

# The global reorganization of legitimate violence: military entrepreneurs and the private face of international humanitarian law

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## **Abstract**

*Although long hidden from the public gaze of international humanitarian law, military entrepreneurialism has played a key role in the global organization of legitimate violence. By examining historical changes in the role and legal treatment of military entrepreneurs, the author sheds light on the contemporary “resurfacing” of privately organized violence in the form of private military companies, and its broader implications for international humanitarian law.*

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## **Introduction**

There is nothing either timeless or natural about the way that violence is organized in today’s world. Yet the system of public territorial states, recognized and constituted by international law, is so central to our lived experience that it is very difficult to imagine how violence might otherwise be organized. Likewise, the law we know – a law of, within and between states – is so central to how we “imagine

the real” that we can hardly conceive of law without states.<sup>1</sup> But the global organization of legitimate violence appears to be changing. Private actors operating through global networks – whether pursuing profit or power – now rival states in their ability globally to mobilize and project violence. In some cases, these actors may attract aspects of legitimacy allowing their privately organized violence to rival or even resemble law.

Traditionally, international humanitarian law has been conceived as a system regulating violence between states and/or organized armed groups that shared many of the territorial, administrative and “public” characteristics of states. How, then, will international humanitarian law deal with this new, private face of organized violence?

In this essay I suggest that one way to answer this question is to reconsider the novelty of this “private face” of organized violence. Private entrepreneurialism, although long hidden from the public gaze of international humanitarian law, has, I suggest, long played a key role in the organization of legitimate violence. Although privately organized violence has taken many forms, in this essay I focus on military entrepreneurs – commercial organizers of military-scale violence. By examining the broad historical outlines of the changing role of military entrepreneurs, I hope to shed light on the contemporary “resurfacing” of privately organized violence, in the form of private military companies, and its broader implications for international humanitarian law.

In the first section of the paper, I briefly examine the role of military entrepreneurs in the production of a pan-European system organizing violence into public and private realms. Next, I sketch the role of military entrepreneurs in exporting this organizational system through colonialism, before turning to the reflection of this hidden, private face of organized violence in the mirror provided by the *jus in bello*. I suggest that certain changes in the *jus in bello* may reflect largely hidden shifts in the relationship between the public and private realms in international society.

This uncovering of the role of military entrepreneurs in the global organization of legitimate violence also illuminates how the conceptual foundations of international humanitarian law orient its gaze towards groups organized on territorial and hierarchical lines. In a third section, I briefly examine the challenges which the contemporary system of international humanitarian law faces, confronted by the resurfacing of legitimate violence which is deterritorialized and non-hierarchical – and thus both private and global. I characterize this as a challenge of adapting international humanitarian law to accommodate a new and more complex understanding of the relationship between public and private authority in the organization of violence – and in law. I suggest that whereas in the past it was the “private” which receded from the international gaze, in the future it may be the “public” which recedes in international practice as private authorities proliferate and compete, the “public” dissolves into the “private” and swathes of territory fall

1 The phrase is that of Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology*, Basic Books, New York, 1983, p. 187.

under private control into which humanitarian actors cannot effectively or securely penetrate. But I also suggest that it is possible to avoid this “loss of the public” by extending arrangements for the responsible provision of public goods beyond states to civil society and business. Reincorporating private entrepreneurs into arrangements for the provision of public goods is thus crucial for ensuring that the reorganization of legitimate violence does not descend into a perpetual war, a continuous, violent competition for global profits, legitimacy and rule.

A word of warning is warranted. This essay is deliberately impressionistic: I offer a sketch, a synthetic thinkpiece which deliberately strives to portray *longue durée* developments in broad brush-strokes. Like an impressionist piece, my sketch may miss some details and elide or even fail to depict others. Like an impressionist piece it seeks to provide a plausible if not always unassailable sense of the whole, rather than a meticulous inventory of the individual parts. This is an inherently risky exercise, especially in a professional journal, and one that I anticipate may attract – and perhaps warrant – considerable criticism. Nonetheless, I consider such a thought experiment inherently valuable – not so much for any sudden revelation of new historical detail or for its incremental addition to a scientific literature, but as an attempt critically to reconsider dominant conceptual paradigms (of law, humanitarianism and international society) as a whole. It is only by occasionally stepping back – even to a distance at which important details may become indistinct – that we can begin to recognize deeper patterns in the details among which we normally move, and find ways to “reimagine the real”.

## Military entrepreneurs and the state system

Military entrepreneurs pose deep challenges to the way in which we understand and conceive “law”. Conditioned by our socialization in the state system, we (by which I mean those of us born in, inhabiting, educated in or otherwise acculturated to industrialized countries, who I take to be the primary readership of this *Review*) can struggle mentally to accommodate systems of violence and legitimacy organized beyond the state. Military entrepreneurs have posed a particular challenge in conceptualizing “law”, because like the brigands and highwaymen who have troubled legal positivists from Aquinas to H. L. A. Hart to Hans Kelsen, they might – at least in theory – impose a monopoly of violence which rivals or even supplants that of the state, but which seems to lack its legitimacy. Are the edicts of such a non-state monopolist of violence, if effective in producing obedience by its subjects, law? Additionally, military entrepreneurs pose a strategic and practical problem in defending “law”, because where state authority is weak such theoretical similarity can quickly translate into practical usurpation. This was the case when Machiavelli warned his Prince of the dangers of the treachery of – or even usurpation by – *condottieri* in early modern Italy,<sup>2</sup> and

2 Niccolò Machiavelli, *The Chief Works and Others*, trans. Allan H. Gilbert, Duke University Press, Durham, N.C., 1965, Ch. XII.

remains the case in many parts of the world today where state authority is dependent on protection by and from private military companies, warlords and predatory criminal networks.

The distinction between military entrepreneurs and sovereign states can be understood in part as a distinction between the private, commercial nature of the violence military entrepreneurs organize, and the public nature of the coercive force of the state. It is public legitimacy (both local and systemic) that transforms private control of a defined territory into state sovereignty.<sup>3</sup> Because the line between private influence and public authority is fine and elusive, much ink has been spilt in trying to trace it. But in focusing on the conceptual boundary separating public and private, we risk losing sight of how the private and the public are linked and, in particular, how private social activity generates and sustains the public state. This oversight is particularly deeply institutionalized in the field of international law, with its rigid differentiation of the international (the inter-sovereign public) and the national (the private realm of the sovereign), the political (public) and the commercial, religious and familial (private). This conceptual bifurcation is replicated in the international regulation of violence, through distinctions between commerce and war and between non-international and international armed conflict. As a result, in our accounts of the organization of violence, we easily lose sight of how privately organized violence has helped to produce and support the “public”-based organization of legitimate violence constituted by the state system. So obscured have the deep connections between social organization and public institutions become that when, now, we are confronted by a phenomenon – private military companies – which seems to straddle the public and the private, the military and the commercial, we struggle to find a place for it within our conceptual maps and institutional practices, instead suggesting that it must fall within some “vacuum”.<sup>4</sup>

In this section I attempt to begin to correct this oversight by uncovering some of these hidden connections. I commence with an examination of the role of military entrepreneurs in the birth of the public state in early modern Europe, and then move to look at military entrepreneurs’ role in the export of this organizational and regulatory system around the world.

### Military entrepreneurs as catalysts for the emerging public/private distinction

Private, commercial organizers of violence played a key role in the generation of state sovereignty, and its legalization, in early modern Europe. Commercially organized violence was, in many ways, the midwife to publicly organized law, catalyzing the precipitation of public institutions out of the private mix of feudal,

3 Cf. Max Weber, “Politik als Beruf” (Politics as a vocation), repr. in H. H. Gerth and C. Wright Mills (eds.), *From Max Weber: Essays in Sociology*, Oxford University Press, New York, 1958, p. 78.

4 See, e.g., Peter W. Singer, “War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law”, *Columbia Journal of Trans-national Law* (Spring 2004).

religious, kinship and other social arrangements, and the emergence of a continent-wide constitutional settlement balancing private influence and public authority.

One historical explanation of the emergence of the state describes the centralization of economic power in the hands of a few feudal lords, transforming their relational, land-based entitlement to their tenants' and vassals' labour (whether in combat or in productive industry) into contractual employment relations based on a monetized economy underpinned by universally enforceable private property and a mobile wage-labour force.<sup>5</sup> As this "modern" arrangement emerged, entitlements to organize and regulate violence were surrendered increasingly to centralized authorities – territorial states in most places, but also associations of merchants and townsfolk in some places – who could enforce these arrangements and guarantee property rights.<sup>6</sup> In return, noblemen, the emerging merchant class and other lower social strata received greater commercial, religious and personal freedom. Society transformed from a heteronomous system of overlapping status groups and authority systems into two increasingly distinct realms, one commercial, familial (and to an extent religious) and "private", and one political and "public". It was the public realm which was exposed to the gaze of the state – and other states – while the private realm was increasingly hidden from this gaze.

This precipitation of the public did not occur all at once, and private military entrepreneurs in fact played a key role in catalyzing the process by facilitating the centralization of political and legal authority which underpinned emerging legal technologies and systems necessary to sustain new forms of commerce. All of the different social actors in pre-modern European society – lords, vassals, serfs, tenants, merchants, emerging burghers and townsfolk – existed in translocal social networks. These social networks and status groups took a number of forms: personal tributary relationships, commercial associations and trading networks, and the continental spiritual hierarchy of the Roman Catholic Church. But during the twelfth and thirteenth centuries two major legal reform processes set in train a slow transformation of this plural system of rule, authority and influence, providing the basis for land-rich feudal lords to work with merchants and military entrepreneurs to consolidate their power.

### *Commercial interests*

First, commercial interests – particularly in Italian trading centres, but gradually throughout Europe – promoted the revival and adaptation of Roman law. This

5 See Michael Mann, *The Sources of Social Power: Volume 1, A History of Power from the Beginning to 1760 A.D.*, Cambridge University Press, Cambridge and New York, 1986, pp. 410–11; Karl Marx, *Capital*, New World Paperbacks, London, 1972, vol. III, pp. 860–1; M. Dobb, "A reply. From feudalism to capitalism", in R. Hilton (ed.), *The transition from Feudalism to Capitalism*, New Left Books, London, 1976, pp. 57–97.

6 Mann, above note 5, pp. 420–1; Anthony Giddens, *The Nation-State and Violence. Volume Two of A Contemporary Critique of Historical Materialism*, Polity Press, Cambridge, 1985, p. 100.

significantly facilitated translocal commerce by standardizing contractual relations, adjudication and remedies, simplifying the convertibility of private property throughout Europe.<sup>7</sup> Roman law's textuality allowed continent-wide commerce to overcome the orality of many indigenous traditions, facilitating the transmission of economic value across space, independent of trust and status group relations. The advent of paper (considerably cheaper than parchment) and, later, printing enhanced this legal deterritorialization further, improving the speed of communication of judicial decisions and legal codes and the development of decentralized administrative surveillance through written reporting to superiors located elsewhere.<sup>8</sup> As Roman law was "recovered", it was simultaneously adapted and combined with indigenous forms of law; the rise of trans-continental trading networks even fostered cross-fertilization with legal systems outside Europe, particularly Arabic law.<sup>9</sup> In this way, local communities were slowly connected into an expanding legal web, producing a deepening continental market.

This system bracketed political and military questions off from commerce – whereas in the feudal system they had been inherently intertwined through relations of fealty. The spread of these legal technologies reduced commercial risk and transaction costs, providing entrepreneurs access to deeper pools of finance and other production inputs – including emerging wage labour forces. In these ways, the re-emergence of Roman law across Europe facilitated the emergence of mobile capital and other production inputs and assisted the development of continental commercial networks, collapsing the time in which finance, labour and *matériel* – and thus organized violence – could be mobilized, and enlarging the territory over which military power could effectively be projected by entrepreneurial noblemen, towns and groups.

### *Legal and administrative practices*

At the same time, secular political authorities were slowly adopting rationalized legal and administrative organizational practices first developed in the Church through Gregorian reforms.<sup>10</sup> This particularly transformed their ability to tax populations, allowing them to develop the infrastructure sought by town merchants: the policing of traffic and borders, a reliable coinage and measurement system, and the enforcement of market transactions.<sup>11</sup> The city-state's role in enforcing private title, and in providing judicial and other forms of administrative

7 Perry Anderson, *Lineages of the Absolutist State*, Humanities Press, Atlantic Highlands, N.J., 1974, pp. 24–9; P. Vinogradoff, *Roman Law in Medieval Europe*, Clarendon, Oxford, 1929.

8 M. H. Mills and C. H. Jenkinson, "Rolls from a sheriff's office of the fourteenth century", *English Historical Review* (1928), p. 43; Giddens, above note 6, p. 179.

9 Giddens, above note 6, pp. 99–100, 150.

10 Harold Berman, *Law and Revolution in the Formation of the Western Legal Tradition*, Cambridge, Mass., Harvard University Press, 1983, p. 276; Wolfram Fischer and Peter Lundgren, "The Recruitment and Training of Administrative and Technical Personnel", in Charles Tilly (ed.), *The Formation of National States in Western Europe*, Princeton University Press, Princeton, N.J., 1975, pp. 456–561, 471, 475–80.

11 Gianfranco Poggi, *The Development of the Modern State: A Sociological Introduction*, Stanford University Press, Stanford, 1978, p. 42.

infrastructure, thus became central to the emerging capitalist economy.<sup>12</sup> Administratively centralized towns allied with emerging capital to regulate violence, separating the public from the private, the political from the economic. There were both winners and losers in this separation of economic value from political allegiance; it represented a profound epistemological shift.<sup>13</sup> The social underpinnings of legitimacy and their superstructural manifestations in law were radically reoriented; the very concepts of “proof” and “truth” shifted,<sup>14</sup> with faith-based proof through combat being overtaken by rationalist mechanisms such as written evidence and oral testimony.<sup>15</sup> The immanent, rational, human state began to replace transcendent divinity and social loyalty as the sources of normative authority and rule. These profound social shifts did not go without resistance, provoking a number of popular rebellions.<sup>16</sup>

### *Military entrepreneurs*

Simultaneously, these shifts offered military entrepreneurs an opportunity: to use the emerging European commercial system to develop for-hire military capacity available to cities, noblemen and other clients throughout the continent to conduct hostile takeovers of their rivals or to pacify their urban hinterlands. This was essentially the deal that produced the German *Landsknechte*, the Swiss *Reisläufer*, the Italian *condottieri* and the English mercenaries – although the structures of co-operation between public authorities and military entrepreneurs differed somewhat from case to case, depending in part on the bargaining power between those who controlled the capital and those who controlled the coercion.<sup>17</sup> Military entrepreneurs’ bargaining power was weakest in what Charles Tilly identifies as “coercion intensive states” such as Brandenburg and Russia, heavily reliant on direct coercive extraction of funds from civil society; it was moderate in Tilly’s “intermediate capitalized-coercion” states, such as England and France, where states sought to integrate private capitalists into state structures, but could not adopt a baldly coercive approach; and it was greatest in the “capital intensive” states such as Italy and the Netherlands, where states partnered with private financiers.<sup>18</sup> Some states became increasingly dependent on the taxation of strong capitalist groups, which in turn developed an interest in the demand supplied by

12 Mann, above note 5, pp. 422–3, 431–2.

13 Georges Duby, *The Early Growth of the European Economy: Warriors and Peasants from the Seventh to the Twelfth Centuries*, trans. Howard Clarke, Cornell University Press, Ithaca, 1978, p. 261; Henri Pirenne, *Medieval Cities: Their Origins and the Revival of Trade*, Princeton University Press, Princeton, N.J., 1952, p. 118.

14 Hendrik Spruyt, *The Sovereign State and its Competitors*, Princeton University Press, Princeton, N.J., 1994, p. 103.

15 For a different perspective on the relationship between trial by court and by combat, see Evgeny Pashukanis, *Law and Marxism: A General Theory*, trans. B. Einhorn, intro. and ed. C. Arthur, Ink Links, London, 1978, p. 118.

16 See Charles Tilly, *Capital, Coercion and European States, AD 990–1990*, Blackwell Publishers, Malden, Mass., 1990, pp. 100–2.

17 Tilly, above note 16.

18 *Ibid.*, p. 30.

state war-making activities,<sup>19</sup> producing what one writer has labelled a “military-commercial complex” (with deliberate reference to President Eisenhower’s warning on leaving office in 1961 of the dangers of an emerging military-industrial complex in the United States of America).<sup>20</sup> Along the trading corridor of the Rhine the bargaining power of merchant classes may in fact have been so high that centralized states were *unable* to develop, until the territorial states which had developed outside that trading corridor in neighbouring France and Prussia encroached.<sup>21</sup> The parallel with contemporary corridors, such as the west African hinterland and the eastern Democratic Republic of Congo, where responsible states are weak and military entrepreneurs numerous and powerful, is unmistakable.

### *Reinforcement of state monopoly on violence*

What was common to the various modes of state development in early modern Europe, though, was that all essentially involved an underlying competition between states and military entrepreneurs to form “protection bargains” with merchants and emerging capitalists, even though in some cases states and military entrepreneurs formed strategic alliances which obscured that competition.<sup>22</sup> States were prepared to accommodate mercenarism because mercenaries provided a cost-effective means for states to defend their monopoly on legitimate violence from other states and internal rivals – just as private military companies do for weak states today. At the same time, the mercenary trade reinforced states’ monopolies in a number of ways: the requirement to raise funds to pay mercenaries forced states to find ways to increase taxation and penetrate their own societies. Over time, this improved states’ positions in their own constitutional settlements with internal, “private” rivals. The most famous evidence of this dynamic is the settlement in clause 50 of Magna Carta, under which the English crown agreed to give up its use of mercenaries against English nobles, while they in turn recognized the central authority of the state and its entitlement to ensure collective protection from external threats.<sup>23</sup>

Yet mercenaries represented a constant risk to states, especially if they developed territorial ambitions of their own. Some small states avoided that risk

19 Mann, above note 5, pp. 431–2.

20 Samuel E. Finer, “State- and Nation-Building in Europe: The Role of the Military” in Tilly, above note 16, p. 115. See Farewell Address by President Dwight D. Eisenhower, 17 January 1961; Final TV Talk 1/17/61 (1), Box 38, Speech Series, Papers of Dwight D. Eisenhower as President, 1953–61, Eisenhower Library; National Archives and Records Administration.

21 See Stein Rokkan, “Dimensions of State Formation and Nation-Building: A Possible Paradigm for Research on Variations within Europe”, in Tilly, above note 16, pp. 562–600.

22 The term is that of Spruyt, above note 14, pp. 84–6; see also Michael Mann, “The Autonomous Power of the State: its Origins, Mechanisms and Result”, in Michael Mann, *States, War and Capitalism: Studies in Political Sociology*, Basil Blackwell, Oxford and New York, 1988, p. 27. For an analysis of protection bargains in contemporary state-formation, see Vadim Volkov, *Violent Entrepreneurs: The Use of Force in the Making of Russian Capitalism*, Cornell University Press, Ithaca, 2002.

23 Mann, above note 5, p. 431.



by turning themselves over to act as bases for mercenary activity and sources of mercenary manpower, in effect corporatizing the state. But, over time, mercenarism slowly receded under a combination of two pressures: state pressure, as states sought more systematically to ensure that mercenary groups did not become rivals to their own power; and the advent of firearms and disciplined military training, which favoured territorialized armed forces over itinerant mercenaries because of territorial forces' ability to raise funds to sink into the construction of defensive installations and into peacetime training, and because of their possession of land into which (literally) to sink those costs.<sup>24</sup> The cost structures of war-making increasingly favoured states over private entrepreneurs, allowing them to attract the best professionals, so that, as Hintze put it, "colonels ceased being private military entrepreneurs, and became servants of the state".<sup>25</sup>

Perhaps equally significantly, nascent public rulers' control of a fixed territory and development of hierarchical administrative machinery allowed them to offer a range of public infrastructures to commercial clients which military entrepreneurs could not.<sup>26</sup> These infrastructures were institutionalized as the state and its system of public rule: law. As Michel Foucault put it,

Law was not simply a weapon skilfully wielded by monarchs: it was the monarchic system's mode of manifestation and the form of its acceptability. In Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law ... . [This was a] juridical monarchy.<sup>27</sup>

The concepts and practices of law thus became ineluctably intertwined with the concept of the public, as the great Marxist theorist of law, Evgeny Pashukanis, understood:

[T]hanks to its new role as a guarantor of the peace indispensable to the exchange transaction, feudal authority took on a hue which had hitherto been alien to it: it went public.<sup>28</sup>

## Military entrepreneurs and the global export of the public/private distinction

Commercial security providers were not only key in spreading this public/private distinction across Europe, but also in exporting it around the world. While mercenarism receded in Europe as states entrenched their territorial monopolies on legitimate violence, military entrepreneurialism played a key role in colonialism

24 Tilly, above note 16, pp. 83–4; Herfried Münkler, "The wars of the 21st century", *International Review of the Red Cross*, Vol. 85, No. 849 (March 2003), p. 14.

25 Otto Hintze, in F. Gilbert (ed.), *The Historical Essays of Otto Hintze*, Oxford University Press, New York, 1975, p. 200.

26 Cf. Giddens, above note 6, pp. 151–2.

27 Michel Foucault, *History of Sexuality Volume 1: An Introduction*, ed. Robert Hurley, Penguin, Harmondsworth, 1978, pp. 87, 89.

28 Pashukanis, above note 15, p. 136. Cf. Spruyt, above note 14, p. 165.

and the extra-European projection of – and competition between holders of – state power.

### *The emergence of trans-national commercial law*

The emergence of the legal state created a separation between a legal public, regulating politics through a monopoly on legitimate violence, and private law, in which the state protected commercial, familial and religious orders while exercising only limited normative authority within those realms. The private law which ordered domestic and commercial affairs was dependent on the state for the administrative technologies and practices which gave it life, including the enforcement of property rights and contracts, and the creation of protected spaces available for the free practice of one's religion and exercise of familial authority. States were able to provide that public legal infrastructure, partly due to their alliance with a trans-national merchant class; in part, the protection of European commercial activities was not in fact the province of any one state, but a common activity of all states. The result was the emergence of a trans-national commercial law:

[T]he historical rise of the sovereign state is thus one aspect of a comprehensive reorganization of the forms of social power. The change that it works in the form and content of the international society is no less startling. For under this new arrangement, while relations of citizenship and jurisdiction define state borders, any aspects of social life which are mediated by relations of exchange in principle no longer receive a political definition (though they are still overseen by the state in various ways) and hence may extend across these borders.<sup>29</sup>

Here were the first outlines of the split, by now so axiomatic, of “international law” into two branches: public international law, dealing with the relations between public entities, and private international law, dealing with trans-national exchange relations. Yet this did not mean that private commercial relations, and private international law, were unrelated to the state:

Transnational elements of the early medieval economy had depended on Christian normative regulation. As the economy became more extensive, it depended more on alliance with the state.<sup>30</sup>

By the time of the discovery of the Americas, the major Atlantic European states had developed sufficient administrative machinery to allow them to act as what Michael Mann describes as “monopoly licensers of international trade”.<sup>31</sup> As he explains, the result was that “international trade would not necessarily reduce the economic salience of national states”.<sup>32</sup> If anything, the discovery of the New

29 Justin Rosenberg, *The Empire of Civil Society: A Critique of the Realist Theory of International Relations*, Verso, London, 1994, p. 129.

30 Mann, above note 5, p. 473.

31 *Ibid.*, p. 472.

32 *Ibid.*

World and the opening of maritime routes to Asia in fact increased the reliance of private capitalists on states, because they required access to large-scale organized violence and state-controlled military technologies and access to the shared regulatory framework offered by international law in order to reduce the commercial risks of undertaking foreign commercial expeditions:

Trade also depended on state regulation. Expansion onto other continents enhanced the state-boundedness of capitalist developments. No prior regulation of international relations among European powers, and between them and other powers, existed there ... The expansion out of Europe thrust trade and warfare, merchants and the military arm of the state, even closer together.<sup>33</sup>

### *Shaping public international law*

Thus while imperialism was theorized and justified as an affair of state – a political, military affair – it was financed and organized through private capital, licensed and chartered by the state in forms such as the Dutch and British East India Companies. A vivid account of the varying forms this alliance took has been provided by Janice Thomson, in her exceptional volume *Mercenaries, Pirates and Sovereigns*.<sup>34</sup> Thomson's account demonstrates how states tolerated and engaged mercenaries and other military entrepreneurs, harnessing them to consolidate, protect and project their own monopolies on legitimate violence. These military entrepreneurs in turn continued to play a role in the development of the international legal system – although it was now hidden from formal theorizing, with debates being framed in terms of national interest and *raison d'état*. Commercial interests played a significant influencing role in shaping public international law. The most famous case is that of Hugo Grotius, commissioned by the Dutch East India Company to advocate interstate legal rules – the freedom of the seas – which served Dutch merchants' and the Dutch state's strategic interests by contesting the monopoly on Asiatic trade claimed by the Portuguese.<sup>35</sup> In a less well-known case, the English crown cut off trading privileges to the Hanseatic League – a territorially discontinuous trading and political alliance of merchant towns across northern Europe – because the League's inability effectively to enforce compliance with its international obligations by its members was creating significant costs for the English Merchant Adventurers association – and, they argued, reducing English taxation revenues. Other states quickly followed suit

33 Ibid., p. 473.

34 Janice Thomson, *Mercenaries, Pirates, and Sovereigns: State-Building and Extraterritorial Violence in Early Modern Europe*, Princeton University Press, Princeton, N.J., 1994; see also Janice Thomson, "Sovereignty in Historical Perspective: The Evolution of State Control over Extraterritorial Violence", in James Caporaso (ed.), *The Elusive State*, Sage Press, New York, 1989, pp. 227–54; Janice Thomson, "State Practices, International Norms, and the Decline of Mercenarism", 24 *International Studies Quarterly* (1990), pp. 23–48.

35 C. van Vollenhoven, *The Framework of Grotius' Book De Iure Belli ac Pacis*, Noord-Hollandsche uitgeverijmaatschappij, Amsterdam, 1932, p. 103.

under similar pressure from their own domestic commercial lobbies, leading to a pattern of circumvention of the League as states dealt directly with League members. When it came to the negotiations at Osnabrück and Münster which ultimately produced the Peace of Westphalia, the European states denied the Hanseatic League legal standing to be represented at the conferences. Twenty years later the Hansa dissolved itself.<sup>36</sup>

The significance of these anecdotes is not only that they reveal the subterranean influence of commercial interests on the formation of basic aspects of public international law – such as international legal personality, in the case of the Hansa, or freedom of the seas, in Grotius’s case – but also the direction of this revealed influence. In both these cases domestic commercial interests sought to organize international spaces in a way that left private commerce relatively free from foreign state intrusion, but at liberty to organize violence through a partnership with states. They sought, in other words, to work through their home state to shape international legal rules in a manner that reproduced the public/private distinction at the global level, masking the role that private actors played in organizing “public” violence. With the private face of organized violence thus legitimized and hidden by emerging public international law, states and capitalists were free to work with military entrepreneurs to expand their power globally.

### *State organization*

One result of this exporting of the public/private distinction was that the conceptual foundations of international law increasingly oriented its gaze towards “public” organizations that resembled states, specifically sharing states’ territoriality and administrative hierarchy.<sup>37</sup> Organizations that could not offer global commerce the same administrative effectiveness as the territorial, hierarchical organization of the state, such as the Hanseatic League – or city states such as Venice and Hamburg, and archipelagic states such as the Duchy of Burgundy – were slowly excluded from the system.

This pattern of exclusion was not confined to Europe: in their colonial enterprises the manner in which European states tended to deal with the indigenous groups they encountered depended in large part on the territorialization and hierarchy of those groups. Those with a monopolistic control of a fixed territory, enforced through hierarchical political authority, were often recognized as formally sovereign and were treated with, as occurred throughout north America and in many parts of Asia and the Pacific. Often, however, in pursuit of equal treatment and through engaging with the rules of international law, these indigenous groups were forced to transform their own systems of social rule to

<sup>36</sup> Spruyt, above note 14, pp. 170–1.

<sup>37</sup> This orientation is ultimately and most clearly reflected in Article 1 of the Montevideo Convention on the Rights and Duties of States, signed on December 26, 1933, which states, “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.”

resemble public, legal states on the European model, by more precisely defining the limits of their territorial jurisdiction and by establishing complex, hierarchical administrative bureaucracies – as did Siam, China and the Ottoman Empire.<sup>38</sup> But where colonial states encountered social groups whose social systems were not based on territorialization and hierarchy – and who could not or would not transform their systems of rule to operate on such bases – equal treaties did not follow. Instead, the European states, unable to identify any “public” entity with which to engage in international relations, either treated such territories as *terra nullius* (the territory of no one) and therefore open to colonization and settlement, as occurred in Australia,<sup>39</sup> or delegated responsibility for the pacification, administration and commercial exploitation of the territory to commercial agents (usually chartered companies, such as the British South Africa Company), thus confining the organization of violence within the territory to the “private” realm. Particularly in Africa, European states saw this as a means to balance the costs and benefits of establishing their own territorial and administrative control in foreign lands, while their commercial, military entrepreneur agents benefited from the “privatization” of governmental power through reduced accountability and increased administrative discretion.<sup>40</sup>

Whereas towns and nascent states in early modern Europe worked with military entrepreneurs to establish the monopoly control which allowed them to develop the legal and administrative infrastructure needed to attract and tax commercial flows, states were now working with military entrepreneurs to project power extra-territorially, reaping the benefits of commercial flows projected into these new spaces, but without offering the public benefits of law to local populations. Military entrepreneurs thus facilitated the export of the public/private distinction, but in ways that benefited private commerce and often disadvantaged local populations by exposing them to unaccountable organized violence. So well-masked was this privatized violence that Europeans could, as Lord Lugard put it, “persuade themselves that the omelette had been made without breaking any eggs”.<sup>41</sup>

### *Domestication of private military entrepreneurs*

But just as the power of military entrepreneurs in Europe declined relative to that of the states they had helped to form, so the power balance between military entrepreneurs and states in also shifted in the global projection of military power.

38 Richard S. Horowitz has demonstrated the role that treaties of friendship and commerce played in transforming the internal rule structures of Siam, China and the Ottoman Empire in “International Law and State Transformation in China, Siam, and the Ottoman Empire during the Nineteenth Century”, *Journal of World History*, vol. 15, no. 4 (December 2004).

39 See Stuart Banner, “Why *Terra Nullius*? Anthropology and Property Law in Early Australia”, *23(1) Law and History Review*, vol. 23, no. 1 (2005), p. 95.

40 See, e.g., Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control*, Princeton University Press, Princeton, 2000, pp. 61–80.

41 Lord Lugard, *The Dual Mandate in British Tropical Africa*, 5th edn, Frank Cass and Co., London, 1965, p. 15.

As the twentieth century progressed and the sunk costs of military technology once again rose, states took over the global projection of military power from military entrepreneurs, as they had earlier taken over the projection of military power within their own borders. The alliance between states and capital continued to operate through the technologies of international law and international organization, as Anthony Anghie has demonstrated in his account of how the Mandate system of the League of Nations introduced administrative technologies and governmental practices into Mandate territories, preparing them for penetration by global commerce.<sup>42</sup> Military entrepreneurs dropped out of this picture, relegated to the margins, to the domestic weapons factories and commercial supply lines of large, globally mobile national armed forces – but no longer mounting their own expeditions. Increasingly, military entrepreneurs were viewed as frightful anomalies (*les affreux*) in international society, which was increasingly conceived as a purely interstate system. The private face of the organization of legitimate violence was increasingly domesticated, in every sense of the word. As had occurred in Europe, military entrepreneurs had now assisted states to expand their power to such a degree that their own role in the organization and execution of legitimate violence was not simply obscured but jeopardized. Only with the privatization (both intentional and unintentional) of governmental functions in the late twentieth century would that role once again begin to expand.

### Military entrepreneurs and the development of the *jus in bello*

The changing role of military entrepreneurs in the global organization of legitimate violence has been reflected in shifts in the international law governing the conduct of hostilities – the *jus in bello*. In this section I suggest that states appear to have found ways of absorbing the impact of commercially organized violence into their inter-public liability and responsibility systems, while leaving each other room to work with military entrepreneurs, so long as those partnerships do not challenge systemic interests. By tracing the trajectory of the development of these rules we may, therefore, be able to trace changing conceptions of these systemic interests. That, in turn, may offer a window onto the gradual reorganization not only of violence but legitimacy, within international society, allowing us to trace shifts in the balance between private and public authority in international society.

### *The limits of permitted military entrepreneurialism*

States have used international law to limit, control and co-opt – but not eradicate – military entrepreneurialism, subordinating it to and aligning it with the state

42 Anthony Anghie, “Colonialism and the Birth of International Institutions: Sovereignty, Economy and the Mandate System of the League of Nations”, *New York University Journal of International Law and Politics*, vol. 24 (2002), p. 513; see also Anthony Anghie, “Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law”, in *Harvard Journal of International Law*, vol. 40 (1999), pp. 1–81.

system. The international legal system has traditionally left the means of organizing violence within the state largely to states to decide for themselves, permitting them to purchase military power from commercial entrepreneurs. However, over time, rules have developed, often in response to social and technological change, attributing liability to states in certain cases for the acts of private groups with which they are associated, to ensure that private actors cannot destabilize or even unravel the state system. As technology has changed, allowing private agents to project violence with increased ease from a state's territory, states have agreed more restrictive interstate liability rules (moving from a weaker position on attribution of responsibility to more intrusive due diligence and effective control requirements). Yet states have never chosen to outlaw commercial military activity per se as they have chosen to outlaw some other types of privately organized violence (such as piracy and certain types of terrorism). Instead, they have bargained to a complex set of voluntary norms ensuring that military entrepreneurs do not escape control by the state system as a whole.

Because no state was able to exercise effective monopoly control over the high seas, one of the earliest sets of international rules affecting military entrepreneurialism emerged there. Janice Thomson has described how sovereign states at first tolerated private entrepreneurs using violence to turn a profit on the high seas, so long as they did not threaten states' own interests, including in stable trade; where they did, they were declared "pirates", subjected to universal state jurisdiction, *hostes humani generis*. But the rule against piracy was originally only intermittently applied, and states were often happy simply to participate in naval protection rackets, for example through the tributes paid to the Barbary pirate states – a practice ended only by the first American Marine expedition in the early 1800s.<sup>43</sup> However, as states became more dependent on maritime trade, particularly as they moved to colonial political economies, their hostility to piracy grew, and the rule against piracy was enforced with increasing alacrity.

### *Maritime neutrality*

In some cases, however, states nationalized high seas entrepreneurialism by commissioning private actors (even former pirates) as "privateers". This had not only individual but also systemic benefits, since it facilitated other states' identification of a peer state from whom the costs of unlawful privateering activity could be recovered, creating greater transparency and promoting state control of private agents operating from their territories. But it also risked unravelling international trade by turning it into a violent mercantilist competition for national domination of global markets. States' interest in

43 See, e.g., US–Tunisia, Treaty of Peace and Friendship, August 28, 1797, printed in Hunter Miller (ed.), *Treaties and Other International Acts of the United States of America*, vol. 2, Government Printing Office, Washington, D.C., 1931.

maintaining international trade led, therefore, to a complex legal system protecting the concept and practices of maritime neutrality, separating “neutral” commerce on the high seas from “political” warfare. Commercial interests relied on states to provide them with a framework of law within which they could operate as they conveyed goods by sea, and to protect their property from predatory sovereigns and private military entrepreneurs such as pirates. Out of this grew a complex legal regime governing maritime neutrality, co-ordinating the interests of states and capitalists through such doctrines and legal technologies as stop-and-search, character of the cargo, continuous-voyage doctrine and embargo. This system encouraged states to enforce common rules regulating organized violence directed against trade by creating mechanisms for recognizing actual and constructing putative hierarchical relations between maritime actors and territorial states. These rules depended on and moved with the changing character of trade and warfare – and particularly the changing administrative and technological capacities of states effectively to police maritime commerce.<sup>44</sup> The trajectory of the development of maritime neutrality law thus served as an artefact of the shifting boundaries between private commerce and public warfare and law enforcement on the oceans.

### *Terrestrial neutrality*

By the end of the nineteenth century a similar need had emerged for a regime to prevent trans-boundary military entrepreneurs from dragging neutral states into conflict through their terrestrial activities. A range of precedents and doctrines emerged, creating attributed state liability and due diligence obligations, incentivizing action by states to control private military entrepreneurs to protect the stability of the state system, though that control might fall short of eradication.<sup>45</sup> In 1907, for example, European colonial powers rejected a German proposal for a total ban on the service of foreigners in national militaries (i.e. a ban on a global military labour market), and instead opted merely to require neutral states to prevent commercial recruiting on their territory. This left commercial recruiters free to operate within belligerent states, or within the overseas territories of European empires, corraling the global military labour market within conflict zones to avoid spillover into neutral states.<sup>46</sup>

As national armed forces grew through the first half of the twentieth century, states worked with domestic and foreign industry to underwrite and organize weapons production and, on the battlefield, logistics support – a role which was validated when the 1949 Geneva Conventions afforded military

44 See James Cockayne, “Stephen C. Neff, *The Rights and Duties of Neutrals: A General History* (Book Review)”, *Leiden Journal of International Law*, vol. 17, no. 1 (2004), pp. 203–10.

45 See generally Montgomery Sapone, “Have Rifle With Scope, Will Travel: The Global Economy of Mercenary Violence”, *California Western International Law Journal*, vol. 1 (Fall 1999), pp. 32–33.

46 Convention Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague Convention No. V), 18 October 1907, 36 Stat. 2310–31; 1 Bevans 654–68, Art. 4.



contractors prisoner-of-war status, but only if they possessed a state-supplied identification card.<sup>47</sup> Military entrepreneurialism was once again permitted – as long as it was state-controlled.

### *Decolonization*

In the 1960s the private face of organized violence began to resurface. As colonial states pulled back their administrative apparatus from former colonies, the private, social violence underneath, which had been obscured by the veil of state sanction from the gaze of international law – and to an extent, of international society – became more clearly discernable. In 1961 the Belgian government chose not to enforce Belgian laws against mercenary recruiting (required by the 1907 Hague Convention discussed above), but to allow Belgian corporations to back an attempted secession by Katanga, a mineral-rich Congolese province, from newly independent Congo. This revealed the exploitative nature of Belgian commercial interests in Congo, and mercenaries and other entrepreneurs figured prominently in the military confrontation which ensued, as well as in a number of subsequent postcolonial confrontations on the continent. Just like their European forebears half a millennium earlier, cash-rich but coercion-poor African elites saw hiring military entrepreneurs as a means to gain, consolidate and hold power.

The similarities did not end there. Just as nascent European states had earlier turned to law to ensure that the military entrepreneurialism they were stoking did not ultimately undermine their own power, so newly decolonized states turned to law to limit the legitimacy of contemporary military entrepreneurialism. Newly decolonized states quickly took action on the issue in the General Assembly<sup>48</sup> and Security Council of the United

47 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, adopted 12 August 1949, 75 UNTS 31, Art. 13(4) (applying the Convention to supply contractors and members of labour units); Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, adopted 12 August 1949, 75 UNTS 85, Art. 13(4); Geneva Convention (III) relative to the Treatment of Prisoners of War, adopted 12 August 1949, 75 UNTS 135, Art. 4(4) (granting certain contractors PoW status).

48 See the Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, GA Res. 2131, UN GAOR, 20th Sess., Supp. No. 14, p. 11, UN Doc. A/6014 (1965); GA Res. 2465, UN GAOR, 23d Sess., Supp. No. 18, p. 4, UN Doc. A/7218 (1968), para. 8 (“the practice of using mercenaries against movements for national liberation and independence is punishable as a criminal act”, calling on Governments to outlaw mercenarism through national legislation); Principles of International Law Concerning Friendly Relations and Cooperation Among States, GA Res. 2625, UN GAOR, 25th Sess., Supp. No. 28, p. 123, UN Doc. A/8028 (1970) (“every state has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another State”; characterized by the ICJ as reflecting customary international law in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 ICJ 14, pp. 187–92 (June 27) (Merits)); Declaration on Basic Principles of the Legal Status of the Combatants Struggling Against Colonial and Alien Domination and Racist Regimes, GA Res. 3103, UN GAOR, 28th Sess., Supp. No. 30, p. 142, UN Doc. A/9030 (1973), par. 5 (“The use of mercenaries by colonial and racist regimes against the national liberation movements struggling for their freedom and independence from the yoke of Colonialism and alien domination is considered to be a criminal act and these mercenaries should accordingly be punished as criminals”); GA Res. 51, UN GAOR, 44th Sess., 78th mtg., UN Doc. A/RES/44/51 (1989) (referring to the 1988 attempted invasion of Maldives); GA

Nations,<sup>49</sup> the Organization for African Unity<sup>50</sup> and other multilateral treaty-negotiating forums,<sup>51</sup> developing norms criminalizing certain forms of military entrepreneurialism – specifically, military entrepreneurialism directed against them. But at the same time these states ensured that they retained a free hand to use military entrepreneurs to consolidate their own hold on power, against rebel movements or to promote self-determination and decolonization. Here were the outlines within the *jus in bello* of a subtle shift in the treatment of privately organized violence, narrowing the private freedoms offered to military entrepreneurs to ensure they did not work against the global public interest of self-determination.

### *A space for contemporary entrepreneurialism*

Nevertheless, the *jus in bello* allowed military entrepreneurs considerable space to harness emerging global communications and transport advances and the increased availability of experienced personnel and weaponry after the end of the Cold War, under a corporate veil. In the late 1980s and 1990s entrepreneurial networks developed, linking current and former government and military officials and commercial speculators to take advantage of these business opportunities, often operating through corporate nodes – today’s private military companies. Most of the commercial military activity which these companies undertake falls well within what is permitted by the *jus in bello*.<sup>52</sup> States and commercial suppliers

Res. 31, UN GAOR, 49th Sess., 83rd mtg., UN Doc. A/Res/49/31 (1995) (emphasizing the vulnerability of small states to the external threat of mercenaries and “[c]ondemning all such acts of aggression”); GA Res. 33, UN GAOR, 45th Sess., 44th mtg. p. 17, UN Doc. A/Res/45/33 (1990); GA Res. 79, UN GAOR, 44th Sess., 78th mtg. p. 34, UN Doc. A/Res/44/79 (1989); GA Res. 89, UN GAOR, 46th Sess., 74th mtg., UN Doc. A/Res/46/89 (1992).

49 Resolution 239 (1967), UN Doc. S/INF/22/Rev.2, 1967 (condemning “any State which persists in permitting or tolerating the recruitment of mercenaries... with the objective to overthrow the governments of the United Nations”; calling on governments “to ensure that their territory as well as their nationals are not used for the planning of subversion, recruitment, training and transit of mercenaries”); UNSC Res. 289 (Nov. 1970) (demanding withdrawal of mercenaries from Guinea); UNSC Res. 405, 32 UN SCOR, UN Doc. S/INF/33 (1977) (in light of the invasion of Benin, condemning states that continued to permit and tolerate the recruitment of mercenaries “with the objective of overthrowing the Government of Member States”, and calling upon all states to take all “necessary measures” to prevent the use of their territory by mercenaries or recruiters so as to prevent “the planning of subversion and recruitment, training and transit of mercenaries designed to overthrow the Government of any Member State.”) See also UNSC Res. 226, UN SCOR, 1306th mtg. (1966); S.C. Res. 239, UN SCOR, 1367th mtg. (1967); UNSC Res. 241, UN SCOR, 1378th mtg. (1967).

50 OAU Convention for the Elimination of Mercenaries in Africa, initialled Libreville, July 1977, entered into force 22 April 1985, reprinted in Gino J. Naldi (ed.), *Documents of the Organization of African Unity*, Mansell, London and New York, 1992, p. 58. See also OAU Doc. ECM/Res. 5 (III) (1964) (Addis Ababa); OAU, Resolution on the Activities of Mercenaries, AHG/Res. 49 (IV) (1967); OAU Doc. ECM/Res. 17 (VII) (1970) (Lagos); OAU, Declaration on the Activities of Mercenaries in Africa (June 23, 1971), all reprinted in Robert E. Cesner, Jr. and John H. Brant, “Law of the Mercenary: An International Dilemma”, *Capital University Law Review*, vol. 6 (1990), pp. 363–6.

51 See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

52 See the discussion in ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987, at para. 1806 et seq.

deliberately exploit legal loopholes, as Sandline's contract with the Papua New Guinea government made clear.<sup>53</sup> The result of postcolonial bargaining over military entrepreneurialism has thus been not so much a "vacuum" as a "patchwork" of international regulation that leaves states free to harness private military companies in a manner that renders them free agents within – but very much of – the state system.

At the same time, however, we can discern a subtle shift even in the last two decades in how states have conceived the systemic legitimacy which military entrepreneurs ought to serve, increasingly seeking to align military entrepreneurialism with concepts of humanitarianism. In the 1990s humanitarian activity grew in scale and reach, just as states scaled down and pulled back their overseas military presences following the end of the Cold War, leaving a security "gap" which military entrepreneurs have filled.<sup>54</sup> The increasing reliance of states, international organizations and private actors in conflict zones on commercial military entrepreneurs points to a deepening normalization of the market form of regulation at the international level. Although the discussion of mercenarism initiated within the Commission on Human Rights in the mid-1980s developed out of an attempt by anti-market socialist and anti-colonial non-aligned states to portray commercial military entrepreneurialism as a per se human rights violation,<sup>55</sup> discussion within the Commission gradually shifted to focusing on how to ensure military entrepreneurs' protection of human rights and compliance with international humanitarian law. This is the approach which underpins the current Swiss–ICRC initiative detailed elsewhere in this issue of the *Review*, in the ICRC's own work with private military companies (PMCs),<sup>56</sup> and in other regulatory initiatives focused on military entrepreneurialism.

### *Extending existing rules*

These approaches focus on extending existing norms governing the organization of legitimate violence, developed in interstate settings, to private actors. But it is worth considering the limits of such an approach. Traditionally, the *jus in bello* has started from a *jus ad bellum* presumption that "private" actors are not legitimately entitled to organize violence on a military scale, absent state consent, and that where they do so such actors are, in fact, properly the object of state-organized violence (whether military or criminal) aimed at their repression or criminal sanction. Many of the controversies in the development of the *jus in bello* and

53 See *Sandline International Inc. v. Papua New Guinea*, in (1999) 117 ILR, pp. 552–65, 565–93 (in the Queensland Supreme Court). Sandline employees were sworn in as members of PNG armed forces, thereby circumventing rules against mercenarism.

54 See James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study*, International Peace Academy, New York, March 2006.

55 See generally International Alert, *The Mercenary Issue at the UN Commission on Human Rights: The Need for a New Approach*, International Alert, London, 2001.

56 See Claude Voillat, "Private Military Companies: A Word of Caution", *Humanitarian Exchange*, no. 28 (2005), p. 33.

related fields such as counter-terrorism in the last thirty years have hinged precisely on the extent to which norms governing and legitimizing interstate hostilities ought to be extended to non-state actors. The 1977 First Additional Protocol to the Geneva Conventions famously extended the system to situations involving peoples “fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”,<sup>57</sup> thus suggesting that legitimacy for the organization of violence might be drawn not only from state consent, but also (or even, perhaps, “rather”) from its alignment with larger global public interests such as self-determination. The same approach seems to underpin more recent discussion of the Responsibility to Protect. These issues are controversial at least in part because it is not always entirely clear that non-state actors have the same capacity for responsible participation in the systems developed in interstate contexts. Merely bringing them into the existing system may not be adequate; it might stretch the skin of international humanitarian law so thin that it could ultimately break.

To see why this is the case, it is worth looking in more detail at how the *jus in bello* has been extended to cover “private” actors in these last thirty years. Since 1907 all the major international instruments governing the *jus in bello* have restricted the organization of legitimate violence to groups exercising effective territorial control<sup>58</sup> and organized through hierarchical administration (reflected in the doctrine of responsible command<sup>59</sup>) – regardless of whether their legitimacy was drawn from concepts of belligerency, statehood or self-determination and other global norms. While the characteristics of groups recognized as subjects of the *jus in bello* have changed with altering social and technological conditions, in particular the rise of guerrilla warfare, the underlying orientation in favour of hierarchical administration and territorial control has endured. International humanitarian law relies on territorial control and hierarchical administration as the cornerstones of the system of responsible provision of humanitarian goods, services and treatment. Simply extending existing rules of international humanitarian law to deterritorialized, non-hierarchical non-state actors risks reducing the effectiveness of the system, because those actors may be unable (or unwilling) effectively and responsibly to deliver those humanitarian goods, services and treatment.

The challenge for international humanitarian law, then, is to find ways to incorporate deterritorialized, non-hierarchical organizations, which previously have been treated as “private” actors – including private military companies, but

57 API Art. 1(4).

58 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulation concerning the Laws and Customs of War on Land, 26 Martens Nouveau Recueil (ser. 2) 949, 187 Consol. T.S. 429, 4 September 1900, Art. 42; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287, Art. 154; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 UNTS 609, 7 December 1978, Art. 1(1).

59 See especially API, Arts 86, 87; Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998), entered into force 1 July 2002, Article 28.

arguably also including the armed wings of global social movements such as Hizballah and Al Qaeda, and globally organized criminal enterprises – into the system regulating public goods such as access to security and to humane treatment. But to find these ways, we must first understand why and how violence is once again being organized and legitimized privately.

## The return of the private in the global organization of legitimate violence

For most of the last millennium, social and technological developments have ultimately favoured states over private military entrepreneurs in the organization of legitimate violence. States have – sometimes by forming tactical alliances with military entrepreneurs – established, deepened and exported their own monopolies on legitimate violence. Territorialization and hierarchical organization have habitually won out over other organizational forms. This has led to a system in which both law and war are constituted as global and state-centric systems, slowly hiding the private activities which underpin public, coercive power. But the balance between the private and the public in the global organization of violence (whether legitimate or illegitimate) seems once again to be shifting.<sup>60</sup> What we are witnessing may be a return of the private.

### Contemporary military entrepreneurialism

Take piracy. Despite co-ordinated efforts by states, it remained ubiquitous until the nineteenth century, when the advent of the steamship raised the sunk and operating costs of piracy higher than pirates, given their itinerancy, low social position and general lack of political power, could meet.<sup>61</sup> Piracy has now, however, re-emerged both in south-east Asian waters and off the Horn of Africa, where barriers to market entry are once again low: the vessels and small arms and light weapons needed are cheap and easily available on the market, and valuable assets sail through the Strait of Malacca and around the Horn of Africa every day – while state policing power is often weak and corruptible. Under the prevailing technological – and regulatory – conditions, it has once again become financially feasible for small-scale naval entrepreneurs to organize violence outside the state system.

The resurfacing of military entrepreneurialism is not confined to the seas. Military entrepreneurialism has also resurfaced on land – and even taken to the air.<sup>62</sup> Military entrepreneurialism has flourished where (i) local state enforcement

60 A good introduction is provided by Bjørn Møller, “Privatisation of Conflict, Security and War”, DIIS Working Paper no. 2005/2, Danish Institute for International Studies, Copenhagen, 2005.

61 See Ethan A. Nadelmann, “Global prohibition regimes: the evolution of norms in international society”, *International Organization*, vol. 44 (1990), pp. 479–526.

62 Aerial examples include the key role commercial aviation operators have played in conflicts in west Africa and the Great Lakes region, both as transport and as combat capacity providers. This activity is limited by comparatively high barriers to entry (the costs of acquiring the helicopters and aeroplanes) and high operating costs (especially repairs, fuel and the salaries of skilled pilots).

power is functionally weak or perceived to be illegitimate, or supportive of or acquiescent in such private activity; (ii) demand for organized violence is high; and (iii) other sources of organized violence (such as foreign states or international organizations) are not available or are perceived to be less efficient or legitimate. The relative gap in the strength of state and private forces has also narrowed as state forces have been downsized following the end of the Cold War and under the global financial discipline of the Washington consensus, and with the proliferation of small arms and light weapons, motor vehicles and other means of contemporary asymmetric warfare.

Existing regulatory conditions favour the corporate organization of such military entrepreneurialism by offering legal tools through which to protect the fruits of the trade from intrusive state regulation. First, global commercial arrangements encourage military entrepreneurs to organize as conglomerates of limited liability corporations, distributing risk, shielding assets from seizure and profits from taxation, and allowing regulatory arbitrage. Commercial confidentiality and the protection of profits through state judicial enforcement of international arbitral awards further assist military entrepreneurs, increasing their power relative to states.<sup>63</sup> Military entrepreneurs use multi-sectoral alliances with natural resource extractors, construction companies, risk consultants and moonlighting governmental elements to achieve economies of scale and distribute risk.<sup>64</sup>

### The decreasing importance of territorial and hierarchical characteristics

The net result of contemporary technological and regulatory conditions is that territorialization and hierarchical administration are becoming decreasingly important in the organization of violence – not only for licit commercial military entrepreneurs, but also for those military entrepreneurs driven by illicit profit motives, ideology or lust for power. It is not only legitimate private military companies, but also terrorists, organized crime and other non-state armed groups that have taken advantage of these conditions, using global financial, transport and communications networks and legal tools to finance, organize and provide legal cover for violence. As the Kurdish rebel leader, Abdullah Öcalan, has put it, “If you have money you can find anything on the market.”<sup>65</sup> Many of these private organizers of violence also use global media to try to build a global constituency for their activities, justifying their various forms of non-state violence through

63 On arbitration see D. Sturzaker, “The Sandline affair: illegality and international law”, *International Arbitration Law Review*, vol. 3 (2000), p. 164.

64 Herbert Howe, “Private security forces and African stability: the case of Executive Outcomes”, *Journal of Modern African Studies*, vol. 36, no. 2 (1998), pp. 307–31; Pratap Chatterjee, “Mercenary Armies and Mineral Wealth”, *Covert Action Quarterly Magazine* (Fall 1997); Pratap Chatterjee, “Guarding the Multinationals, DSL and the International Private “Security” Business”, *Multinational Monitor*, 1 March 1998.

65 Hamit Bozarslan, “Kurdistan: économie de guerre, économie dans la guerre”, in François Jean and Jean-Christophe Rufin (eds.), *Économie des guerres civiles*, Hachette, Paris, 1996, p. 137.

appeals to a variety of norms such as humanitarianism (e.g. Blackwater) and *jihad* (e.g. Al Qaeda).

The increasing penetration of cyberspace into social life is also likely to facilitate the privatization of violence. Cyberspace will serve for private actors both as a space in which violence can be organized and as a location of valuable assets which may be targeted for control or destruction. It will allow predatory groups to organize and operate, although dispersed across the globe, making counter-attack by territorial, hierarchical entities such as states difficult. It will also allow private actors to strike at valuable assets located in cyberspace, doing not only economic damage to societies (e.g. by destroying financial records or stealing financial value) but also political and even physical damage (e.g. by shutting down infrastructure or even hacking into and controlling conventional weapons). While this may seem removed from the type of physical violence which international humanitarian law has regulated, in a sense that only goes to show how the existing regulatory system may struggle to cope with new deterritorialized, non-hierarchical social realities: both the concepts and the practice of international humanitarian law will need to be adjusted to encompass such dispersed groups, if cyber-violence is effectively to be regulated.

Together, these technological and regulatory shifts seem to herald a fundamental shift in the balance of power between “public” and “private” authority in international society, presenting fundamental challenges for the existing system of international humanitarian law, which continues to be largely oriented towards a Weberian–Clausewitzian conception of war as a competition between centralized hierarchies seeking to exert political power over a defined territory. Today’s social and technological systems – underpinned by a globalizing law sustaining global private commerce – instead make the financing, staffing, resourcing and legitimization of violence, and its projection around the world, unimaginably democratic, and decidedly global.<sup>66</sup> As violence is deterritorialized and organized less hierarchically, legitimacy will likely also change, producing a law which is increasingly social, not statist, and shared, not monopolized. Applying the existing tools of international humanitarian law may become increasingly difficult.

## Challenges for international humanitarian law caused by the return of the private

### Scope and universality

The first challenge posed by the return of the private for theorists and practitioners of international humanitarian law is to know where and when that law applies: to know, in other words, its scope.

66 Cf. Program on Humanitarian Policy and Conflict Research, *Transnationality, War and the Law*, Harvard University, Cambridge, Mass., April 2006, p. 19.

The modern conception of war as an extension of public, interstate politics by other means has allowed the evolution of a *lex specialis*, a regulatory system confined within the temporal and spatial scope of “war”, or, as it is conceived within contemporary international humanitarian law, “armed conflict”. The determination of whether protracted armed violence amounts to a situation of armed conflict, and whether this regulatory system therefore applies, rests on determinations of fact about the extent of violence within a specific locale and about the participation of responsible (i.e. hierarchically organized) armed groups within it. Armed conflict is presumed to involve a struggle for political and military control over territory.

The “new wars”, as Mary Kaldor has described them,<sup>67</sup> problematize such determinations.<sup>68</sup> In such conflicts violence is often territorially dispersed and participation carried out remotely, through intercontinental satellite transmissions and cash remittances, media messaging and mobile-phone calls. Violence is increasingly organized through contractual agents, networks of charismatic and social influence and even inspirational example, rather than direct command and control. Determinations of when and where armed conflict is taking place, what it means to “actively participate in hostilities”, and when violence is “associated” with armed conflict become increasingly problematic. As a result, it is difficult to know when and where international humanitarian law applies, and when some other legal regime such as human rights, refugee law or criminal law applies. It is also increasingly difficult to determine which national jurisdictions ought to exercise prescriptive and sanctioning power, or which of many competing jurisdictions ought to take precedence.

At some levels this appears to be driving convergence, particularly among national and international criminal jurisdictions. But at other levels there is a risk of fragmentation and competition, leading to conceptual confusion or even a race to the bottom. Seen in this light, the US Supreme Court’s recent decision in *Hamdan v. Rumsfeld* that Common Article 3 applies to all detainees in the United States’ war with Al Qaeda may in fact herald a rather pyrrhic victory in the defence of international humanitarian law against its detractors, since it may cut off Guantánamo and CIA detainees from stronger protections to which they might otherwise be entitled.<sup>69</sup> What is already clear from debates in the United States and beyond is that humanitarian law’s detractors will view its statist orientation – and the consequent difficulties in adapting and applying it to emerging private forms of violence – as leverage for arguing that it does not, or should not, apply to conflicts with private groups. These detractors have sought, in the last half-decade since 9/11, both literally and figuratively to locate private organizers of violence in

67 Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era*, Polity Press, Cambridge, 1999.

68 Program on Humanitarian Policy and Conflict Research, above note 66, p. 19.

69 *Hamdan v. Rumsfeld*, No. 05-184, Supreme Court of the United States of America, 29 June 2006. The recent Military Commissions Act (2006) indeed points to *Hamdan* being used as the occasion for US Congress to remove detainees’ access to stronger legal protections, such as US constitutional rights and *habeas corpus* remedies.



international humanitarian law's apparent "holes" in coverage. Sometimes this works to the benefit of the private actors – as for US military contractors in Iraq (immunized from Iraqi law, in the vast majority of cases beyond the jurisdiction of US criminal law, and only in rare cases violating international prohibitions on mercenarism) – and sometimes to their detriment – as it has for Guantánamo and CIA detainees.

In the longer term this confusion over scope may fragment the legitimacy of international humanitarian law, in particular undermining its claim to universality. As the application of international humanitarian law is corralled or even wound back, the system's conceptual coherence and practical relevance may be challenged. The central distinction between *jus ad bellum* and *jus in bello* which underpins humanitarian law's universalist humanism may erode, and with it the notion of humanitarianism as a universal public good. Access to more than the absolute minimum levels of humane treatment as a prisoner, or to humanitarian relief as a victim of armed conflict, may no longer be viewed as a right accruing to all humans, but as an entitlement conditional on membership of a status group, or possession of something of private value – whether a nationality, a creed, a race or cold hard cash.

## War, law enforcement and humanitarian action

In such a climate, as legitimacy becomes more and more difficult to discern, the line between war, law enforcement and humanitarian intervention may become increasingly blurred.

Civilian contractors provide a good example of the increased difficulty of applying the principle of distinction when violence is organized not through an administrative hierarchy, but through transactional and private social relations. Is a civilian analyst contracted to decipher images from unmanned aerial devices relayed from Fallujah to Florida, where he sits, responsible for inaccurate bombardment based on his image analysis? Is he a legitimate military target? Is the managing director of a civilian language firm responsible for grave breaches that occur during interrogations made possible by interpreters supplied by her firm? Is she a legitimate military target? There certainly are legal answers to these questions, but they are often difficult to discern – particularly for military commanders and other combatants who confront severe time and expertise constraints.

Similar interpretive difficulties arise in relation to other forms of private violence. Deterritorialized network wars do not offer clean-cut distinctions between civilians and participants in responsible armed hierarchies as have, supposedly, interstate wars for the last century and a half. As the recent conflict in southern Lebanon demonstrates, the dispersal of participation in the organization of the financing, staffing and resourcing of violence by private actors throws an ever-widening net over "civilian" society, increasing the temptation of – and perhaps the legal scope for – state counter-attacks on dual-use facilities under Articles 50–54 of the First Additional Protocol. With participation in hostilities

dispersed through contractual and social networks, distinctions between lawful collateral damage inflicted by states, non-state terrorism and militias' ravishing of civilian communities become increasingly difficult to sustain. Not only the fact of distinction, but ultimately the very principle of distinction might risk collapse.

Another example of how the legitimacy and relevance of the principle of distinction is being challenged by the dispersal of participation in armed conflict – or at least, by increased media reporting and public awareness of that dispersal – is the discussion around the involvement of children in armed conflict. Children provide cheap and easily manipulated labour, in war just as in productive industry. Children are often participants in contemporary hostilities or are essential to the viability of military and criminal enterprises for which they are coerced to work. This involvement of children as actors in the organization of violence problematizes our instinctive combatant/civilian and perpetrator/victim dichotomies, undermining the principle of distinction and striking at the social legitimacy of existing legal frameworks.

While theorists and jurists may find creative ways to adapt the existing mechanisms of international humanitarian law to these new social realities, as did the International Criminal Tribunal for the former Yugoslavia (ICTY) in adapting the concept of “protected persons” in Article 4 of the Fourth Geneva Convention to situations where allegiance rather than nationality determined group membership,<sup>70</sup> such theoretical nimbleness may not be replicable in the unwieldy and often rather conceptually inert bureaucracies of military command structures. The challenges for military commanders in developing and consistently implementing such theoretical innovations are manifold, particularly where states are engaged in asymmetrical warfare with private actors. Military commanders need clear guidance before the fact, if there is to be consistency in their approach and discipline in their forces. Without that clear guidance the temptation for armed forces is, of course, to abandon existing norms – wholesale. Even where private actors have the organizational wherewithal reciprocally to provide the protections which international humanitarian law currently demands (such as the detailed detention arrangements mandated for prisoners of war by the Third Geneva Convention), they often lack the necessary motivation or incentives. And much emerging “private” violence simply lacks that organizational capacity, because it lacks territory on which to hold prisoners, or the hierarchical relations needed responsibly to administer other obligations under existing international humanitarian law – such as suppression of grave breaches.

This leads us to another central challenge to international humanitarian law posed by the contemporary reorganization of legitimate violence: the dispersal of responsibility for enforcing the law. The prevalence of non-hierarchical organization problematizes the application of command responsibility. On the battlefield this leads military commanders increasingly to rely on “draining the

70 *Prosecutor v. Tadic*, Judgement, Case No. IT-94-1-A, ICTY, 15 July 1999, repr. in (1999) 38 *International Legal Materials*, vol., p. 1518.

pool” strategies, sometimes verging on collective punishment. The principle of proportionality is stretched (as it was in the recent conflict in southern Lebanon) and the humanitarian space is shrunk as military commanders seek to weaponize humanitarian aid, and as humanitarian groups become unwitting or reluctant associates of parties to armed conflict.<sup>71</sup> The concepts and practices of humanitarian neutrality, impartiality and independence risk slowly being obscured.

In the process the previously differentiated activities of states which we have known as military action, law enforcement, humanitarian assistance and development aid may blur into complex projections of a particular form of social rule.<sup>72</sup> A number of actors already question the secular universalist agenda of contemporary humanitarianism itself, some questioning the validity of its secularism, some questioning whether it is truly universalist or in fact a vehicle for the transformative social agendas of the liberal West.<sup>73</sup> In fact, this description – of a competitive, intrusive projection of a complex system of rule – seems equally plausibly applied to a range of contemporary initiatives, from the “global war on terror” to multilateral peacebuilding to certain contemporary interpretations of *jihad*. The advent of each renders the theory and practice of international humanitarianism, and its protection through law, more problematic.

### Competition to rule?

The risk is of the emergence of a regulatory competition: an ongoing violent struggle – not quite peace and not quite war – between contending systems of rule promoted by rival coalitions of states and non-state actors, with no clear front lines.

At present that competition may seem most closely to resemble the contention between the Enlightenment-derived, rationalist humanism of Western states and societies, and the theological rule of some contemporary brands of political Islam. I have written previously in these pages about this relationship and its implications for the historical development of international humanitarian law, so I will not revisit those issues here.<sup>74</sup> Instead, I simply note that while much contemporary discourse frames this as a “clash of civilizations”, what the analysis above would suggest is that the challenges that international humanitarian law confronts arise at least equally from clashes within civilizations, between different discourses, political agendas and even epistemologies.

71 See Cockayne, above note 54. In 2001, US Secretary of State Colin Powell famously described NGOs in Afghanistan as a “force multiplier” and an important part of the US “combat team”: Colin Powell, Remarks to the National Foreign Policy Conference for Leaders of Nongovernmental Organizations, 26 October 2001.

72 See Mark Duffield, *Global Governance and the New Wars: The Merging of Development and Security*, Zed Books, London, 2001.

73 See Birgitte Refslund Sørensen, “Violence and humanitarian assistance: Reflections on an intricate relationship”, *Journal of Humanitarian Assistance* (September 2006), pp. 14–19.

74 See James Cockayne, “Islam and international humanitarian law: from a clash to a conversation between civilizations”, *International Review of the Red Cross*, Vol. 84, No. 847, September 2002, pp. 597–626.

What unifies contemporary debates over private military companies, terrorism, organized crime and even the Responsibility to Protect is a profound reconsideration within and among numerous global communities over the extent to which violence ought be organized and regulated by public – and in the global context, universal – standards of legitimacy and organizational systems. It is a debate over the scope and content of the social responsibilities of a variety of organizational forms, whether states, business, religious institutions or civil society organizations, in particular the extent to which they ought be responsible for providing physical and social protection to human beings – particularly those outside their groups or exchange relationships – and over the question of to whom they ought be accountable for the provision of that protection. This is, in other words, in part a quest to find a new constitutional settlement at the global level between the public and the private in the organization and regulation of legitimate violence. It is a struggle over the global reorganization of legitimate violence.

## **Reimagining international humanitarian law**

What would a system of globally organized legitimate violence be like, and where would international humanitarian law figure in it? To answer this question we must grapple with the role of the international, the humanitarian and the law in such a system.

### **From the international to the global**

First, we must consider whether humanitarian action in such a deterritorialized setting can continue to rely on state consent alone as the basis for its legitimacy. What sources of legitimacy are required to underpin humanitarian action worldwide in a setting populated by military entrepreneurs ranging from private military companies to global terrorist networks and local warlords, all fuelled by access to global markets?

Interstate reciprocity alone seems insufficient as a basis for a humanitarian law that enmeshes all these actors. Confronted by adversaries who are unwilling or unable to offer state personnel the same protections that international humanitarian law requires states to offer each other and to offer to non-state actors, many states will continue to be tempted to corral or to avoid altogether the application of international humanitarian law. Many of those non-state actors will, themselves, justify their actions not by reference to state sanction but by reference to “global” norms such as humanitarianism, shareholder value and divine authority.

Given these vulnerabilities, humanitarian law will need to find additional sources of legitimacy, for example by drawing in global business, civil society and even trans-national armed groups.<sup>75</sup> Steps by the Red Cross movement to work

<sup>75</sup> On this topic see Program on Humanitarian Policy and Conflict Research, above note 66.

with private military companies to implement existing law are only the beginning. We shall need to think about ways of treating non-state actors not only as objects of governance, but as sources of normativity and legitimacy. This will require a highly creative approach to global governance, going well beyond state-centric international legal approaches, emphasizing non-territorial and non-hierarchical aspects of global “public” citizenship. Mechanisms for promoting such public citizenship could include voluntary arrangements such as the Deed of Commitment promoted by Geneva Call or the US–UK Voluntary Principles on Security and Human Rights; national regulatory strategies and mechanisms incentivizing or mandating private actors’ compliance with certain standards, as the Swiss government and ICRC are currently exploring in relation to private military companies; and public advocacy engaging individual consumers, voters and worshippers.

### Contesting humanitarianism

Whether or not we adopt such creative approaches to legitimacy, it is entirely foreseeable that at some point political pressure to revisit the content of existing norms of international humanitarian law may become overwhelming, particularly because of the prevalence – or at least the prominence – of asymmetric warfare. In many cases this will require a revisiting of the very notion of humanitarianism, to develop a common consensus on which behaviours it mandates. The challenge here is to find ways to adjust the interstate edifice of international humanitarian law to deal with global private violence, without abandoning the humanitarian foundations that underpin the existing edifice.

This may require systematic thinking and extensive discussion of, for example, how the seven Fundamental Principles of the Red Cross movement (humanity, impartiality, neutrality, independence, voluntary service, unity and universality) and other key principles (such as those of distinction and proportionality) ought to be adjusted in dealing with deterritorialized, non-hierarchical organizers of violence. There is no doubt that humanitarian workers in the field are already forced to make such on-the-spot adjustments; they need and deserve more comprehensive and consistent guidance, not only from their headquarters but from the so-called “international community” at large, whose interests they are often purported to represent. This is not simply a question of what the “humane treatment” requirements of Common Article 3 are in the case of a terrorist with unique apparent knowledge of a future crime, but also of how humanitarian workers in the field ought deal with warlords and private military companies and what the role of detention visits is in relation to criminal kidnapping organizations, to name but a few contemporary challenges.

Although we might aim, ultimately, to resolve questions of competing standards of humanitarianism offered by different legal traditions, jurisdictions and regimes, a more cautious approach might involve focusing on what is common, rather than on what is contested. The aim here must be, once again, to find a “global” solution which reinforces the consensus underpinning behaviours

we know as “humanitarianism”. International humanitarian actors such as the ICRC might join with stakeholders such as private military companies, national and sub-national law enforcement authorities, national and international refugee regime administrators, national militaries, multilateral peacekeepers and human rights authorities to forge commitments on activities of common interest, such as detention, interrogation, international transfer (including *réfoulement*) and minimum trial standards, that apply at all times and in all places.

But we also need to accept that defending humanitarianism requires more than standardizing norms. It may also require creating legal, administrative and socioeconomic structures which create incentives for humanitarian behaviour. There may be a level at which the “acceptance” approach of some humanitarian actors is no longer sustainable, absent an extra level of incentives to regulate and constrain the threats posed by those actors who reject and attack humanitarianism. This need not translate into coercive restraint. Some private actors may be induced to act in accordance with public values and to offer public goods if such behaviour clearly offers them private benefits, including, for example improved economic benefits. This is as true of private military companies who adopt corporate social responsibility measures to improve their market “brand” as it is of local militias who are induced to disarm by the prospect of alternative livelihoods offered by the international community.

Humanitarianism ought, such a line of thinking would seem to suggest, to be considered as part of a larger social system which values non-violence, practised by all social actors, whether military or commercial, public or private. Global humanitarian action may need, therefore, to deal not only with responsible command structures, but responsible enterprise more generally. Where international humanitarian law has operated predominantly through “responsible command” models, this more social conception of global humanitarian regulation may need to develop additional “enterprise” models. Such models, which attribute responsibility and liability not through hierarchical relations but through transactional relations, may already be beginning to emerge through litigation in national and international courts.<sup>76</sup> These models may facilitate the transparent and globally consistent regulation of violence which is organized not through hierarchical subordination, but through aiding, abetting, complicity, joint criminal enterprise and social influence.<sup>77</sup>

The development of such models through decentralized litigation is itself a key process in the movement towards a global reorganization of legitimate violence, rebalancing the relationship between public values and private interests in global society. It is a system being built by decentralized, often private action through courts and contracts. But for that very reason it risks fragmentation and

76 See especially Anita Ramasastry and Robert C. Thompson, *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law*, FAFO Report 536, FAFO, Oslo, 2006.

77 For examples of the early adaptation of doctrines of command responsibility to such situations, see *U.S. v. Krauch et al.* (“IG Farben case”, case 6), TWC VIII, pp. 1081–210 at pp. 1124, 1126; *Prosecutor v. Musema*, T.Ch, 27 January 2000, Judgment and Sentence, ICTR-96-13.

inconsistency. Moreover, it risks producing dominant interpretations of humanitarian and military norms which are skewed towards criminal justice perspectives. Over time, this criminal law orientation may lead to norms of conduct which are meaningful to prosecutors, judges and juries, but not to actors in the field such as military commanders and humanitarian workers. (Again, the *Tadić* “protected persons” example springs to mind.) A more effective approach might be for states and other key actors within the humanitarian system to work with interested parties, such as business, to codify these rules, and to clarify how existing norms governing humanitarian conduct by governments and their auxiliaries ought to apply in a variety of non-hierarchical, relational situations.

### From law to rule?

Such a project assumes that there will be room for humanitarian action in the future. The final danger of the return of the private is the possibility of the development of a rather more gloomy scenario in which such action has lost its relevance. The broader danger is that law itself will in a sense be privatized, leaving no room for public service delivery on the global level, and therefore no room for global humanitarian action.

If not appropriately regulated, private military companies and other military entrepreneurs, operating through trans-national networks of financial, governmental, social, legal and military power could render security a commodity available only to those with sufficient financial, social or political power. The danger here is that access to security may cease to be a matter of right flowing from one’s humanity, at least nominally guaranteed by states, and instead become a matter of financial, social and political power. The modern, rational legal entitlements protected by international humanitarian law risk reverting to relational, transactional entitlements, closer to the historical experience of pre-modern societies such as feudal Europe.<sup>78</sup> In such an arrangement, law disaggregates into overlapping and often competing systems of rule and authority. The danger is that, with military entrepreneurs figuring prominently in the mix, this competition may become violent. The globe would then risk reproducing conditions such as those in pre-modern Europe, with states and private entrepreneurs vying to run protection rackets for overlapping populations, and humanitarian “protection” being reduced to a strategic tool in efforts to win the allegiance of and control over populations – “hearts and minds” operations writ large.

Such developments may seem remote or unlikely to some, but to others they may describe how humanitarian action is already perceived and received in some parts of the world. Much of what we often take for granted in today’s global organization of legitimate violence probably seemed far-fetched, if not inconceivable, before it came to pass – whether it was Dunant’s plan to establish

78 Cf. A. C. Cutler, “Globalization, the rule of law, and the modern law merchant: Medieval or late capitalist associations?”, *Constellations*, vol. 8 (2001), pp. 480–502.

committees to assist wounded soldiers on the battlefield, or the concept of a legitimate secular state, or even the axiomatic distinction we make between the public and the private. The first step in managing these processes of reorganization may in fact be to “reimagine the real”. There are signs that the world is already reorganizing around us: the return of the private in the organization of violence, exemplified by the resurfacing of military entrepreneurialism in the form of private military companies, is just one example of the recalibration of the balance between public authority and private power. If we wish to maintain the legitimacy of international humanitarian law and action, and to retain the public access to humanitarian goods, services and treatment that it protects, we must act quickly to “reimagine” the real and to find this law’s place in it.