean de facto anarchy and even perennial war. But it could also mean inter-communal law between communities that are not states, if we assume that people without states would spontaneously form political communities, albeit of a different nature. Or it could be mainly transnational law, formed between apolitical bodies, like corporations.<sup>1</sup> Or, perhaps, a bit of all of that.

As any international lawyer will know, international law is already past the traditional view of itself as a system composed exclusively of and for states, so in one sense the future is already here, to some extent. And, as a careful reading of history will tell us, in that sense it has always been here.<sup>2</sup>

International law contains rules on the relations between states (diplomatic relations, treaty-making, etc.), on the avoidance or tempering of conflict (allocation of territory and jurisdiction, prohibition of intervention, regulations on the use of force etc.), on common interests (the high seas and other areas outside sovereign territory, the environment, conflict prevention, etc.) as well as on supposedly common values (human rights). In this brief essay I will look into one particular aspect of international law, the regulation of the conduct of war (the law[s] of war, the law of armed conflict or international humanitarian law [IHL]), which is centered on the Geneva Conventions and their Additional Protocols. The regulation of inter-communal violence seems to be an issue that will always be of relevance, even beyond the state.

I do not claim that the possibilities of an IHL without the state is a litmus test

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1 It could, of course, also mean law in a supra-state with states being replaced by provinces, subjected to a higher, regional or even global law. However, that perspective has been fairly well explored, for instance in by the World Order Models Project (WOMP) and will not be dealt with here. For a history of WOMP and the World Policy Institute, see the historiography on the World Policy Institute’s web page “[worldpolicy.org/history](http://worldpolicy.org/history)” and Luis Cabrera’s interview of Richard Falk, posted on Falk’s blog “[richardfalk.wordpress.com/tag/world-order-models-project/](http://richardfalk.wordpress.com/tag/world-order-models-project/)”.

2 In state practice, various types of actors have been recognized as belligerent parties. See Paust, Jordan J, *Armed Opposition Groups*, in Noortmann, Math, Reinisch, August, and Ryngaert, Cedric (eds), *Non-state actors in international law*, Bloomsbury Publishing, London, 2015, p 273-292, at p 278, 289 and passim. Regarding action against the “barbary states” on the North African Coasts during the beginning of the 19th century, Neff makes a sharper distinction between states and pirates as criminals. Neff, Stephen C., *War and the law of nations: A general history*, Cambridge University Press, 2005, p. 247.

for whether international law in general without the state would be possible. On the one hand, in standard historiography, regulations of armed conflict regularly feature as early instances of international law,<sup>3</sup> which suggests that a law on warfare might be easier to achieve than some other forms of regulation, but on the other hand, IHL applies at times when a community's very existence may be at stake, which suggests that actors might be less willing to submit to such rules than to other rules. In fact, the choice of field is arbitrary and, admittedly, partly determined by my own current interests.

Nevertheless, there are some quite profound aspects of this legal field. As Jens Bartelson has pointed out, there is a double bind between conceptions of political authority and the right to go to war – they are mutually constitutive in just war theory and traditional international law. Under the traditional conception, it is the sovereign who has the right to use force, and the one who has the right to use force is sovereign.<sup>4</sup> Since the late Renaissance, both of those predicates have been attached to only one type of subject: the state.<sup>5</sup> As was stated in the most famous of all modern treatises on international law, “[t]o be war, the contention must be between States”.<sup>6</sup> Still today, even though it is generally held that non-state actors are bound by IHL during war, the resort to war (*jus ad bellum*) is covered by international law only if it can be attributed to a state or to an organization of states; the authority to (sometimes) use force remains essentially a state-monopoly. States – which basically are Western constructs -- are considered to be the typical belligerents, and IHL was drafted with states in mind. As Frédéric Megret avers, “the laws of war are a very specific response to a peculiarly Western problem. ... From the start, war is linked to the state.”<sup>7</sup>

However, this sovereignty-centered view of the authority to use force does not correspond to current realities on the ground. As Mary Kaldor has pointed out, current warfare is “a mixture of war, crime, and human rights violations” and distinctions like internal/external, public/private, civilian/military, combatants/civilians, legitimate/criminal are difficult to uphold.<sup>8</sup> Within social

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3 See, for example, Kolb, Robert, *The Protection of the Individual in Times of War and Peace*, in Bardo Fassbender, Anne Peters, Simone Peter (eds.), *The Oxford Handbook of the History of International Law*, Oxford University Press, 2012, p 317-337, at p. 321.

4 Bartelson, Jens, *Double binds: sovereignty and the just war tradition*, in Kalmo, Hent & Skinner, Quentin (eds.) *Sovereignty in fragments: the past, present and future of a contested concept*, Cambridge University Press 2010, p. 81-95.

5 See Schmitt, Carl, *Der Nomos der Erde im Völkerrecht des Jus Publicums Euopaeum*, 3 ed, Duncker & Humblot, Berlin, 1988, p. 123 et seq; Johnson, James Turner, *Just war tradition and the restraint of war: a moral and historical inquiry*, 1981, p 166 & 178.

6 Oppenheim, Lassa, *International Law, Vol II*, H.Lauterpacht, ed, 7 ed, Longmans Green, London, 1952, p. 203. see also Rousseau, Charles E. *Le droit des conflits armés*. Editions A. Pedone, Paris, 1983, p. 123 et seq.

7 Megret, Frédéric, *From “Savages” to “Unlawful Combatants”*: A post-colonial look at international humanitarian law's “other,” 2006, manuscript, p. 32.

8 Kaldor, Mary. *New and old wars: Organised violence in a global era*, John Wiley & Sons, 2013, p. 11 & 29. For an even more futuristic, and scarier, outlook, see Brooker, Paul, *Modern*

theory one speaks about a “new Middle Ages”,<sup>9</sup> in which our loyalties are divided between a variety of organizations and policymakers (then: the church, the emperor, the prince, the village community, the guild, the city etc; today: the EU, the state, the nation, the transnational company, the professional network, NGOs, religious authorities, etc.).

Even if the state is still the most powerful form of social organization and will surely be around for the foreseeable future, it would be interesting to draw out some trajectories from current trends to a world in which the state is no longer dominant. Could IHL exist? What would such a law look like, how would it be made and who would be the legitimate authorities that make and apply that law?

## 2 Is Humanitarian Law Without the State Possible?

In the third, fourth and fifth parts of this essay, I will ask what an IHL beyond the international society of states might look like, how it might be formed and, perhaps most importantly, what its actors might look like. Before engaging in such speculations – which, of course, can only be more or less informed guesses – I will ask the more basic question if IHL without the state is even conceivable. If there are historical and/or current examples of regulations of war applicable to non-state actors, that would corroborate my speculations.

### 2.1 Historical Examples

Even a very cursory historical review suggests that laws pertaining to war without the state as we know it are conceivable. The ancient laws of Manu from India, written about two millennia ago, contain provisions relating to warfare, including that one should not strike “one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight.”<sup>10</sup> This law assumed that society was politically organized, and the norms were directed at a responsible leader, but it was a society organized in ways much different from the current nation-state-centric system.<sup>11</sup> And there have been plenty of other examples of regulation of the conduct of war in circumstances markedly different from the modern state system.<sup>12</sup>

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*Stateless Warfare*, Palgrave Macmillan, 2010.

9 In international relations, this was discussed most famously by Hedley Bull in *The Anarchic Society* in 1977.

10 *The Laws of Manu*, (George Bühler, translator), verse 7:92. “m.t.hudsoncress.net/hudsoncress.org/html/library/india/TheLawsofManu.pdf”. See also Neff, Stephen C. *War and the law of nations: A general history*. Cambridge University Press, 2005, p. 21 & 23.

11 See also Jaakko Husa’s article in this volume.

12 See the examples and sources provided in Pictet, Jean Simon. *Development and principles of international humanitarian law: course given in July 1982 at the University of Strasbourg as part of the courses organized by the International Institute of Human Rights*. Vol. 2. Martinus

Even in the modern era, the monopoly of the state has not been absolute. From the formation of *jus gentium* (what we now think of as the early stages of international law) the prevailing doctrine was that the right to wage war was based on powers from the state.<sup>13</sup> Nevertheless there were still other actors who also made war, like trading companies (such as the East India Company),<sup>14</sup> brigands, barbary states and tribes.<sup>15</sup> For sure, these wars took place in a context in which there were state-made laws around, and at least one of the parties was a state or a state sponsored entity (like trading companies). However, it was still the case that the situation was not as neat as present images of the Westphalian international society of states suggest.

## 2.2 *Current Examples*

What is the situation today?

Current international humanitarian law already covers armed conflicts with non-state entities as well as conflicts between such entities (or armed groups as they are usually referred to).<sup>16</sup> This follows from Article 3 of the Geneva Conventions and several other conventions.<sup>17</sup> There is also plenty of practice of the UN Security Council, the UN General Assembly as well as the International Committee of the Red Cross (ICRC), which points in the same direction.<sup>18</sup> There are two thresholds involved: that the violence has a certain quality (“protracted violence”) and that the groups concerned are organized, which clearly necessitates a chain of command.<sup>19</sup> Therefore, in its major study of customary

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Nijhoff Publishers, 1985, p. 6 *et seq.*

13 *See*, for instance, Grewe, Wilhelm, *Epochen der Völkerrechtsgeschichte*, Nomos-Verlag, Baden-Baden, 1984, p. 246.

14 Grewe, note 13, p. 346.

15 For references, *see* Paust, note 2.

16 Henckaerts, Jean-Marie, Doswald-Beck, Louise and Alvermann, Carolin, *Customary international humanitarian law. Vol. 1*. Cambridge University Press, 2005., p. 299. But *see*, e.g., the practice cited in Tomuschat, Christian, *The Applicability of Human Rights Law to Insurgent Movements*, in Fischer, Horst, et al., *Crisis Management and Humanitarian Protection*, Berliner Wissenschafts-Verlag, Berlin, 2004, p. 299 footnote 1.

*See* further Henckaerts, p. 536. There are some examples of attribution of responsibility to armed opposition groups. For example, in a report on the situation of human rights in Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that the Sudanese People’s Liberation Army was responsible for the killing and abduction of civilians, looting and hostage-taking of relief workers committed by “local commanders from its own ranks”. Henckaerts, p. 536.

17 The Hague Convention for the Protection of Cultural Property and its Second Protocol and in Amended Protocol II to the Convention on Certain Conventional Weapons. *See* further Henckaerts et al, note 16, p 497.

18 Henckaerts, note 16, p. 498.

19 There is even some practice that indicates that armed opposition groups have to provide appropriate reparation for violations of international humanitarian law. For example, the

international humanitarian law, the ICRC concluded that “armed opposition groups must respect international humanitarian law.”<sup>20</sup>

Hence, non-state armed groups (NSAGs) are generally held to be bound under international humanitarian law. Since they are not states, they cannot become parties to the Geneva Conventions and their Protocols, but they may make unilateral commitments which confirm their being bound by IHL, and this has happened on many of occasions.<sup>21</sup> A considerable number of NSAGs have made commitments to the ICRC, and an NGO, Geneva Call, has drafted three ‘Deeds of Commitments’ on a Total Ban on Anti-Personnel Mines, on the Protection of Children from the Effects of Armed Conflicts and on the Prohibition of Sexual Violence in Situations of Armed Conflict and towards the Elimination of Gender Discrimination, respectively.<sup>22</sup> The Deed on Anti-Personnel Mines has been signed by forty-nine NSAGs, including groups from Burundi, Somalia, Sudan, Burma/Myanmar, North East India, the Philippines and Iraqi Kurdistan.<sup>23</sup>

Why would a NSAG adhere to IHL? According to Olivier Bangerter, there are several reasons: “morale of their own fighters, support of the people, effective use of military resources, weakening of the enemy, and impact on long-term victory. In their view, decisive advantages can be gained from showing genuine respect for IHL.”<sup>24</sup> Compliance will boost the self-image of the group<sup>25</sup> and there is also “the possibility of ‘scoring points’ by claiming that they are the ‘good guys’ and ... that the enemy are the ‘bad guys’.”<sup>26</sup> An example, provided by Stefanie Herr: When SPLM/A in 2001 signed the Deed of Commitment on Anti-Personnel Mines, this was “because they had a strong need for legitimacy” under the “shadow of future statehood” (which in 2011 came to be realized in

Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines, provides that “the Parties to the armed conflict shall adhere to and be bound by the generally accepted principles and standards of international // humanitarian law” and also provides for indemnification of the victims of violations of IHL. *See* Henckaerts, note 16, p. 549-550.

20 Henckaerts, note 16, 536. *See* also, on reparations, p. 549-550. “While it is the majority view that international human rights law only binds governments and not armed opposition groups,<sup>1</sup> it is accepted that international humanitarian law binds both.” Henckaerts, note 16, 299. But *see*, e.g., the practice cited in Tomuschat, note 16, p. 299 note 1.

21 Sassoli, Marco, *Transnational Armed Groups and International Humanitarian Law*, Program on Humanitarian Policy and Conflict Research, Harvard, Occasional Paper Series, 2006, 1-45.

22 Geneva Call, *Deed of Commitment*, “[genevacall.org/how-we-work/deed-of-commitment/](http://genevacall.org/how-we-work/deed-of-commitment/)”.

23 *See* Geneva Call, *Landmine ban*, “[genevacall.org/what-we-do/landmine-ban/](http://genevacall.org/what-we-do/landmine-ban/)” and Hofmann, C., *Engaging non-state armed groups in humanitarian action*, International Peacekeeping, vol 13, 2006, p. 396-409, at p. 403.

A further example: NSAGs have made public commitments to stop using children as soldiers, like RCD-Goma in the DRC, FARC, Tamil Tigers (LTTE), LURD in Liberia and SPLA in the Sudan. Hofmann, note 23, p. 396-409, at p. 404.

24 Bangerter, O., note 25, p. 361.

25 Bangerter, O., *Reasons why armed groups choose to respect international humanitarian law or not*, International Review of the Red Cross, vol. 93, 2011, p. 353-384, at p. 361.

26 Bangerter, O., note 25, p. 360.

South Sudan).<sup>27</sup> Bangerter finds that IHL has its “universal, customary, and ‘civilized’ character in its favour: all states have ratified the Geneva Conventions”, and this “endows IHL with considerable moral force.”<sup>28</sup> Nevertheless, as has been noted, the reasons of for NAGs to abide by IHL are diverse.<sup>29</sup> Since their rationals for respecting current IHL differs, one might also suspect that their views on the content of a future, stateless IHL would differ, as will be discussed in Section 3.

Further, far from all NSAGs attach importance to the protection of civilians<sup>30</sup> -- a fundamental tenet of IHL -- and they may also be guided by other codes. As Bangerter points out, “IHL is not the only body of law that governs warfare. ... Most societies, especially traditional societies, also establish their own limits for what is or is not permissible during war” which may or may not agree with IHL. For instance, Arab and other tribes who pillaged and enslaved in southern Sudan during the civil war in Sudan believed that such practices were normal. As a contrasting example, the Pashtunwali, an ethical code of the Pashtuns in Afghanistan and Pakistan, makes it obligatory to give shelter to and protect anyone who asks for it. Bangerter summarizes: “The codes to which I refer are never completely contrary to IHL but contain rules that are compatible with that law as well as provisions that are incompatible with it.”<sup>31</sup>

What is relevant to this essay is if there is any likelihood that non-state armed groups, in a world no longer dominated by states, might comply with IHL or with a future set of norms that might bear some resemblance to IHL. The brief review above suggests that that is not impossible. On the one hand, there is probably a least overlapping agreement between IHL and the morality of many of these groups, and perhaps it is also significant that a number of formal commitments to respect IHL were made not to states but to the ICRC and NGOs like Geneva Call.<sup>32</sup> On the other hand, IHL as a state-made artifact was a given factor in these situations, and the legitimacy awarded to groups that comply with IHL was seen as useful in particular in view of a future statehood or government. In a world where statehood is a less important asset, this compliance-pull will surely decline.

What about other types of armed actors, like criminal gangs? There are a number of examples of government military operations against criminal

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27 Herr, S., *Binding Non-State Armed Groups to International Humanitarian Law Lessons from Sudan*, PRIF Report No 95, Peace Research Institute Frankfurt Frankfurt a.M. 2010, II.

28 Bangerter, O., note 25, p.367.

29 Bangerter, O., note 25, p.384. In fact, "armed groups may allow practices that they have previously rejected if they think that their short-term survival is at stake." Bangerter, O., note 25, p.364.

30 Bangerter, O., note 25, p.384. In fact, "armed groups may allow practices that they have previously rejected if they think that their short-term survival is at stake." Bangerter, O., note 25, p.364.

31 Bangerter, note 25, p. 370.

32 Hofmann, C. note 23, p. 40.

organizations, like in El Salvador, Brazil and Mexico.<sup>33</sup> With reference to Rio de Janeiro, Peterke finds that many “residential areas are presumed to be in a state of 'war', i.e. subject to ... frequent fighting between the criminal associations, militias” or the State's security forces.”<sup>34</sup> Another author finds that the Mexican Drug War – or instances of it – constitutes a non-international armed conflict.<sup>35</sup>

It is a moot question whether battles or skirmishes between criminal gangs and military formations can ever amount to armed conflict in a legal sense. For that to be the case, it does not suffice that the fighting is of a certain intensity and character. It is also necessary that the gangs are organized in a sufficient manner. One author contends that “some of the most powerful armed gangs in these countries could potentially be considered ‘armed groups’ as understood in the context of IHL” and many of the gangs have a command structure and exercise control over territory, which enables “them to carry out sustained and concerted military operations”, that may trigger the application of Additional Protocol II to the Geneva Conventions.<sup>36</sup> By contrast, yet another author concludes that the concept of an 'organised armed group' does not fit criminal associations.<sup>37</sup> In the words of Keralis, drug cartels and other organized crime groups “are different from politically motivated armed groups in that they are purely profit-driven”. Since they are not interested in formal recognition, they have little incentive to comply with international humanitarian law. “Their end goal ... is illegal and inherently harmful, so officials cannot offer any concessions regarding their activities,”<sup>38</sup> and, as Peterke notes, they cannot “recognize the adversary as a partner of any kind of contract.”<sup>39</sup>

Nevertheless, there are certain instances of practice regarding humanitarian assistance, which indicate that some humanitarian norms may be possible, even in these conflicts. “The impartiality and the neutrality of humanitarian action” has been recognized in slums controlled by criminal gangs. For example, MSF ambulances have been allowed to enter violent areas in Guatemala City and Rio

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33 Gomez, J. C., *Twenty-First-Century Challenges: The Use of Military Forces to Combat Criminal Threats*, in Watkin, K., & Norris, A. J. (eds.), *Non-International Armed Conflict in the Twenty-first Century*, p. 279-291, at p. 284.

34 Peterke, S., *Urban Insurgency, “Drug War” and International Humanitarian Law: The Case of Rio de Janeiro*, 1 *Journal of International Humanitarian Legal Studies*, 2010, p. 165–187, at p. 168.

35 Bergal, C. (2010). *The Mexican Drug War: The Case for a Non-International Armed Conflict Classification*. *Fordham International Law Journal*, 34, 1042.

36 Lucchi, E., *Between war and peace: humanitarian assistance in violent urban settings*. *Disasters*, vol 34, p. 973-995, at p. 979.

37 Peterke, note 34, p. 184.

38 Keralis, *Drug cartels in Mexico*, *Forced Migration Review*, vol 37, 2011, p. 31.

39 Peterke, note 34, p. 183. Peterke also points out that in the negotiations leading to common article 3 of the 1949 Geneva Conventions some delegations feared – and objected to – the possibility that “armed conflict of a non-international character” might be construed to cover “plain banditry”. Peterke, note 34, p. 174.



de Janeiro.<sup>40</sup> Regardless of whether this would count as a proper application of IHL or not, it suggests that there are principles that might be recognized by such gangs, at least sometimes.

There is no need here to settle the issue whether criminal gangs can ever be considered parties to an armed conflict under present international humanitarian law, but may it suffice here to say that some such groups can certainly mount fairly large-scale operations, and that they sometimes (though far from frequently) may be convinced to respect at least some humanitarian norms, like the duty to allow humanitarian access.

Private military companies (PMCs) also have economic motives, albeit often legitimate and usually legal. They can be employed by governments for various types of services, including for combat operations, but they can also have corporate clients. The notorious South African company Executive Outcomes was engaged in civil wars in both Angola and Sierra Leone, nominally on the government side, but allegedly also to further the interests of diamond companies.<sup>41</sup> It is well established that PMCs are bound by IHL when engaged in armed conflict, either as adjuncts to government forces or as armed groups. However, there are few voices that think of them as having any representative or otherwise political legitimacy.

To sum up, some non-state actors with the capacity to mount military operations are clearly capable, and sometimes willing, to comply with international humanitarian law, while others are quite unlikely to do so. We will return to the differences between categories of non-state actors in section 5.

### 3 What Would Humanitarian Law Look Like?

The present IHL rules have a very high pedigree, the 1949 Geneva Conventions being the only universally ratified multilateral conventions. However, if the political and legal basis for these conventions would erode, as it would in a world no longer dominated by states, these norms might be challenged.

Perhaps the most basic norm in international humanitarian law today is the distinction between combatants and civilians, which provides that combatants are always legitimate targets (unless sick, wounded or surrendered), while civilians may never be targeted.<sup>42</sup> As a corollary, the targeting of civilians as

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40 Lucchi, note 36, p. 990.

41 Howe, H. M., *Private security forces and African stability: the case of Executive Outcomes* *Private security forces and African stability: the case of Executive Outcomes*, *The Journal of Modern African Studies*, vol. 36, 2000, pp. 307–331. See also Singer, P., *Corporate warriors: the rise of the privatized military industry and its ramifications for international security*, *International Security*, vol 26, 2002, p. 186–220, at p.206-207. See also generally Sheehy, Benedict & Maogoto, Jackson, *The Private Military Company- Unravelling the Theoretical, Legal & Regulatory Mosaic*, *ILSA Journal of International & Comparative Law*, vol 15, 2011, pp. 147-181.

42 “Distinction is the cornerstone of the Law of War. It is fundamental: combatants are lawful targets during times of war while civilians are protected.” Mark David Maxwell & Richard

well as indiscriminate attacks that affect civilians are prohibited.<sup>43</sup> It is equally basic that these norms apply to both sides, the “just” and the “unjust” one.

However, it is perfectly possible to think about this in other terms. As mentioned, the horsemen who carried out pillaging and enslavement of civilians in southern Sudan thought that their practices were normal.<sup>44</sup> One prominent Republican presidential candidate in the 2016 primaries repeatedly called for “carpet bombing” of ISIS in clear violation of IHL.<sup>45</sup> Another example is provided by the official Republican presidential nominee, who declared, in his major foreign policy speech, that the US should have “kept the oil” in Iraq and invoked the old rule that “to the victor belonged the spoils”.<sup>46</sup> The ancient law of Manu had a similar view, which also included chariots, horses, elephants, cattle and women among the permitted booty.<sup>47</sup> The existing international humanitarian law, by contrast, explicitly prohibits the taking of immovable public property<sup>48</sup> and criminalizes pillage of civilian property.<sup>49</sup>

Modern philosophers, too, have challenged the established view. As Oxford professor Cecil Fabre avers, “there is a remarkable degree of consensus, in war ethics, on the liabilities of civilians who make a material contribution to the war”<sup>50</sup> above “a certain threshold of causal and moral responsibility”.<sup>51</sup> This is also, by and large, the view of, for example, Helen Frowe<sup>52</sup> and Jeff McMahan<sup>53</sup> (associates at Fabre’s Oxford Institute for Ethics, Law and Armed Conflict).

V. Meyer, *The Principle of Distinction: Probing the Limits of Its Customariness*, The Army Lawyer, 2007, p. 1. See also ICRC, *Distinction – Protecting Civilians in Armed Conflict*, “icrc.org/eng/assets/files/other/icrc\_002\_0904.pdf”. Best, Geoffrey, *War and Law since 1945*, Oxford University Press, 1997, p. 115.

43 For this rule, see Henckaerts, note 16, p. 3 *et seq* and p. 37 *et seq*.

44 Bangerter, O., note 25, p. 370.

45 See these newspaper reports about Ted Cruz: “businessinsider.com/ted-cruz-isis-carpet-bomb-strategy-2016-1?r=US&IR=T&IR=T”; “washingtonpost.com/news/checkpoint/wp/2016/02/01/from-iraq-general-rebuked-ted-cruzs-plan-to-carpet-bomb-the-islamic-state/”; “nytimes.com/2015/12/12/opinion/ted-carpet-bomb-cruz.html?\_r=0”.

46 Full Transcript of Donald Trump Foreign Policy Speech, “heavy.com/news/2016/08/read-donald-trump-full-transcript-speech-foreign-policy-address-remarks-prepared-august-15/”. Perhaps tellingly, this passage was omitted from the Trump campaign’s transcript (“donaldjtrump.com/press-releases/donald-j.-trump-foreign-policy-speech”). I heard the speech and can verify that the transcript at heavy.com reflected the spoken word as quoted in this text.

47 *The Laws of Manu*, George Bühler, translator, verse 7:96.

48 Article 55 of the Hague Regulations, annexed to the Fourth Hague Convention of 1907.

49 Article 8(2)(b)(xvi), the Rome Statute of the International Criminal Court.

50 Fabre, C., *Guns, Food, and Liability to Attack in War*, Ethics, vol 120, 2009, p. 36–63, at p. 37.

51 Fabre, C. note 50, p. 63.

52 Frowe, H., *Self-Defence and the Principle of Non-Combatant Immunity*, Journal of Moral Philosophy, vol 8, 2011, p. 530–546, at p. 546.

53 McMahan, J., *The Just Distribution of Harm Between Combatants and Noncombatants*, Philosophy and Public Affairs, vol 38, 2010, p. 342–379, at p. 357.

Oxford colleague David Rodin, however, upholds the immunity from attack of non-combatants (though on grounds other than those reasons that are assumed by mainstream international law).<sup>54</sup>

Hence the clearly established views on civilian immunity from attack are challenged not only by tribal mores and political leaders but also by analytic philosophy. It is therefore not at all clear that the present basic principles of IHL would hold in a future world no longer dominated by states. But that would, of course, depend on how those norms would be created.

#### **4 How Would Humanitarian Law be Made?**

If the state would suddenly disappear, one could imagine that many current norms would continue to live on, not least the norm that it is prohibited to target civilians. Over time, as new power structures would develop, these norms might fade away. Or, rather, the residual legitimacy of those norms would fade. Instead, new norms would be based on other forms of overlapping consensus, which look different from what we now think legitimate.

But how would new norms be made? The historical basis of international law is customary law – based on state practice and *opinio juris* (legal conviction). The second main source of international law is treaties -- agreements between states (and other international subjects). A third type of source, but much less important in practice, is general principles of law.<sup>55</sup> All of these sources could apply also to non-state actors.

As already noted, there are numerous agreements between non-state actors in the humanitarian field and, of course, billions of agreements between non-state actors –like individuals and corporations – mainly regulated under domestic law. There are even plenty of norm-making agreements between non-state actors, from agreements on industrial standards to the Sphere project for humanitarian organizations. International law without states would probably build less on global conventions, since the number of non-state actors is potentially very large, and since it is not likely that their status could be verified in a record (like membership of the UN is for states). Instead, there may be bilateral or plurilateral agreements between actors that recognize each other and are ready to take account of one another's views, but which exclude other actors, who are unwilling or who are not recognized by the parties.

It is perfectly conceivable that non-state armed groups could agree on standards of behavior in armed conflict, perhaps with the assistance of other

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54 “The correct interpretation of restrictive asymmetry is that while harming just combatants in an unjust war is wrong, harming non-combatants is worse.” Rodin, D., *The Liability of Ordinary Soldiers for Crimes of Aggression*, Wash. U. Global Stud. L. Rev., 2007, vol 6, p. 591-607, at p. 606. This applies equally to both the just and the unjust party. Ibid 605.

55 This category could be broad or narrow, and it has never been clarified exactly what it covers. Nevertheless, the concept, which smacks of natural law, could be useful in the construction of any normative system.

Of course, Article 38 of the Statute of the International Court of Justice also lists court practice and doctrine as “subsidiary” sources. For lack of space, I will not discuss them here.

actors (like the ICRC), although the likelihood that every group will sign up to the same standards is not very high (in contrast to the universal 1949 Geneva Conventions). It is also conceivable that legitimate business in the military sector could subscribe to international standards (as so many ordinary businesses already do, for example to standards provided by the non-governmental International Organization for Standardisation; ISO<sup>56</sup>), and a number of PMSFs have been quite active in this regard.<sup>57</sup> The prospects for normative agreements between criminal organizations seem much gloomier.

It may also be possible to think of something that resembles current customary international law. Interdependence between communities and entities gives rise to cooperation and regimes, which are governed by norms, which in their turn form the basis for enhanced cooperation, and so on. There are, of course, many instances of customary norms in domestic law or in other forms of law beyond what we know as international law, many of which have an international impact, and writers like Paul Berman speak of global legal pluralism.<sup>58</sup> The ICRC's monumental study of customary international humanitarian law includes "[t]he practice of armed opposition groups, such as codes of conduct, commitments made to observe certain rules of international humanitarian law and other statements".<sup>59</sup> Although the authors of the ICRC study assess that "its legal significance is unclear",<sup>60</sup> in a world no longer dominated by states, such elements of practice would surely take on an increased normative value.

Since the legal significance of future agreements and custom might be questionable (at least by the standards of current international law), it is useful to discuss "soft law", which is prevalent in current international law discourse.<sup>61</sup>

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56 See the website of the ISO: [www.iso.org](http://www.iso.org).

57 Some such efforts are actually on their way, but much remains to be done. *Policy Paper on Private Military and Security Companies: "Capacity Gained—Accountability Lost? Establishing a Better Political and Regulatory Framework*, "transparency.de/fileadmin/pdfs/Wissen/Publikationen/TID\_Policy\_Paper\_PMSC\_web.pdf"; Dirk Siebel, *New ISO Standard for Private Maritime Security Companies* (blogpost), 2014, "academia.edu/7728567/ISO\_PAS\_28007\_new\_standard\_for\_private\_maritime\_security\_companies".

See also Cameron, Lindsey, and Chetail, Vincent, *Privatizing war: private military and security companies under public international law*, Cambridge University Press, 2013, p. 336. Some efforts have been made with the involvement of states, such as the Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict. See the Swiss Government's website for the Montreux document.

58 Berman, Paul Schiff., *Global legal pluralism: a jurisprudence of law beyond borders*, Cambridge University Press, 2012, passim. On customary law, see 48, 49, 223-230.

59 Henckaerts, note 16, p. xxxviii.

60 Henckaerts, note 16, p. xlii.

61 See, for instance, Chinkin, Christine M., *The challenge of soft law: development and change in international law*, *International and Comparative Law Quarterly*, vol 38, 1989, pp. 850-866 as well as a number of articles published in volume 58 of *Scandinavian Studies in Law*, devoted to soft law.

Soft-law can be made in many ways – through (non-binding) resolutions in international organizations, through gentlemen’s agreements between state authorities (like the Basel Committee on Banking Supervision), through agreements with parties that do not have recognized international legal personality, etc.<sup>62</sup> While such norms may not be accepted as binding hard law, they may still have an exacting effect. As pointed out by Hillgenberg, non-binding norms may be “the source of a self-contained regime subject to legal thinking”.<sup>63</sup> Actors may be held to account against soft-law norms by public opinion, and such norms may also legitimate “soft sanctions”.<sup>64</sup>

This very heterogeneous group of norms is controversial, and some lawyers refuse to acknowledge them as relevant for the practice of law. However, as mentioned, they do play a role in international governance. In a world in which the traditional legislators (states) are no longer around or are less powerful, there will be less concern with the distinction between state-made hard law and other sorts of norms.

It is clear that the presence of the state is not necessary for norms to develop. However, in the making of agreements, it is almost inevitable that some actors will be left out, because they are unwilling or because they are not recognized by those who are part of the bargain. That risk is greater if there is no authoritative statement of who the relevant interested parties are. It is likely that such agreements will be determined by mutual interests or by opportunism rather than by common values, since a world not dominated by states would lack all-encompassing fora like the UN, where there is a certain pressure to conform to professed universal standards. Furthermore, in a world without an established understanding of which custom is lawmaking and which is not, customs will have (even) less normative pull than at present.<sup>65</sup>

## **5 Who Would be the Future Parties to Humanitarian Law?**

To sum up so far, it seems perfectly possible that there will be at least some norms to guide warfare even in a world beyond the nation states, but it is highly uncertain what pedigree and normative pull they will have.

And this brings me to the last question, which in my view is fundamental, namely who would the parties be in a non-state based international humanitarian law. As pointed out above, there is an important connection between the authority to make war and the authority to make law, and I will therefore link

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62 Hillgenberg, H., *A fresh look at soft law*, European Journal of International Law, vol 10, 1999, p. 499–515, at p. 501. Non-treaty agreements are based on “a coincidence of declared intentions”. Hillgenberg, note 62, p. 506.

63 Hillgenberg, note 62, p. 515.

64 An example would be criteria for the provision of assistance or services. Hillgenberg, note 62, p. 511.

65 Of course, enforcement will be even more difficult, but I will leave out that discussion, in the interest of space.

these two predicates: to be a recognized party to a war and to be a political authority.

In traditional just war theory, the capacity to use force was only bestowed on those who were legitimate. In order for a certain entity to be recognized as a legitimate party under international law in the classical age, that entity had to be a *justus hostis*, a recognized and equal enemy.<sup>66</sup> Recognition was based on a set of criteria, constructed from perceptions of legitimacy, which in those days often were dynastic. Hence, there was neither law-making nor war-making authority without legitimacy. However, as I will claim, in present international law, authority is not conditioned on legitimacy.

When a conflict reaches the threshold of war, or armed conflict in legal terms, the application of international humanitarian law (the laws of war) is triggered. This means that the state of war may be generated not only by acts of governments but also by acts of organized armed groups, if they start to fight,<sup>67</sup> regardless of any claim to legitimacy.

A state of war entails some important legal consequences. One is that all parties to the conflict may use violence, which constitutes a large exception to the usual peace-time regimes of human rights and criminal law. Another, and related, consequence is that individuals involved as combatants may be released from legal responsibility for their acts in the war. Combatants have the right to take part in the military conflict, and to kill other combatants, as long as IHL is complied with. This certainly applies to soldiers in a war between states, but under some conditions it does so also in internal armed conflict. The traditional position is that the members of the non-state armed forces are guilty of rebellion and may thus be prosecuted by the territorial state. The modern position of the international community is that “[a]t the end of hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict...”.<sup>68</sup> Further, amnesties are common in peace agreements.<sup>69</sup> Another, and often very important consequence of the initiation

66 Schmitt, Carl, *Der Nomos der Erde*, 3 ed, Duncker & Humblot, Berlin, 1988, 113-114 & 121.

67 As developed by the UN’s International Criminal Tribunal for the former Yugoslavia, armed conflict is “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”. *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Oct. 2, 1995, Case No. IT-94-1-AR72, § 70.

68 Article 6(5) of Additional Protocol II to the 1949 Geneva Conventions. The reason for this provision, which is not mandatory, is that if non-state combatants can enjoy combatant immunity for lawful belligerent acts that are in compliance with IHL, they will be more likely to comply with IHL (including the protection of civilians). Furthermore, rebels will likely not be extradited from a third state in order to face prosecution for rebellion, since that is generally held to be a political crime, which is exempted from extradition. At any rate, members of armed rebel groups will not be prosecuted abroad, since rebellion is not an international crime, and they may often not be extradited to their country of origin, since rebellion is generally considered to be a political crime, which is not extraditable.

It is now generally understood that Article 6(5) does not apply to war crimes and other international crimes.

69 See the quite impressive practice in the ICRC’s database on customary IHL, *Practice*

of an armed conflict, is that non-state parties to non-international armed conflicts are usually invited to peace talks to end the conflict.<sup>70</sup> Such negotiations will usually result in agreements on both the treatment of combatants (amnesty, support for reintegration, etc) and on the political future of the country.

Hence, current international law does not require that the parties that initiate an armed conflict, and thus arrogate to themselves the right to continue to use force, and perhaps also decide on the political future of the country, are legitimate in any sense. They have an authority, but a naked one, based on their ability to employ military force rather than on their ability to govern well.

What if this current *de facto* authority is extended and they become recognized as new pillars of a post-state order, with authority to make war and law? Would that be a welcome development?

In Western political thought, legitimacy for political power has generally been based either on the state's effective ability to uphold life and order (Hobbes) or on the will of the governed (Locke, Rousseau). Late modern international law gave legitimacy to effective authority over territory as the decisive criterion in most theories about recognition of states. Effective authority could also be exercised by politico-military movements that have gained control through their struggle. This *de facto* power can be accorded a wider politico-moral importance, as a necessary factor for the protection of life and order, for the protection of people – either just their most basic rights, like the right to life and bodily integrity, or their human rights in general. As Anne Orford notes, the responsibility to protect concept emphasizes “the capacity to provide effective protection to populations at risk” rather than *de jure* grounds for authority, “grounded on right, whether that right be understood in historical, universal or democratic terms.”<sup>71</sup>

As implied, the other main source of legitimacy is democracy. The Universal Declaration on Human Rights – not a binding treaty but still the most revered expression of the idea of human rights – proscribes in Article 21(3) that “the will of the people shall be the basis of the authority of the government”. Philosopher Thomas Pogge elaborates this principle: “[P]ersons have a right to an institutional order under which those significantly and legitimately affected by a political decision have a roughly equal opportunity to influence the making of this decision – directly or through elected delegates or representatives.”<sup>72</sup>

Could any of the present types of actors fulfill the conditions of popular support and effective control?

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*Relating to Rule 159. Amnesty*, “ihl-databases.icrc.org/customary-ihl/eng/docs/v2\_rul\_rule159, visited 14 September 2016.

70 The current peace processes between the government of Colombia and the FARC and ELN, respectively, is a prominent example.

71 Orford, Anne, *International Authority and the Responsibility to Protect*, Cambridge University Press, 2011, p. 17.

72 Pogge, Thomas W., *Cosmopolitanism and Sovereignty*, in T Brooks (ed.) *The global justice reader*, 2008, p. 61. See also Beitz, Charles R., *The Moral Standing of States Revisited*, *Ethics & International Affairs*, vol 23, 2010, p. 325–47.

The type of actor that most closely resembles the state is what I will call politico-military non-state actors (PMNSA) —actors with military capabilities and political programs, like national liberation movements and other types of armed groups.

The authority of national liberation movements<sup>73</sup> is to a large degree based on popular consent, that is, on their position as instruments for a people's right to self-determination. Article 1(4) of the First Additional Protocol to the 1949 Geneva Conventions assimilates "armed conflicts which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination" with international armed conflicts (inter-state wars).<sup>74</sup> Hence, it is the cause – implementation of the right of self-determination – that produces the authority. Other armed groups, like FARC in Colombia or the Moro Islamic Liberation Front in the Philippines, derive their more restricted powers -- the power to create a state of non-international armed conflict with some prospects of combatant immunity - only from their capacity for violence. After all, it is the ability to "exercise[s] such control over a part of its territory as to enable [it] to carry out sustained and concerted military operations" that triggers the application of the Second Additional Protocol to the Geneva Conventions (Article 1).

Hence, a PMNSA may represent a constituency, and may even act for the protection of individual rights. It often has some territorial control, and some such actors also have external recognition, like the PLO<sup>75</sup> and previously SWAPO of Namibia. Hence, PMNSAs often rely on the same justifications as states do, but apart from national liberation movements – which are quite rare in our days<sup>76</sup> – any popular legitimacy is only incidental, and not necessary for the status of the group under current international law.

What about "economic military actors"? Private military companies are firms that offer armed security to public and private clients. These actors are usually incorporated as legitimate businesses in a state. However, as mentioned above, under current international law, they have no explicit mandate to use military force under their own authority.<sup>77</sup> A PMC may, however, be considered to be a party to an armed conflict as an armed group, if it corresponds to the criteria for

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73 The discussion on NLMs builds partly on Wilson, Heather, *International law and the Use of Force by National Liberation Movements*, Oxford University Press, 1988, p. 91-136.

74 The Protocol has 168 parties, but some important states are missing, including the USA and Israel.

75 The PLO now represents an entity – Palestine -- that is recognized as a state by many countries, but it had a seat at the UN as an observer already from 1974.

76 Polisario of Western Sahara is an exception.

77 For sure, if attacked, they can defend themselves, like any person, but they have no authority to perform offensive operations at the tactical or strategic level.



such organizations.<sup>78</sup> Whatever political legitimacy a PMC may have depends on its client, like a state.<sup>79</sup>

Even less do criminal organizations or networks have any recognized right to use force, and it is unlikely (though not impossible) that they will make agreements about the use of force.<sup>80</sup> As averred by one commentator, they “do not seek a military victory; they are interested only in creating chaos and provoking overreaction by military forces with the objective of causing a loss of support for the government, thereby perpetuating never-ending conflicts.”<sup>81</sup>

## 6 Final Words

Both international politics and international law still regard the state as the basic actor. However, the central role of the state is just a construct that leads us to believe that the inhabitants of a country have the same interests as their governments (which they have only sometimes). When the state can no longer sustain loyalty (or obedience), political affiliations move or fragment. On the ground, numerous non-state actors from rebel forces in Eastern Congo to non-territorial “tellurian” groups like al-Qaida and terrorist quasi-states like Daesh (the Islamic State) to drug gangs in Latin America challenge the idea of war as an inter-state phenomenon between territorial polities organized as states. Bartelson sums up the situation: “[T]he contestation of legitimate authority we experience today seems to restore the default settings of political thought and action after what appears to have been a Westphalian interlude, an interlude during which the locus of legitimate authority remained relatively uncontested.”<sup>82</sup>

So, to whom would we pass legitimate authority, after the state? First of all, it should be a political community. Political communities potentially embrace any subject-matter, because what is political is a political decision,<sup>83</sup> and under

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78 Cameron, note 57, p. 314-316.

79 For a nuanced discussion, which is not fully in line with my own view, see Baker, D., & Pattison, J. (2012), *The principled case for employing private military and security companies in interventions for human rights purposes*, *Journal of Applied Philosophy*, vol 29, 2012, pp 1-18. See also other works by James Pattison.

80 I have made some efforts to find whether there are any such examples but I have not found any. I do not believe it completely unlikely, however. Members of criminal gangs also have families that they would like to see protected, and it is quite common that gangs make agreements which apportion markets (for drugs etc) between them.

81 Gomez, J. C., *Twenty-First-Century Challenges: The Use of Military Forces to Combat Criminal Threats*, in Watkin, K., & Norris, A. J. (eds.), *Non-International Armed Conflict in the Twenty-first Century*, 2012, p. 279-291, at p. 282.

82 Bartelson, note 4, p. 95.

83 Schmitt, Carl, *Das Problem der innerpolitischen Neutralität des Staates* (1930), in *Verfassungsrechtliche Aufsätze auf den Jahren 1924–1954*, Duncker & Humblot, Berlin, 1958, p. 41, at p. 56.

(most if not all) modern political doctrines, people are equal in a political community. By contrast, licit or illicit economic organizations do not cover all aspects of human life, only those relevant to the business venture at hand. Further, people are not equal in economic communities. In a business arrangement and in a work-place, it is basically ownership that determines persons' relations.<sup>84</sup> So, it would indeed be unfortunate if a future regulation of armed conflict would be made by private military companies (or, much worse, criminal networks), which award each other the authority to use violence.

However, even non-state politico-military actors are deeply problematic in this context. The present sovereign borders are arbitrary, constructed and contingent, but they are nevertheless objective facts, and quite convenient facts: at any given time, each person is present in one state, and almost all people are attached to a state as citizens or legal residents.<sup>85</sup> By contrast, in a non-territorial society, democracy as we know it must be formed on other grounds, and it seems very difficult to imagine that delimitations between polities will be drawn so that everyone will belong to one. And the same goes for the protection of human rights – who is responsible for person X, living on coordinates Y and Z, if no one claims sovereign responsibility for that place?

And, as noted above, even if there would be representative and democratic political actors who take responsibility for the people under their control, it would be difficult to determine who their legitimate and effective partners would be in a project of post-state regulation of IHL. Therefore, while some form of regime governing conduct in hostilities is feasible even in a world no longer dominated by state, I am glad that the state – for all its shortcomings – is still around and calling the shot.

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84 Admittedly, to make a distinction between political and economic actors is not always easy. Political actors might have economic motives. The ulterior motive of a leader of a coup may be to create a better future for that person and his/her family, and economic issues are very important driver for voters. An economic actor could – in principle -- have territorial control, in particular if it cooperates with a PMC. Corporate territorial control is rare today, since corporations usually depend on governments or – sometimes in situations of armed conflict – on armed groups, but was common during the era of colonialism, when trading companies such as the East India Company established effective territorial administration. Further, many PMAs are also involved in typical criminal activities to finance their political and military operations, like drug smuggling and extortion, and sometimes it is difficult to know whether those activities have transformed an original political motivation into an economic one, and, conversely, political programs may be a façade for criminal activities. The political guerilla or terrorist group and the profit-minded criminal gang may cooperate (Ndrangheta and Red Brigades) or be united in the same organization. Cockayne, J., Chapter Ten: Crime, Corruption and Violent Economies. Adelphi Series, vol. 50, 2010, p. 189–218. Nevertheless, in the vast majority of instances, the distinction is clear, and it is relevant.

85 This is, of course, not to belittle the problems of those who are state-less.