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Are There "Inherently Sovereign Functions" in International Law?

By Frédéric Mégret[*]

Abstract

Privatization of functions that were traditionally considered sovereign has reached new heights. International lawyers have responded mostly by seeking to limit some of the consequences of that phenomenon, by, for example, ensuring accountability of states for outsourcing. International law has sometimes appeared agnostic, however, about the very legality of privatization. This Article explores a more radical take, namely the possibility that certain state functions could be seen as "inherently sovereign" under international law. International law can be understood this way, the Article argues, despite its general deferral to sovereignty (including the sovereignty to outsource), the fact that historically all kinds of functions that we have come to associate with the state have been exercised privately, and international law's own role in legitimizing privatization in our era.

I. Introduction: International Law and the Limits of Privatization

Privatization of functions that were previously considered sovereign has reached new heights, accelerating a process of "retreat of the state."[1] This privatization has extended not only to the use of force (police, military, spying), but also to the running of previously public monopolies, including the health system, education, and even prisons.[2] It has also affected key resources such as water.[3] The "commercialization of sovereignty" has even affected border control and the administration of asylum claims,[4] raising concerns about the rampant privatization of citizenship itself, and its conferral on what seems to be a purely transactional and commercial basis.[5] In short, privatization has led to an increased blurring of the always fragile distinction between the public and the private sphere.

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[1] Susan Strange, The Retreat of the State: The Diffusion of Power in the World Economy (1996).

[2] Manfred Nowak, Human Rights or Global Capitalism: The Limits of Privatization (2017).

[3] Khulekani Moyo & Sandra Liebenberg, *The Privatization of Water Services: The Quest for Enhanced Human Rights Accountability*, 37 Hum. Rts. Q. 691 (2015).

[4] Thomas Gammeltoft-Hansen, Access to Asylum: International Refugee Law and the Globalisation of Migration Control 31 (2011).

[5] Anna Leander, *Marketing Security Matters: Undermining De-securitization Through Acts of Citizenship*, *in* Citizenship and Security: The Constitution of Political Being 97, 102–03 (Xavier Guillaume & Jef Huysmans eds., 2013).

The phenomenon is domestic, but it is also, crucially, global, often involving the disaggregation of the state across multiple boundaries and outsourcing to a series of both domestic and foreign actors. Its source lies in neoliberal policies initially implemented in the United Kingdom and the United States, policies that have been gradually extended to much of the Global South as part of development projects, structural adjustments, and the "Washington consensus."[6] Privatization is inseparable from dominant ideas about globalization and the market, and it is often highly embedded in agendas of shrinking the public sector. It involves "a bifurcation of the sovereign space into heavily and lightly regulated realms—all in order to attract international business and capital."[7]

But are there any limits to what states can privatize under international law? The delegation of a number of traditionally public functions has been defended and promoted as above all optimally efficient for the provision of certain services, allowing significant public savings by adapting services to an increasingly global economy.[8] This is not the place to address such claims on their merit, but clearly much of privatization is not per se illegal under international law. By the same token, there is no doubt that privatization goes to the heart of some current anxieties about the law. Privatization of functions that were previously seen as sovereign seems to hollow out the state, leaving public law on an unsure footing. It raises questions about constitutionally and internationally protected rights. What kind of vocabulary does international law offer to think through the consequences of privatization?

There is significant theoretical[9] and domestic and comparative literature[10] on the extent to which states should be allowed to outsource sovereign functions. That literature, however, is largely oblivious to the international dimension of the problem. Even scholarship on military privatization often looks at the international from within the depths of domestic priorities rather than one informed by the exigencies of communal international life.[11] Although this literature will be examined at least in passing, this Article is ultimately less interested in the domestic constitutional dimension than what might be described as the global constitutional context of privatization.

In that respect, it should be noted that rampant transnational and globalized privatization is a challenge *to international law as well*. Descriptively, international law is at risk of losing its conceptual underpinnings:

> the prevailing orthodox view of the public–private distinction as found in international law is very much based on the concept of a strong sovereign state, one that retains a firm

[6] Saul Estrin & Adeline Pelletier, *Privatization in Developing Countries: What Are the Lessons of Recent Experience?*, 33 WORLD BANK RES. OBS. 65 (2018).

[7] GAMMELTOFT-HANSEN, *supra* note 4, at 31.

[8] Ronald A. Cass, *Privatization: Politics, Law, and Theory Symposium*, 71 MARQUETTE L. REV. 449 (1988).

[9] CHIARA CORDELLI, THE PRIVATIZED STATE (2020); PRIVATIZING THE STATE (Béatrice Hibou ed., Jonathan Derrick trans., 2004).

[10] Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397 (2006); Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162 (2013); Manuel Tirard, *Privatization and Public Law Values: A View from France*, 15 IND. J. GLOB. LEG. STUD. 285 (2008); George Katrougalos, *Constitutional Limitations of Privatization in the USA and Europe: A Theoretical and Comparative Perspective*, 17 CONSTELLATIONS 407 (2010).

[11] PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT (2007).

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> grip, if not monopoly, on the use of force. Although such states clearly still exist, international legal doctrine has failed to adapt to the increasing variety of modern, post-modern, and also pre-modern states.[12]

There is, furthermore, a close connection between international law's descriptive and normative limitations. International law had long treated a certain set of core sovereign functions as coterminous with legality, security, and rights, and, as such, participated not only in the regulation but the constitution of sovereignty.[13] The gradual dissolution of that ambition arguably leaves international law with very little intellectual backbone. These concerns mean that, as Laura Dickinson has pointed out, "international law scholars, policymakers and advocates can no longer afford to ignore privatization,"[14] especially when it is implicated in the circumvention of international legal prohibitions.

In this context, a number of international legal voices have begun to make themselves heard. Among the most influential have been those seeking to make private actors susceptible to domestic and international obligations,[15] and generally more accountable,[16] as well as broader efforts to rethink some state functions in light of globalization.[17] These approaches usefully examine the issue of privatization from a global perspective.[18] They do not, however, particularly take issue with privatization in itself, foregrounding a resolutely pragmatic and regulatory response. In that respect, they fail to tell us precisely what might be potentially problematic about privatization, independently of its more or less circumstantial consequences.

This Article, by contrast, explores a more radical tack by considering the possibility that international law might in some cases, instead of merely seeking to mitigate the consequences of privatization, *mandate* the publicness of certain functions or at least provide significant material for those who would resist privatization. These functions would be deemed, as a result, to be "inherently sovereign" (hereinafter ISFs), functions that the state cannot, *under international law*, validly devolved to other actors. The Article does not presume that such functions exist from the outset, but it seeks to examine what understandings of international law might buttress their existence. A function will be understood as "inherently sovereign" (as opposed to "inherently governmental," the similar expression most often used in the domestic context) if *international legal arguments militate against its privatization or outsourcing by the state*. The Article argues that, by contrast with a merely regulatory approach,

[12] Nigel D. White, et al., *Blurring Public and Private Security in Indonesia: Corporate Interests and Human Rights in a Fragile Environment*, 65 NETH. INT'L L. REV. 217, 225 (2018).

[13] Conversely, when international law sought to deny sovereignty to entities, it excluded access to inherently sovereign functions. See for example, under the mandates system, the "prevention of the establishment of fortifications or military and naval bases and of military training of the natives." Treaty of Peace with Germany, Art. XXII, June 28, 1919, 1919 UST 7.

[14] Laura A. Dickinson, *Public Values/Private Contract*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 335, 356 (Jody Freeman & Martha Minow eds., 2009).

[15] *See, e.g.*, MENNO T. KAMMINGA & SAMAN ZIA-ZARIFI, LIABILITY OF MULTINATIONAL CORPORATIONS UNDER INTERNATIONAL LAW, VOL. 7 (2000).

[16] *See, e.g.*, JENNIFER ZERK, CORPORATE LIABILITY FOR GROSS HUMAN RIGHTS ABUSES: TOWARDS A FAIRER AND MORE EFFECTIVE SYSTEM OF DOMESTIC LAW REMEDIES (2014).

[17] EYAL BENVENISTI & GEORG NOLTE, THE WELFARE STATE, GLOBALIZATION, AND INTERNATIONAL LAW (2011).

[18] LAURA ANNE DICKINSON, OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS (2011).

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the focus on ISFs better makes sense of underlying intuitions that there is an *a priori* legal preference for certain functions being exercised by states.

Although some international law voices have occasionally hinted at the existence of ISFs, they have done so with respect to specific subject areas (such as intelligence[19] and military activities[20]) and have not developed a broad theory that could clarify what might be a normatively cogent international legal position on the matter. Moreover, they have sometimes too readily dismissed the notion of ISFs as impracticable.[21] Conversely, most existing work on ISFs, which comes in various domestic, administrative, and constitutional law forms,[22] has tended not to engage with the international law dimension of the problem.[23]

It is thus hoped that this Article can invigorate a conversation between various administrative, constitutional, and jurisprudential traditions and the tradition of international law, as modes of thought that, each for their own and not necessarily incompatible reasons, aim to delineate a public domain.[24] In that respect, the effort is consistent with the resurgent interest in the way in which "rather than international law being a creation of the state, making the state is an ongoing project of international law."[25] Displacing questions of "internationality" in favor of a renewed interest in "publicness" as the core of international law's predicament, then, can help forge new connections between human rights, constitutional, and international law.

Part II sets out the broad parameters for a theory of ISFs under international law, highlighting the kind of constraints under which it operates and what characteristics it would have to display to have explanatory and normative value. Part III examines some areas in which a theory of ISFs can be said to have actually manifested itself as a function of interstate relations, notably in relation to the regulation of the use of force. Part IV discusses a more vertical justification of ISFs based on international human rights law and its continued reliance on an implicit notion of publicness. Part V concludes with some thoughts about how reimagining international law as a law that guarantees a minimum sovereign content of certain state functions might reenergize" jurisprudential thinking about international law going forward.

[19] Simon Chesterman, *"We Can't Spy . . . If We Can't Buy!": The Privatization of Intelligence and the Limits of Outsourcing "Inherently Governmental Functions,"* 19 EUR. J. INT'L L. 1055 (2008).

[20] Nigel D. White, *The Privatisation of Military and Security Functions and Human Rights: Comments on the UN Working Group's Draft Convention*, 11 HUM. RTS. L. REV. 133 (2011); James Cockayne, *Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document*, 13 J. CONFL. SECUR. L. 401 (2008).

[21] By contrast, it has sometimes been dismissed out of hand in the more internationally oriented literature. *See* DICKINSON, *supra* note 18, at 38.

[22] Robert S. Gilmour & Laura S. Jensen, *Reinventing Government Accountability: Public Functions, Privatization, and the Meaning of "State Action,"* 58 PUBLIC ADM. REV. 247 (1998); Seema Ghani & Nematullah Bizhan, *Contracting Out Core Government Functions and Services in Afghanistan*, *in* CONTRACTING OUT GOVERNMENT FUNCTIONS AND SERVICES: EMERGING LESSONS FROM POST-CONFLICT AND FRAGILE SITUATIONS (OECD, 2009); Verkuil, *supra* note 10.

[23] For example, Paul Verkuil almost never refers to the international law dimension even when discussing the privatization of military force. Verkuil, *supra* note 10; VERKUIL, *supra* note 11.

[24] Lorenzo Casini, *"Down The Rabbit-Hole": The Projection of the Public/Private Distinction Beyond the State*, 12 INT'L J. CONST. L. 402 (2014).

[25] Luis Eslava & Sundhya Pahuja, *The State and International Law: A Reading from the Global South*, 11 HUMANITY: INT'L J. HUM. RTS., HUMANITARIANISM & DEV. 118, 118 (2019).

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II. An Argument for Inherently Sovereign Functions from International Law?

This Part examines broadly some of the parameters of what might be a workable theory of ISFs under international law. The emphasis is on highlighting some of the fundamental challenges to an international law theory of ISFs, the potential and limitations of purely domestic approaches to the topic, and what form such a theory could take.

A. Challenges to a Theory of ISF

1. The Sovereignty Not to Be Sovereign

One reason for international law's relative silence on the issue of ISFs may be that it is committed to sovereignty, understood as the default rule that states have considerable discretion, particularly domestically. This means that, in principle, it is also very much within sovereign discretion internationally how "public" a sovereign wants to be and how much it decides to outsource. This may make it an awkward role for international law to simultaneously, on account of some substantive vision of sovereignty, insist on a thicker version of "publicness." It may be, as we will see, that a sovereign could not fully privatize itself out of existence, but at the very least most international lawyers would agree that it can probably privatize a great many functions, some of which may well come very close to what one would consider to be the state's public core. Such is the consequence of international law's pluralism and its emphasis on a wide diversity of economic and social systems. This is the central paradox of sovereignty from the point of view of international law: that it includes the sovereignty not to be sovereign, or at least not to be sovereign in the way that sovereignty may have been understood traditionally.

This paradox is no mean hurdle to a purported theory of ISFs in international law. It has long been evident in the idea of an "international law of coexistence" of regimes that may otherwise be diametrically at odds. Historically, international law has countenanced quasi-totalitarian all-absorbing states on the one hand and libertarian minimal states on the other.[26] Deferral to a state's preferences in terms of domestic organization has been renewed in the wake of Third World insistence on respect for sovereignty and friendly relations between states. It is evident, moreover, in international human rights law as the branch of international law perhaps most concerned with the state's domestic organization. International human rights law's traditional unease with stipulating any standard of "public content" of the state stems, notably, from the danger of being drawn into the realm of ideological preferences.

As has been noted euphemistically, the Committee on Economic, Social and Cultural Rights (CESCR) has "adopted a somewhat ambiguous stance as regards what types of political and economic system are acceptable vehicles for guaranteeing rights."[27] Famously, according to the Committee:

[26] Ivo Lapenna, *The Legal Aspects and Political Significance of the Soviet Concept of Co-existence*, 12 Int'l Comp. L. Q. 737 (1963).

[27] Ben Saul, David Kinley & Jaqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials 170 (2014).

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> the undertaking "to take steps . . . by all appropriate means . . ." neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, provided only that it is democratic and that all human rights are thereby respected. Thus, in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez-faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed inter alia in the preamble to the Covenant, is recognized and reflected in the system in question. . . .[28]

In other words, perhaps wisely and prudently, the Committee retreated behind the goal (human rights), leaving the means (the sociopolitical organization of the state, including as it affects its particular public/private mix) to each state.

This is a standpoint that of course has a very historical dimension, notably the need to avoid being seen as taking sides on "ideological" issues during the Cold War. It is also revealing of a particular post-war pragmatic approach to international human rights law, for which the means themselves are neutral and only ends matter.

Nonetheless, it is a position that continues to have relevance to this day. It seeks to make the most of international human rights law's universalizing ambition whilst simultaneously clinging to international law's decentralizing and independence-respecting aspiration. It is also, one might think, a position that is better at resisting the imposition of a single, potentially hegemonic concept of the "right" division of the public and private spheres, in a context where we have reason to think that international law upholds "a very traditional view of the role of the state" and "the location of any line between public and private activity is culturally specific."[29] The CESCR's approach thus makes sense in the long term as an aspiration to allow states to experiment, in the exercise of their self-determination, with different permutations of the public and the private.

2. The Elusiveness of Ontology

From a long-term perspective, the current trend toward privatization of key state functions is both unsurprising on one level and striking on another. It is unsurprising because the state has long happily coexisted with private forms. The state, in a sense, built itself against a background where non-state actors were all powerful and frequently competing with it; it did so in a context, in fact, where the state itself, or what would become the state, was often little more than a non-state actor among others, at best a *primus inter pares*, vying for precarious domination over territory and subjects. Moreover, the state also emerged with, and thanks to, powerful private actors both domestically and internationally: banks, trading companies,

[28] Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 3: The Nature of States Parties' Obligations, para. 8, UN Doc. E/1991/23 (Dec. 14, 1990).

[29] Christine Chinkin, *A Critique of the Public/Private Dimension*, 10 EUR. J. INT'L L. 387, 390 (1999).

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private prisons, militias, corsairs, etc.[30] In other words, the current phenomenon of privatization of public functions may merely mark a reversal to an earlier, much fuzzier picture marked by chronic confusion between the public and private spheres. This cautions against too ontological a notion of what might be ISFs.

Indeed, one the central challenges of arguing for ISFs may simply be skepticism that anything is "inherent" about anything and, specifically, about the state as an evolving and fluid construct, let alone that international law could capture that dimension.[31] To be sure, skeptics will concede, certain features may be more commonly or at least historically associated with governments, but there is a risk of confusing what is merely habitual and what is inherent. Theories of ISFs simply commit us to a fundamental theory of the state that has become ever harder to justify precisely in a pragmatic age where the results (to be evaluated on a case-by-case basis) matter more than the responsible actor (in that respect, the argument goes, a good corporate actor will always be preferable to a bad sovereign one). Worse: theories that unduly defer to the state can become a justification for the status quo in a context where, inherent or not, it is hardly as if the state has always discharged its functions adequately.

To be clear, then, there is almost no function that might not conceivably be, and that has not historically been, exercised by actors other than states, including occasionally private actors. At the same time, and seen against the background of the last century, it is also true that the phenomenon of privatization of state functions *is* unexpected because it goes against what had been understood to go to the heart of modern projects of state construction, namely the centralization of powers and functions in the hands of the sovereign. For much of the nineteenth and twentieth centuries, prisons, the police, and the military were brought firmly under the control of the state almost everywhere. And for much of the decades following World War II, a large number of welfare services were rolled out in systematic fashion by the state. That there may retrospectively have been nothing natural or inevitable about this process of state intervention changes nothing to the fact that it became embedded in the experienced reality of the constitutional state, and is the immediate background against which privatization occurs.[32]

3. International Law's Own Production of Privatization

Finally, it is worth noting that, paradoxically, the phenomenon of privatization occurs not despite the state but often very much with its active participation. It is almost as if, at times, states were actively involved in the undermining of their own core sovereignty, selling out, as it were, to private bidders keen for a share of its monopolies. This cautions against too simplistic an assumption that privatization is merely corrosive of sovereignty when it can, in fact, be conceived as a deliberate attempt to extend and demultiply in the process of transforming

[30] Amar Farooqui, *Governance, Corporate Interest and Colonialism: The Case of the East India Company*, 35 SOC. SCI. 44 (2007); Ileana M. Porras, *Constructing International Law in the East Indian Seas: Property, Sovereignty, Commerce and War in Hugo Grotius'* De Iure Praedae-*The Law of Prize and Booty, or "On How to Distinguish Merchants from Pirates,"* 31 BROOK. J. INT'L L. 741 (2006); Martti Koskenniemi, *What Should International Legal History Become?*, *in* SYSTEM, ORDER, AND INTERNATIONAL LAW: THE EARLY HISTORY OF INTERNATIONAL LEGAL THOUGHT FROM MACHIAVELLI TO HEGEL(Stefan Adelbach, Thomas Kleinlein & David Roth-Isigkeit 2017).

[31] On the challenge for international law to capture essences, see Frédéric Mégret, *The Humanitarian Problem with Drones*, UTAH L. REV. 1283 (2013).

[32] Resnik, *supra* note 10.

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it.[33] Privatization can for example be seen as a way of allowing sovereign power to escape the strictures of public law—a sort of pernicious but effective "regulatory workaround."[34]

Relatedly, and further complicating international lawyers' quest for an international legal theory of ISFs, is the fact that privatization is hardly a phenomenon that has arisen outside or independently of international law itself. Whatever normative resources can be found in international law, as we will see, to make the case that some functions at least ought to be exercised by the state, must be weighed against the many ways in which international law has if not precipitated at least amply enabled privatization over the last few decades and, in the process, helped desacralize the notion that any function is inherently sovereign. That process is itself the consequence of a broader orientation toward private ordering since the end of the Cold War, away from an insistence on publicness earlier associated with such projects as the New International Economic Order.

The United Nations has adopted a somewhat ambiguous position on privatization. On the one hand, the UN in its peacekeeping guise has engaged in extensive efforts to assist weak or collapsed states to reinstate them as sovereigns in good standing. Rebuilding includes measures such as disarmament, demobilization, and reintegration that specifically target the multiplication of private militias and rebel groups, including pro-state but private "paramilitaries," with a view to allowing the state to reclaim its monopoly of the legitimate use of force.[35] At the same time, given the opportunity, the UN did not hesitate to privatize key industries in those environments, such as Kosovo, where it was effectively in a position to govern.[36] Separately, the UN has repeatedly been tempted by the idea of privatizing its own peacekeeping operations. Former UN Secretary-General Kofi Annan hinted that he would have been tempted to dispatch a private force to Rwanda to stop the genocide and Executive Outcomes has boasted that it would have been able to do so.[37] As for the Office of the UN High Commissioner for Refugees (UNHCR), it has emphasized the positive potential of including private sector actors in refugee responses.[38] Even transitional justice initiatives increasingly seem to rely on private donors and mediation.[39]

Some components of the UN family have even less ambiguously channeled neoliberal policies of privatization. This is true particularly of the World Bank[40] and the International Monetary Fund.[41] It is the World Bank, for example, that, for a time at least, encouraged

[33] CORDELLI, *supra* note 9.

[34] Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717 (2010).

[35] MONOPOLY OF FORCE: THE NEXUS OF DDR AND SSR (Melanne A. Civic & Michael Miklaucic eds., 2011).

[36] Robert Muharremi, *The Role of the United Nations and the European Union in the Privatization of Kosovo's Socially-Owned Enterprises*, 14 GER. L.J. 889 (2013).

[37] Chia Lehnardt, *Peacekeeping*, *in* PRIVATE SECURITY, PUBLIC ORDER: THE OUTSOURCING OF PUBLIC SERVICES AND ITS LIMITS 221 (2009).

[38] UNHCR'S STRATEGIC DIRECTIONS, 2017–2021, at 13, *available at* https://www.unhcr.org/5894558d4.pdf.

[39] Julia Emtseva, *Philanthrocapitalism, Transitional Justice and the Need for Accountability*, JUSTICEINFO.NET (2020), *at* https://www.justiceinfo.net/en/45639-philanthrocapitalism-transitional-justice-need-accountability.html.

[40] Mary M. Shirley, *The What, Why, and How of Privatization: A World Bank Perspective Colloquium*, 60 FORDHAM L. REV. S23 (1992).

[41] Nancy Brune, Geoffrey Garrett & Bruce Kogut, *The International Monetary Fund and the Global Spread of Privatization*, 51 IMF STAFF PAP. 195 (2004).

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"full cost recovery" from users and backed projects to contract water systems to large multinationals.[42] Privatization has, moreover, been promoted as essential to the realization of the sustainable development goals.[43] More generally, international trade and, particularly, international investment law have been associated with an unmistakable trend toward normalizing the adoption of public functions by private actors. They have allowed regulatory disputes to be resolved by private arbitrators in ways that betray a fundamental "retreat from adjudication" and lead to "the granting of a generalized competence to private arbitrators to define the scope of the public sphere and, as such, the uniqueness of the juridical sovereign."[44] Although investment arbitrators will concede in passing that certain policy decisions (for example, Argentina's changes to the currency exchange system or its taxation policy) are inherently sovereign in that they reflect fundamental national policy, they also in the same breath emphasize that they have jurisdiction to examine whether even general economic policy has a bearing on protected private investments.[45] Indeed, it has been argued that "the significance of international arbitration for juridical sovereignty is its privatization of the authority to define the very concept of the public sphere."[46]

Any international legal theory of ISFs will thus have to contend with the fact that international law can certainly not claim innocence from the trend toward privatization which it has both encouraged domestically and, in fact, duplicated internationally. In fact, the production and adjudication of large parts of international law have themselves already become thoroughly privatized.[47] The challenge is therefore to search for resources within international law to limit privatization, even as international law has been thoroughly implicated in the dismantling of the state.

B. Theorizing International ISFs

Against the background of such evident challenges, what room is there for an international theory of ISFs? For all its implication in the privatization of the last decades, international law has also been part and parcel of the construction of, if not quite ISFs, at least the very concept of sovereignty "from without." Moreover, the increasing overlap between international and domestic law, notably as manifested in human rights, makes international law an interesting laboratory for this debate. An international theory of ISFs, albeit necessarily more minimalistic by reason of its purported universality, would measure states up against a higher systemic and communal standard—against something other than whatever particular form states have taken here or there.

[42] Sara Grusky, *Privatization Tidal Wave: IMF/World Bank Water Policies and the Price Paid by the Poor*, 22 MULTINAT'L MONITOR 14 (2001).

[43] Jens Martens, *The Role of Public and Private Actors and Means in Implementing the SDGs: Reclaiming the Public Policy Space for Sustainable Development and Human Rights*, *in* SUSTAINABLE DEVELOPMENT GOALS AND HUMAN RIGHTS (Markus Kaltenborn, Markus Krajewski & Heike Kuhn eds., 2020).

[44] Gus Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 INT'L COMP. L. Q. 371, 373 (2007).

[45] CMS Gas Transmission Co. v. Arg. Rep., ICSID Case No. ARB/01/8, Decision on Objections to Jurisdiction, para. 33 (July 17, 2003).

[46] Van Harten, *supra* note 44, at 371.

[47] Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573 (2011).

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1. *The Limits and Potential of Domestic Approaches*

Several countries have historically produced conceptions of inherently governmental functions. In France, a country with "a profound cultural preoccupation with the state and its purposes,"[48] the notion of "fonctions régaliennes" is central to the idea of the French state. It describes the pursuit of security, both internal and external, the definition of the law and the rendering of justice, as well as key elements of economic sovereignty (printing money) as being inherently governmental. In the United States, a country which by comparison with Europe, has been quite willing to engage in outsourcing and is not traditionally based on a constitutional reification of ISFs, concerns have nonetheless long arisen about the problematic character of some types of privatization, notably of prisons. The most significant effort to define ISF has manifested itself through a relatively narrow public administration lens. Federal agencies seeking to engage in public-private competition come under a series of procedural obligations to ensure that the activities selected for that purpose are suitable for it.[49]

These domestic traditions are significant in that they point to efforts by at least some states to highlight what, for their purposes, constitute ISFs. The fact that they have done so in occasionally broadly similar terms suggests that something more is at stake than merely the playing out of national peculiarities. The comparison of European and North American approaches suggests at least an interplay between constitutional protections and privatization; a non-instrumentalist concern with the value of the state performing certain functions; and a desire to insulate at least certain functions from excessive privatization. These traditions can be read in light of the occasional case law that has sought to tackle ISFs from a fundamental constitutional, particularly rights-oriented, perspective. This is the case of a landmark Israel Supreme Court judgment, which argued that prison privatization was in and of itself "a violation of the right to dignity."[50] Justice Proccacia noted, in particular, the unsuitability of a "private enterprise" whose "entry into fields that are clearly areas of sovereign activity is motivated by private considerations of profitability."[51] In such a situation, "the moral and ethical basis underlying the exercise of sovereign power is undermined."[52]

But domestic approaches also remain essentially limited for our purposes. First, we have no reason to think that they are particularly connected to international law. There is certainly little sense in European or U.S. practice that ISFs result from some higher international injunction. Even the Israeli Supreme Court judgment, based on human rights as it was, is merely an interpretation of the Israeli Basic Law and contains no reference to international human rights law. Second and as a result, domestic criteria of ISFs tend to be quite self-referential and some at least are obscure about their underlying rationale. They measure each state against a standard manifested by the state itself, in ways that will often seem circular. By the yardstick of the French centralizing state, U.S. privatization of prisons and war fighting may indeed not find favor, but each state will find itself to be a paragon of what a state ought

[48] Tirard, *supra* note 10, at 287.

[49] Jody Freeman & Martha Minow, Government by Contract: Outsourcing and American Democracy 65 (2009).

[50] HCJ 2605/05 The Academic Center for Law and Business**,** Human Rights Division v. Minister of Finance PD 27, 34, para. 4 (2009) (Arbel, J., concurring) (Isr.).

[51] *Id.*, para. 19 (Procaccia, J., concurring) (Isr.).

[52] *Id.*, para. 20.

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to be, in a context where sovereignty has always been understood to entail a large degree of self-definition. Third, domestic theories of ISFs appear to be largely incommensurable. Despite their family resemblance, they are based on quite different visions, even though those visions are not always fully articulated.

Hewing closely to domestic theories, therefore, precisely at the time when the state is under renewed threat from globalization, condemns one to a patchwork of theorizing that often barely conceals its national and peculiar origins, a provincial response to a global phenomenon. It puts any theory of the essence of the state at a standpoint disadvantage (that of methodological-nationalism), where advocates of privatization have long understood the benefits of being able to deploy a transnational and global discourse unrestrained by domestic traditions. What may be needed to fully develop a theory of ISFs is to break the mold of the domestic and see ISFs from outside rather than from within the state.

2. The Problem with Pragmatism

The argument for and against privatization has often been framed in largely pragmatic terms that profess no *a priori* preference for certain functions being implemented by the state. Such an approach merely purports to contemplate how efficiently various actors might be at providing certain services. The critique of privatization has sometimes mimetically adopted that angle as well. For some, the trouble with "tactical privatization" is that it allows public actors to circumvent public strictures and engage in behavior they could not otherwise engage in;[53] others invoke the higher propensity of private actors for causing harm and violating human rights. Such approaches are consonant with the pragmatic notion that we would want sovereignty (and ISFs with it) only to the extent it can achieve particular goals—anything else might appear to be a pure fetishism of power for power's sake.

No doubt there will be the relatively easy cases where the privatization of a water utility, for example, has demonstrably led people to lose access to water. One can point to certain characteristics of privatization that seem to reoccur over time and raise chronic concerns, leaving the unpleasant impression that the problem lies not in the implementation but the very idea. But such arguments will be vulnerable to the counterargument that it is not privatization in itself that is the problem, but merely this particular instance of privatization, and that if only it had been carried out differently (including, perhaps, by adopting more of a human rights framework) then the supposed benefits of privatization could have been obtained without those unfortunate consequences. The argument may also be recast as merely one of relative ability: states may be far from perfect, but, overall, they are better at complying with human rights than private actors (or vice versa).

This empirical approach, useful as it may be, also risks quickly falling into the trap of a mere weighing of utility and of conceding too much to the pragmatic vernacular of technocratic governance. It will always be vulnerable to contrary proof in general or in specific cases. In that respect, the argument that privatization "does not work" may in fact furnish arguments for more privatization by conceding that efficiency is the measure of whether a function should be inherently sovereign or not (and vice versa). In short, the pragmatic, risk-oriented argument against outsourcing can work both ways. Moreover, it is for the most part silent about

[53] Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L. Q. 1001, 1008 (2004).

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what ultimate social good is to be served by efficiency. It does not really provide a solid rationale for ISFs as much as an argument for caution in outsourcing.

The more significant argument, therefore, may well be that we should want certain governmental functions to be assumed exclusively by states even if it were proved, in general or in particular cases, that by the standard of some pure efficiency matrix, private actors were somehow better at delivering the goods.[54] This suggests that one ought to be able to draw a firmer line,[55] albeit one still respectful of both sovereignty and pluralism. Specifically, and in their most abstract form, ISFs can be understood as premised on a strong *a priori* preference for certain functions being discharged by public actors. This allows for the possibility that in some circumstances, of course a good private actor might be preferrable to a bad public one, but simultaneously suggests a preference, all other things being equal, for certain functions being handled by states.

Alon Harel, for example, is associated with the line of theorizing that has criticized law and economics' tendency to level all potential policy outcomes based on efficacy to the detriment of the identity of actors. He instead suggests ways in which consideration of the proper agent to discharge any task is based on "deeply held convictions (and legal doctrines) requiring that certain tasks ought to be performed only by public officials irrespective of their efficacy."[56] Similarly, Chiara Cordelli has put at the heart of her argument against excessive privatization of the state the question of authority to make decisions about the common good and the need for such decisions to be made by agents who are not only authorized but act in the name of the collective will and "have the capacity, both moral and factual, to do whatever it is they are authorized to do."[57] George Katrougalos has argued for a "necessary connection between some public functions and the democratic principle per se, which imposes upon the Government the 'duty to govern'" because no amount of "ex post control [will be] sufficient to safeguard constitutional goals of the magnitude and importance of public order and security."[58] In such defenses of ISF, the contingency of efficiency is transcended by an appeal to the fundamental dimension of states exercising certain functions themselves.

3. The Necessary Ambition of an International Theory of ISF

If nothing else, this stresses the fundamentally principled, rather than consequentialist, nature of the present endeavor, as well as its normative, rather than ontological, dimensions: there are no ISFs in the absolute; only functions that we would want to consider such as part of a defensible theory of what the state should be, for the purposes of international law. An international theory of ISFs gives expression to the intuition that "there is a way of social life that cannot be reduced to the aggregate of the purposes that people may want to attain, a way in which the exercise of authority over a territory should be evaluated irrespective of its outcomes," and that involves something like collective life and a project of self-rule.[59] As such, a

[54] Richard Harding, *State Monopoly of "Permitted Violation of Human Rights": The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons*, 14 PUNISHMENT & SOC'Y 131 (2012).

[55] *See* Avihay Dorfman & Alon Harel, *The Case Against Privatization*, 41 PHIL. & PUBLIC AFF. 67 (2013).

[56] Alon Harel & Ariel Porat, *Commensurability and Agency: Two Yet-to-Be-Met Challenges for Law and Economics*, 96 CORNELL L. REV. 749 (2011).

[57] CORDELLI, *supra* note 9, at 8.

[58] Katrougalos, *supra* note 10, at 414.

[59] Koskenniemi, *supra* note 30, at 69.

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strong theory of ISFs also provides a natural conduit for privileging a specifically legal approach, as opposed to one that would delegate questions of outsourcing to policymakers naturally more inclined to evaluating costs and benefits.[60]

The argument for contemplating a category of ISFs therefore often displays a strong, *a priori* categorical character. It is not so much that such functions exist in the absolute, as a naïve, ahistorical vision might suggest, but that, it is claimed, one cannot avoid turning one's mind to the question if one is ever to fundamentally assign limits to privatization. As Paul Verkuil put it: "To decide if privatization has reached its limits, we must know whether 'inherent functions' of government are being delegated. . . . *But the inquiry cannot be avoided*."[61] The inquiry is a normatively necessary one even if it has no single good answer. If nothing else, the state to exist must delineate itself against a concept of "what is not the state." The tenor of that dichotomy may change over time, but the dichotomy remains, in at least its structuring role. This allows one to move beyond an elusive ontology to retain at least a potentially robust—albeit relational—concept of stateness as opposed to non-stateness.

The problem is that outside an instrumental theory of ISFs, the effort to delineate core public functions on pure public law grounds is, as we have seen, often at risk of a certain circularity ("ISFs are those functions that ought to be assumed by the state because such is its nature"). Alternatively, it may rely on something comparatively elusive and abstract that is vulnerable to the accusation that it has no grounding in actual legal practices. Whether one manages to develop a powerful theory of ISFs, then, may paradoxically depend on one's ambition. Theories that lower their sights too much may end up having trouble challenging the pragmatic, market-oriented competition, because they are at their weakest when dealing with it on its own terms. This is one of the central intuitions and appeals of the Alston report on privatization and human rights, which will be discussed later in this Article—namely that human rights should seek to "reclaim the moral high ground" when it comes to privatization in a context where that ground "is too often yielded to the privatizers."[62]

By the same token, a strong project of ISFs is one that cannot simply dogmatically decree that certain functions should be sovereign on the basis of a sentimental preference for a particular form of sovereignty. Instead, it must adopt an approach that is simultaneously normative (what would we want ISFs for?), interpretative (how can we understand some international legal developments as already contributing to the building over time of a distinctive sense of the state as a public persona in international law?), and prospective (what would it mean to conceive of international law as that legal order which is based, ultimately, on the fundamentally public character of certain functions of the state?). The rest of this Article examines some ways in which one might develop a specifically international legal theory of ISFs, specifically looking at how one might deduct ISFs from the finalities of the international legal system rather than states' self-projection. Taking its cue from domestic and jurisprudential approaches, it distinguishes between theories of ISFs grounded in the "horizontal" demands of the interstate system and theories extrapolating the "vertical" need for ISFs from the demands of human rights.

[60] Daphne Barak-Erez, *The Private Prison Controversy and the Privatization Continuum*, 5 L. & ETH. HUM. RTS. 139 (2011).

[61] Verkuil, *supra* note 10, at 420 (emphasis added).

[62] Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, Extreme Poverty and Human Rights, para. 75, UN Doc. A/73/396 (Sept. 26, 2018) [hereinafter Alston 2018 Report].

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III. ISFs as a Function of Interstate Relations

This Part begins to sketch a specifically international theory of ISFs by envisaging them as emerging through the historical demands of interstate relations. As such, it seeks to show how international law has already, in effect rather than just in theory, been implicated in the constitution of certain state monopolies. The Part therefore involves a rereading of the international legal tradition as one that has significant contributions to make to the question of what functions can be privatized, as part of a broader exercise not only of regulating the uses of sovereignty but of defining sovereignty itself.

The Part opens with a consideration of what is abstractly involved in the hypothesis of ISFs flowing from the demands of international interaction (Section A). It then looks at the international constitution of the monopoly of the legitimate use of force as an important test case that operates a gradual transition from an emphasis on resort to force to a broader humanitarian concern with privatized violence (Section B).

A. International Interaction and the Requirements of Statehood

1. A Thought Experiment: Undoing the State

In this Subsection, I want to suggest, *ad absurdum*, a dramatic illustration of what might be considered an ISF in international law, namely a function whose discharge is essential to a state being considered a state at all. What I have in mind are functions that are treated as so central in and to international law that they have become embedded in the very definition of what it means to be a state—such that a state could not renounce exercising them without renouncing its sovereignty. This exercise will at least help develop an extremely minimalistic basis for the theory, one that allows considerable leeway when it comes to deciding the permissible extent of governmental privatization. The hypothesis aligns with the intuition that international law normally grants significant discretion about the particular mix of the public and the private each state strikes; but that it might dramatically raise the alarm beyond a certain level of privatization, when a state reaches the point where it is on the verge of conceptual collapse.

A first idea that comes to mind, in this context, is that the very criteria for statehood, since at least the Montevideo Convention, are that the state should have not only a territory and a population but, crucially, a *government*. In other words, even if they do nothing else, states do and should *govern*. This, admittedly, is a vague notion, compatible with all kinds of organizational arrangements, but it does point, crucially, to a minimal "duty to govern" in international law, if one is to be considered a state at all.[63] One approximation of what governing means in this context is that one at least has the ultimate authority to decide what gets outsourced and under what conditions. If certain governmental functions are to be outsourced, it should always be done by delegation and in ways that are reversible. As Simon Chesterman put it, moreover: "At the very least the responsibility to determine what is and is not

[63] The existence of such a duty in legal theory has long been intuited, but the connection to international law is typically not made. Paul R. Verkuil, *Outsourcing and the Duty to Govern*, *in* Government by Contract 310 (Martha Minow & Jody Freeman eds., 2009); Leslie Green, *The Duty to Govern*, 13 Leg. Theory 165 (2007).

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'inherently governmental' should itself be an inherently governmental task."[64] A state could thus conceivably delegate everything, except the ability to delegate, so that all sovereign functions would ultimately still be traceable back to it. That would of course be a vanishingly thin state, but conceivably still enough of one for international law purposes.

What would it take, then, for the state to fail to honor even that minimum content of publicness required by international law? For a state to shed its statehood, it would have to forsake its very governmentality in the process of outsourcing it. The image here is that of a state that deliberately scuttles itself. Let us take an extreme example to illustrate the argument. If a state were to decide to "incorporate" itself and sell its territory to a private actor, for example, one can see how from the point of view of international law something would have gone seriously amiss. In essence, the state would have sawed the branch on which it was sitting, depriving itself of the very attributes of sovereignty. A state that had sold out entirely to private interests, that did not even claim to be engaging in public functions might thus be seen to have relinquished a claim to statehood.

This may seem an implausible scenario, although upon closer consideration it is not that farfetched. It is not far off, for example, from the case of so-called "failed" or "collapsed" states"[65] that have become "privatized" in the most brutal sense; states in which, for example, there is simply no public interest distinct from the pursuit of profit by various private militias and criminal groups. Such states are not only evanescent from the point of view of their continued existence; they are also thoroughly incapable of discharging any of the basic obligations that international law assigns to them.[66] This could also describe the situation of mafia-states,[67] where the government has become so gangrened by private corruption that it is very difficult to see the entity in question as, in fact, a state that governs in any meaningful sense of the term. It is not entirely clear in such cases whether the most problematic aspect in such states is their criminalization or their privatization specifically, but the two seem to go hand in hand.

There is of course considerable inertia in the recognition of states as such, and no known case in the practice of international law where a state had been derecognized because it had ceased to govern,[68] although former UN Secretary-General Boutros Boutros-Ghali once deplored that the UN Charter had no mechanism to identify such scenarios.[69] In practice, international law does not seem to be very demanding when it comes to displaying the bare appearance of governing, often happy to rely on formal rather than substantive criteria, and the possibility that the state might continue to exist for a while even when its authority has been largely hollowed out.[70] But ours is a hypothetical scenario from which one can detect the

[64] Chesterman, *supra* note 19, at 1073.

[65] I. William Zartman, Collapsed States: The Disintegration and Restoration of Legitimate Authority (1995); Daniel Thurer, *The Failed State and International Law*, 81 Int'l Rev. Red Cross 731 (1999); Jennifer Milliken & Keith Krause, *State Failure, State Collapse, and State Reconstruction: Concepts, Lessons and Strategies*, 33 Dev. Change 753 (2002).

[66] Chiara Giorgetti, *Why Should International Law Be Concerned About State Failure*, 16 ILSA J. Int'l & Comp. L. 469 (2010).

[67] Moises Naim, *Mafia States: Organized Crime Takes Office Essay*, 91 For. Aff. 100 (2012).

[68] Pablo Moscoso de la Cuba, *The Statehood of "Collapsed" States in Public International Law*, 18 Agenda Internacional 121 (2011).

[69] The United Nations and Somalia, 1992–1996 (1996).

[70] Gérard Cahin, *L'état défaillant en droit international: Quel régime pour quelle notion?*, *in* Droit du pouvoir, pouvoir du droit: Mélanges offerts à Jean Salmon 177, 589 (2007).

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premises of a theory in which states would, short of not governing at all, potentially not govern *enough*, i.e., by not implicating themselves sufficiently in the affairs that they have, through international law, been mandated to invest themselves in.

It is of course true that a state "collapsing" into violent chaos or rotting from within as a result of criminal corruption, is hardly the same thing as a state privatizing in excess. Cases of failed states are often described as involving a prolonged absence of any sovereign and the inability to control territory, a situation that is still qualitatively different from the outsourcing of activity to the private sector. But privatization can be understood, following Chiara Cordelli's philosophical treatment of the question, as itself involving something akin to a pre-civil "regression to the state of nature."[71] Indeed, "failed states" have been identified specifically as those that "find themselves incapable of fulfilling basic regalian functions, such as order maintenance, security, justice, defense and international commitments, etc."[72] and those characterized by a more fundamental "regalian weakness."[73]

The most likely and more difficult scenario, however, is one where the state retains the trappings of statehood and is still nominally in charge, even as it is increasingly a hollow trunk. Extensive privatization can mask the fact that the state has ceased to be the delegator and is, in effect, a state only in name, a de facto private entity robbed of the ability to arbitrate any residual distinction between the public and private spheres. Or it might manifest a kind of loss of sovereign dignity, understood as the implicit obligation to maintain a certain sovereign decorum and to not, for the sake of the international system, engage in behavior 'unbecoming' of a sovereign.[74] In what cases, however, might this hollowing out of the state become identifiably problematic for international law?

2. Special Cases of Mutual International Legal Obligations?

In this Subsection, I want to reinforce the idea that international law has classically gone somewhat further than prescribing a minimum of government based on a bare understanding of statehood, and has had a vested interest in the way—specifically, the public way—states discharge certain functions. This is notably the case of functions that are exercised *inter se*—between states—and that therefore involve a mutual interest in their discharge. In such cases, the inability to comply with certain minimum international obligations as a result of privatization creates a particularly keen international regulatory interest. The suggestion is that interstate relations are a special case of the larger problem of how far a state can go in outsourcing certain functions and a distinct contribution that international law can make to our

[71] CORDELLI, *supra* note 9, at 72.

[72] Ousseni Illy, *L'Etat en Faillite» en Droit International*, 28 REVUE QUÉBÉCOISE DROIT INTERNATIONAL 53, 55 (2015) (author's translation).

[73] Kévin-Ferdinand Ndjimba, *La prise en charge par le droit international de la fragilité régalienne des États*, 28 CIV. EUR. 55 (2012).

[74] The notion of "sovereign dignity" has long appeared on the margins of international law, notably in relation to immunities. It is typically associated with equality between sovereigns but points to a sort of inherent value in all things sovereign and the fact that states should not subject themselves to the sovereignty of others and vice versa. *See* Peter J. Smith, *States as Nations: Dignity in Cross-doctrinal Perspective*, 89 VA. L. REV. 1 (2003). Analytically, the key is the element of debasement of subjecting oneself to the authority of another. Although born in the horizontal state-to-state context, one can speculate that there is something equally dignity-compromising when states seemingly subject themselves to the authority of private actors which is arguably what happens when they outsource some of their sovereignty to them.

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understanding of ISFs. This is by opposition to purely internally defined sovereign functions for which other states can hardly be said to have a legitimate interest in how other states go about the business of allocating between public and private regulation. It is also distinct from, although not entirely unrelated to, international definitions of the *domaine réservé* where ISFs are understood as functions that *other states* should not usurp or hinder, as in the Tallinn Manual on cyber operations, for example.[75]

Again, let us take a counterfactual, hypothetical scenario. Imagine that State A has just elected President X who is a strident neoliberal advocate of shrinking the state. Unlike some of his predecessors, X thinks that privatization should not stop at Regalian functions and envisages a radical libertarian utopia in which even functions that were traditionally considered as sovereign should systematically be outsourced to the private sector. As part of a raft of new measures being announced publicly, President X dismisses the entire diplomatic corps and abolishes the Ministry of Foreign Affairs. Instead, he decides that, henceforth, A's foreign relations will be handled by a private corporation. A well-known public relations firm wins the contract following a public bidding process and proposes to take charge of the country's foreign relations. It devises an ambitious plan by which its senior partners will be designated as "ambassadors" for speedy approval by the receiving capitals.

Although nothing that extreme has been attempted, privatization of diplomacy is an issue that has received attention and is not entirely implausible.[76] At any rate, other states are now faced with a dilemma. What should they do with these new types of ambassadors? Should they bow to the idiosyncrasies of A, conceding that whilst it may be unheard of to outsource one's foreign relations to a corporation, no rule of international law actually prohibits this? Should they do so, in fact, precisely out of deference to A's sovereignty and its uncontested ability to privatize core functions if it so wishes? Or should they push back on the basis that there is something so uncommon, so unheard of as to put in question one of the very fabric of interstate relations? But if so, what exactly is involved and on what basis would one go about defending a certain international public status quo? And how might one distinguish between merely highly unusual and illegal behavior?

There is, needless to say, no obvious answer to these questions. Such a policy of extreme privatization might appear so radically new as to perhaps offend some long dormant but perhaps too-obvious-to-be-mentioned tenet of the international legal order, a kind of meta-norm about the necessarily public character of the state; or it might not. Those wary of the idea of a *non liquet* in international law may suggest that, either way, international law must have some default position that can be inferred from first principles. Privatizing one's diplomacy might seem "undiplomatic" and counterproductive, although that is likely to be contested. It might be of course that the privatized discharge of diplomatic functions that ensued was not only subpar but deeply problematic because fundamentally beholden to private interests. At any rate, it has long been recognized that states may refuse accreditation where "the status, conduct or character of the person sent is unsatisfactory."[77] There are cases of states refusing to

[75] TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 21–22 (2d ed. 2017).

[76] I note however that work on the privatization of diplomacy tends to focus on private actors engaging in their own diplomacy or states prolonging their interventions through private actors rather than anything resembling outright privatization. *See* Brian Hocking, *Privatizing Diplomacy?*, 5 INT'L STUD. PERSPEC. 147 (2004).

[77] Charles Noble Gregory, *The Privileges of Ambassadors and Foreign Ministers*, 3 MICH. L. REV. 173, 177 (1905).

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accredit ambassadors, for example, on account of their perceived hostility to the host state, and it is not inconceivable that the international community would react to State A's ruthless privatization initiative by simply offering a barrage of failed accreditation. Practice would tell, although the discussion would no doubt be a fraught one.

On the one hand, it seems hard to claim that other states have a sort of acquired right to State A conducting its foreign relations in the time-honored and characteristically public fashion of international society. Moreover, it is not immediately clear what interest of third states is being affected, except an interest in a certain public status quo. The private "ambassadors" in question are not necessarily accused of abusing their office, merely of being employed in a highly unusual way and of not having the sort of status that is normally associated with persons of their function. But it could be argued that they would gain such a status merely by being accredited, thus laundering their private character through the public cogs of international law, such that the failure to accredit them is the problem more than their status as such. In short, the mutual-obligations hypothesis as grounds for a theory of ISFs is fragile because it is not clear that mutual expectations can sustain it.

On the other hand, this sort of scenario does point to a certain habitual and communal interest in the discharge of certain functions by the state. Just as it has been said that a "failed state" is one that is "utterly incapable of sustaining itself as a member of the international community,"[78] it is likely that a functioning state is one that exhibits the ability to sustain itself in the eyes of other sovereigns, including by honoring certain expectations. This might include the ability to publicly discharge certain key internationally mandated functions: in that respect, the organization of the diplomatic service is certainly both a domestic *and* an international exigency. This only underscores the difficulty of coming up with a theory of ISFs in international law and the need to look beyond traditional images of both the domestic and the international to sustain one.

3. The International Law of Immunities as a Precedent

One striking early lead in that respect is provided by the international law of immunities, a classic case of interstate obligation. The international law of immunities has long been focused, for its own purposes, on the determination of what are, fundamentally, sovereign functions at least in the relations of states to each other. The separation of state functions between those exercised *de jure imperii* and *de jure gestionis* and the fundamental disaggregation of both that resulted from the switch to a restrictive theory of immunities, provides a first approximation of those functions that by their very nature fall within the state's purview and those that it can carry out but in a position that is functionally equivalent to that of a private actor. The question, as Lord Wilberforce put it, is whether "the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law."[79] The international law of immunities, albeit mostly as reflected in domestic precedents, thus provides us with both an initial theory of what functions are inherently sovereign and a first tentative list of such functions.

[78] Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, FOR. POL'Y 3, 3 (1992).
[79] I Congreso del Partido [1983] 1 AC 244 (HL), 263–64 (appeal taken from Eng).

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For example, U.S. courts have found that the Foreign Sovereign Immunities Act of 1976 will "attach only to inherently governmental or 'public' acts of a state,"[80] such that "the ultimate inquiry is whether the conduct or transaction is of an inherently governmental or private nature,"[81] with a particular emphasis on "core functions."[82] Over time this has led to a variety of functions being considered fundamentally sovereign for the purposes of honoring immunities, including waging war and defending the state;[83] legislation;[84] the treatment of aliens;[85] the regulation of exploitation of natural resources;[86] or the regulation of the market as opposed to participating in it "in the manner of a private player."[87] It has also been noted that "the enforcement of law, especially of penal or other public law, by mandated public authorities is an exercise of sovereign authority par excellence. It is an act inherently governmental in character."[88]

The international law of sovereign immunities' parsing of certain functions as inherently sovereign is then prolonged through the related analysis of immunities applying to agents of the state and the question of whether certain acts were accomplished in the pursuit of official functions. The idea that criminal acts under international law or violations of *jus cogens* cannot be part of the exercise of state functions for the purposes of criminal law immunity,[89] in particular, suggests *a contrario* that ISFs cannot extend to such acts. Also of interest is the question of whether hybrid public-private or even purely private actors may be entitled to immunities in certain circumstances which, as it turns out, may well hinge on whether they are exercising ISFs. The application of the American doctrine of derivative immunity to private actors operating "in the shoes of the sovereign"[90] suggests that, as far as some national practices of immunities are concerned, what matters is the function rather than the identity of the actor. This dissociation between function and agent, then, tends to validate a view of privatization as ultimately not "undoing" the public character of an activity so long as it is exercised *de jure imperii*.[91]

The strength of a vision of ISFs based on a study of the patterns that emerge from the international law of immunities is that such law is structured by strong mutual expectations, a high degree of practice and a large consensus: states recognize in others what they see in themselves as inherently sovereign. This is living proof, moreover, that there is nothing impossible about

[80] Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1099 (9th Cir. 1990).

[81] Richard Wydeven, *The Foreign Sovereign Immunities Act of 1976: A Contemporary Look at Jurisdiction Under the Commercial Activity Exception Note*, 13 REV. LITIG. 143, 148 (1993).

[82] *See, e.g.*, Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151 (D.C. Cir. 1994); Magness v. Russian Fed'n, 247 F.3d 609, 613 n. 7 (5th Cir. 2001).

[83] Wye Oak Tech., Inc. v. Republic of Iraq, 666 F.3d 205, 215 (4th Cir. 2011).

[84] Oberlandesgericht München [OLG] [Higher Regional Court] Aug. 12, 1975, NEUE JURISDTISCHE WOCHENSCHRIFT [NJW] 2144, 1975 (Ger.).

[85] Kline v. Kaneko, 685 F. Supp. 386, 390–91 (S.D.N.Y. 1988).

[86] MOL, Inc. v. Peoples Republic of Bangl., 736 F.2d 1326, 1329 (9th Cir.).

[87] Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 614 (1992).

[88] Roger O'Keefe, *Decisions of British Courts During 2009 Involving Questions of Public or Private International Law A. Public International Law*, 80 BRIT. Y.B. INT'L L. 451, 554–55 (2009).

[89] R. v. Bartle and the Commissioner of Police for the Metropolis and others Ex Parte Pinochet [1999] 38 ILM 581 (HL) 1333–1338.

[90] Wissam Abdullateff Sa'eed Al-Quraishi v. Nakhla, 728 F. Supp. 2d 702 (D. Md. 2010).

[91] Alberto Oddenino & Diego Bonetto, *The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law*, 20 GLOB. JURIST (2020).

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defining ISFs, something that international law has long engaged in, albeit for quite specific purposes. The limitation of outlining a theory of ISFs based on the branch of international law dedicated to immunities, however, is that it provides at best a first approximation of what ISFs could be. The international law of immunities tells us that states will grant immunities to states in the exercise of functions that are understood as inherently sovereign, but this is more an analytical than prescriptive category: it merely draws consequences from the inherently sovereign character of certain functions rather than it mandates or justifies that they be carried out in a certain way. Moreover, what it recognizes *between* states as inherently sovereign may not easily translate into prescriptions that can be implemented *within* the state. Finally, in focusing on the nature of the acts at stake rather than the agents, it is in fact quite agnostic about whether a sovereign function is exercised by a public or even a private actor.

B. Outsourcing and the Privilege to Wage War

If the case that mutual obligations between states need to be discharged publicly is relatively theoretical—is there, perhaps, a special case within the special case, in the form of an international requirement that *resort to force* at least be inherently sovereign? Imagine, for example, that as part of a massive overhaul of its military strategy, State A decides to entrust its nuclear weapons to Company W, a major defense and utility corporation that has a track record of managing public infrastructure projects. Although the decision to launch nuclear weapons remains in the hands of the head of state, every other aspect of management of the weapons is in the hands of the company; or imagine that the decision to use the weapons (and, in effect, go to war) is effectively outsourced to a privately maintained computer. Would we think, from an international legal standpoint, that something was amiss? And, more importantly, might we be able to justify our unease (as the case may be) on the basis of some solid legal sentiment beyond distaste for the idiosyncrasies of the political mores of one state?

1. A Special Case Within the Special Case? Regulating the Monopoly of the Legitimate Use of Force

Evidently, the monopoly of legitimate force has long been central to the definition of the state from within as it were, and the history and sociology of state construction is rife with references to how "war made the state."[92] But it is also arguably central to international law, which has long sought to ensure that the monopoly is, in fact, guaranteed and protected internationally.[93] The right to engage in war, in particular, was long the object of struggles in the Middle Ages. The rise of the state is co-substantial with the idea that states have the monopoly of resorting to war and that, by implication, private wars are prohibited.[94] International law is very much embedded in and reproduces that strong preference for what one may understand to be intrinsically international legal reasons linked to the maintenance of a certain order and stability. For example, Emer de Vattel insisted that "it would be too dangerous to abandon to each Citizen the freedom to do himself justice against foreigners. A nation would not have one

[92] Charles Tilly, How War Made States and Vice Versa (1987).
[93] Mégret, *supra* note 31.
[94] Maurice Keen, The Laws of War in the Late Middle Ages (2015).

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of its members be able to bring it into a state of war."[95] This right, therefore, "can only belong to the body of the Nation, or to the Sovereign that represents it. It is undoubtedly among those without which one cannot govern in a salutary manner, and which are referred to as Rights of Majesty."[96]

Specifically, and when it comes to international relations, the *jus ad bellum* is typically understood as applying only to states in ways that caution against having the decision to go to war in any way mediated by private entities. Only a state can commit aggression, a dubious privilege but one that in a sense also suggests that the power to use force—be it wrongly and illegally—is strongly vested in sovereigns. The idea that the *jus ad bellum* could in any way be privatized has given rise to strong concerns. These have, so far, been mostly expressed in the language of Just War Theory as part of a renewed interest with "right authority" that strongly overlaps with lawyers' own interest in ISFs. The concern is that privatization can "skew the application of . . . ancillary *jus ad bellum* principles" such as last resort, reasonable chance of success, or proportionality, typically in the direction of making it relatively easier for states to engage in aggressive war.[97] Crucially, the insistence that the state keep the upper hand on any decision process implicating the *jus ad bellum* is not a result of a domestic concern, but very much of a deeply embedded systemic demand of the international legal system itself.

This still leaves open the possibility that, although private actors are not allowed to wage war on their own behalf, they may be actively recruited to wage war for sovereigns. Once private wars were outlawed, the fact that wars were henceforth decided by princes did not mean that they had to be *waged* by them or by troops that would have had a marked "public" or even national character. Vattel himself, needless to say, had nothing against the lucrative employment of Swiss mercenaries and even defended the possibility on the basis of the consent of the Swiss sovereign and the freedom "of all free men to joint whatever Society they please and where it finds it advantageous to do so, to make common cause with it, and espouse its quarrels."[98] In fact, the Helvetic confederation had benefited greatly in terms of its own security from the experience gained by its men at arms in the wars of others. The practice of contracting privateers also persisted on the High Seas until quite late, with *lettres de marque* essentially acting as licenses granted to private vessels to attack and capture enemy ships. Oftentimes, formal commissions were given to the "corsairs" and Hugo Grotius famously defended the practice in *De Iure Praedae*.[99] Although from the sixteenth century onward, it was

[95] II Emer de Vattel, Le droit des gens, ou, Principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains, Liv. III, ch. I, 2 (1863) (author's translation; original reads: "il serait trop dangereux d'abandonner à chaque Citoyen la liberté de se faire lui-même justice contre les Etrangers; une Nation n'aurait pas un de ses membres qui ne pût lui attirer la Guerre")

[96] *Id.* at 3 (author's translation; original reads: "ne peut appartenir qu'au Corps de la Nation, ou au Souverain qui la représente. Il est sans doute au nombre de ceux, sans lesquels on ne peut gouverner d'une manière salutaire, et ce que l'on appelle Droit de Majesté")

[97] Amy E. Eckert, Outsourcing War: The Just War Tradition in the Age of Military Privatization 81–90; James Pattison, *Just War Theory and the Privatization of Military Force*, 22 Eth. & Int'l Aff. 143 (2008).

[98] II Vattel, *supra* note 95, Liv. III, ch. II, at 13 (author's translation; original reads: "de tout homme libre, de se joindre à telle Société qu'il lui plaît, et où il trouve son avantage, de faire cause commune avec elle, et d'épouser ses querelles").

[99] Hugo Grotius, Commentary on the Law of Prize and Booty (1950).

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governments that licensed privateers as a way of complementing their military might, commissions for *private* wars were not unheard of.

Nonetheless, the nineteenth century did see the emergence of a number of international legal efforts to further tighten the public monopolization of the use of force, particularly on the High Seas, an area ever-receptive to international regulation. Several states showed the way by renouncing the use of letters even when at war with other states. The Congress of Paris at the end of the Crimean War then adopted the Paris Declaration of 1856 effectively proscribing privateering.[100] As Sir Geoffrey Butler and Simon Maccoby point out, "to do this was to lay it down that no part of the belligerent's war right of search and capture at sea should thenceforward be deputed to armed forces not under the direct and immediate control of the belligerent state and professionally officered and trained."[101] This understanding was confirmed by the *Oxford Manual on the Laws of Naval War*.[102]

More interestingly for our purposes are some of the arguments that were used to do away with the practice, which are at times eerily reminiscent of those used in today's debate on the war privatization phenomenon.[103] Some clearly tended toward an emphasis on the assertion of sovereign monopoly over the use of force as an essential condition of international stability in and of itself. For example, private letters of marque, which had originally been granted to private parties to redress real or perceived "denials of justice" through a form of reprisal, were the first to be phased out. The perception was that allowing privateers to prey on foreign private ships brought little by way of military benefit to states giving the letters and might create interstate conflicts where there had been none. Instead, letters of marque could only be granted as an extension of states' own war efforts. Moreover, several states insisted that letters de marque could only be given to one's own citizens, essentially "nationalizing" the practice (those who were not nationals of the power that had given them letters would then often be treated as pirates by other nations).

In essence, "the rise of national states, with a new consciousness of [the] duty [to press the claims of individual subjects against foreign states], by force if need be, . . . eventually made unnecessary any reliance upon individual self-redress."[104] One of the arguments at the time was that privateers remained for too long outside the reach of the state and therefore could ultimately not be controlled. In distinguishing between corsaires and "corps francs maritimes" (private crews and ships incorporated in the navy in time of war), it was emphasized that corsaires were not part of official forces, depended only upon themselves and were not amenable to military discipline. So much so that "the sovereign, whoever it may be, is no longer free, in fact, to apply only if it wants to this ancient and necessary principle of international law, according to which things captured in war belong to the state, and not the captor."[105]

[100] Declaration Respecting Maritime Law, Art.1, Apr. 16, 1856, 115 CTS 1.

[101] Sir Geoffrey G. Butler & Simon Maccoby, The Development of International Law 124 (1928).

[102] Manual of the Laws of Naval War 9, Arts. 3–10, Aug. 9, 1913.

[103] Kenneth B. Moss, Marque and Reprisal: The Spheres of Public and Private War (2019).

[104] Albert E. Hindmarsh, *Self-Help in Time of Peace*, 26 AJIL 315, 318 (1932).

[105] Arthur Desjardins, Le Congrès de Paris (1856) et la jurisprudence internationale 25 (1884) (author's translation; original reads : "le souverain, quel qu'il soit, n'est plus libre, en fait, d'appliquer à sa guise ce principe ancien et nécessaire du droit international, d'après lequel les choses capturées à la guerre appartiennent à l'Etat, non au capteur").

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In many ways, therefore, the outlawing of recourse to the letters of marque was the continuation of the long-term trend toward reinforcing the public character of war, extending to who might participate in any given war, albeit under a state's authority. It was to be explored anew many years later, notably with the beginning of the decolonization era, in relation to mercenarism. The concern was with the fact that mercenarism, particularly the kind that was beholden to shadowy private interests, might, according to the draft International Convention against the Recruitment, Use, Financing and Training of Mercenaries, "violate principles of international law such as those of sovereign equality, political independence, territorial integrity of States and self-determination of peoples."[106] The UN Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination proceeded for many years from such assumptions. Mercenaries had no business using force whether they did so out of their own entrepreneurial initiative or with the backing of a state which engaged, through them, in action that would certainly not be allowable if it were conducted by its own troops. In the 1990s, privatization was seen as the problem in itself and the Working Group rapporteurs developed a strong critique of the neoliberal moment as it began to express itself through the development of private military and security companies.[107]

2. *Concerns with the Humanitarian Impact of Violence*

For both corsaires and mercenarism, however, one can detect an evolution over time away from the fixation on the *jus ad bellum* and toward a more humanitarian concern with the quality of private violence. By the late nineteenth century, the effort to outlaw private capture on the High Seas came to be explicitly connected to emerging *humanitarian* conceptions of war as arising only between sovereigns, and therefore excluding private citizens. This was particularly in response to the fact that privateers tended to prey on private property as a result of the international law on capture, which effectively incentivized harmful behavior against noncombatants. Affirming the distinction between participants and non-participants in war, by contrast, increasingly required international law to further purge the international stage of bellicose private opportunists on the High Seas who endangered the orderly and humane pursuit of war.

Émile de Laveleye, a professor at the Université de Liège, published an article in 1884 in which he complained of the English refusal to prohibit capture arguing that it was based on a conception of war as a "state of conflict . . . not only army against army, but citizen against citizen" in which it was "perfectly admissible that individuals of the contending countries should be allowed to employ all means to do each other the utmost possible harm." This "barbarous" practice characteristic of the Middle Ages flowed directly from England's defense of the "right of capture." Contra that vision, he promoted one in which "the state of warfare only exists between the armies, who are expected to respect the life and property of all peaceful

[106] Organization of African Unity Convention for the Elimination of Mercenaries in Africa, July 3, 1977, 1490 UNTS 89; International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, Dec. 4, 1989, 2163 UNTS 75; GA Res. 43/107 (Dec. 8, 1988); GA Res. 46/89 (Dec. 16, 1991); Draft Code of Crimes Against the Peace and Security of Mankind, Art. 23(1), YILC (1991) Vol. I, 186, at 228.

[107] Kim Sorensen, *Sisyphus in the Agora?: How the United Nations Working Group on the Use of Mercenaries Functions as a Special Procedure of the Human Rights Council*, 38 ADELAIDE L. REV. 257 (2017).

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inhabitants of the enemy's land."[108] The law of sea warfare ought therefore to be normalized and aligned with the more humane regime of war on land, one in which the reins of violence were more tightly and predictably vested with sovereigns. This is on some level a familiar humanitarian theme, but it is less common to see it tied explicitly to the ongoing delimitation of the public and private spheres in international law.

The ambiguity of this argument is that it was not directly clear why prohibiting the capture or the destruction of private property would actually require the prohibition of privateering. Corsaires might presumably still have been instructed to only target public and military property, and obliged. But one may speculate that there would have been less incentive in terms of prize in such a scenario, and that the very political economy of capture was based on for-profit actors pursing (and harming) private interests. Indeed, a specifically humanitarian clue for not entrusting private actors with the pursuit of violence is provided by one commentator to de Laveleye's article, who explained that:

> the arguments which have led to the abolition of privateering by so many of the leading nations of the civilized world are chiefly connected with the irregular and predatory character of the warfare carried on by privateersmen. The chief motive of a privateersman is plunder—the motive, in fact, of a pirate. This is a motive which has such a debasing and degrading effect that it is excluded, so far as possible, from civilized warfare. Again, the control over the crew is slight, the responsibility very remote, *and the risk of barbarity and inhumanity almost as great as in medieval private warfare*.[109]

In other words, inhumanity was seen as flowing from the very private character of violence in a way that is very evocative of the argument for ISFs.

A similar evolution seems to have taken hold over time in the much later context of mercenarism. The Working Group has increasingly deplored what it has described as the "privatization of war" on grounds that are less imbued by an ideological critique of privatization than they express a concern with private violence's potential for humanitarian harm. It has cautioned states, for example, that "outsourcing . . . does not relieve States of their obligations under international law" and, in fact, that "States should not outsource activities that constitute direct participation in hostilities."[110] These admonitions have been ambiguous and their foundation not always been clear. As it turns out, however, that more agnostic approach cannot avoid fundamental questioning about the usefulness of ISFs. It is vulnerable to the possibility that mercenaries, although they might no doubt be awful war criminals, might in some circumstances be more adept at respecting the laws of war (for example because they are bound by strong contractual mechanisms that require them to do so). As Dino Kritisotis notes, this opens up the possibility of a "re-consideration of the mercenary enterprise . . . especially if the new breed of mercenary is trained to fight in a professional and

[108] Émile de Laveleye, *On the Rights of War*, 39 THE NATION 392, 393 (1884).

[109] *Id.* at 392–93 (emphasis added).

[110] Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination: The Evolving Forms, Trends, and Manifestations of Mercenaries and Mercenary-Related Activities, paras. 76, 79, UN Doc. A/75/259 (July 28, 2020).

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disciplined way."[111] It remains difficult to systematically tie negative humanitarian outcomes to the mere fact of privatization, without a clearer understanding of the grounding of ISFs.

3. Linking Humanitarian Concerns and ISFs

This renewed *in bello* sensitivity has led to a rekindling, in international law, of arguments taken very explicitly from theories of ISFs. The Preamble to the proposed Draft Convention on Private Military and Security Companies, for example, deplores "[t]he increasing outsourcing of inherently State functions which undermine any State's capacity to retain its monopoly on the legitimate use of force"[112] and states its very purpose as being "[t]o identify those functions which are inherently State functions and which cannot be outsourced under any circumstances."[113] In particular, it provides a definition of inherently state functions as those:

> which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to [Private Military and Security Companies (PMSCs)] under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, law-making, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State Party considers as inherently State functions. One of the consequences of such functions being identified as inherently sovereign is that they cannot be delegated or outsourced to PMSCs.[114]

In parallel and somewhat belatedly, specifically humanitarian efforts have begun discreetly reasserting a certain stake in the monopolization of war waging functions. For example, the Montreux Document, a soft law initiative led by the Swiss government, indicates specifically that "[c]ontracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner of war camps or places of internment of civilians in accordance with the Geneva Conventions."[115] More generally, "in determining which services may not be contracted out, contracting states take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities."[116]

Neither the Draft Convention on private military and security companies nor the Montreux Document are, of course, part of positive international law as of now. The

[111] Dino Kritsiotis, *Mercenaries and the Privatization of Warfare*, 22 FLETCHER F. WORLD AFF. 11, 12 (1998).

[112] Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN Human Rights Council, Annex, UN Doc. A/HRC/15/25 (July 5, 2010).

[113] *Id.* Art. 1(b).

[114] *Id.* Art. 2(i).

[115] Federal Department of Foreign Affairs/ICRC, The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, at 11 (2009).

[116] *Id.* at 16.

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Draft Convention, notably, has been opposed very consistently by key Western powers intent on not letting the language of ISFs compromise their ability to resort to PMSCs.[117] Neither, moreover, positively excludes all recourse to private military actors: the former because it is only concerned with mercenaries rather than the whole issue of outsourcing military functions; the latter because it is only concerned with a particular subgenre of military functions that might have significant humanitarian ramifications. They do nonetheless indicate an intellectual trend to try to reestablish, through international legal means, a sense of ISFs that is specifically connected to the humanitarian project, and not just the sovereignty-upholding goal of maintaining the state's monopoly over the use of legitimate force for its own sake. Characteristic of modern international humanitarian law trends, they also do not distinguish between international and non-international armed conflicts.

There is, in fact, a remarkable degree of practice when it comes to considering certain functions as inherently sovereign, at the interface of the domestic and the international. For example, the increasing focus on ISFs in the context of the debate on mercenarism has led to at least one interesting exercise in elucidating state practice. The Working Group asked states to comment on their views on ISFs. A number responded providing some clear evidence, in the context of an inquiry by an international law body, of the range of functions that are ordinarily considered to be inherently governmental by states themselves. Most included the use of force but also went significantly beyond it. For example, Algeria insisted that "all public functions concerning the sovereignty of the State, in particular law enforcement, the armed forces and the justice system were inherently governmental functions that could not be exercised by the private sector."[118] Similarly, Bangladesh noted that "functions attributed to the Ministries of Defence, Finance and Budget, Foreign Affairs, Justice and the Interior were inherently governmental."[119] Colombia noted that constitutionally "only the Government could manufacture weapons,"[120] whilst Costa Rica listed "national security, politics, jurisdiction and the police as inherently governmental functions."[121] Finally, El Salvador mentioned "the functions of national defence and security; the management of foreign policy; international relations; economic policy; the State tax system; the management of foreign debt; and other functions which the Constitution and international conventions specifically excluded from decentralization."[122] All of these statements may not directly reflect *opinio juris* but, made in an international environment and with remarkable constancy, they do suggest a strong expectation that all aspects of the use of coercion will ultimately be tightly traceable to the state.

As such, the debates on mercenaries in international law provides an interesting segue to potentially even more radical efforts to reassert state prerogatives via international law inspired by human rights that more directly target the state's domestic spheres of competency. Indeed, like the Israeli Supreme Court judgment on prison privatization, they begin to portray the

[117] Berenike Prem, *The Regulation of Private Military and Security Companies: Analyzing Power in Multi-stakeholder Initiatives*, 0 CONTEMP. SEC. POL'Y 1 (2021).

[118] Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, UN Doc. A/62/301 (Aug. 24, 2007).

[119] *Id.*, para. 29.

[120] *Id.*, para. 46.

[121] *Id.*, para. 47.

[122] *Id.*, para. 48.

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necessarily public character of certain "services" (here, the provision of security via the use of armed force) as flowing from a fundamental human exigency rather than merely the international system's need for mimetic reproduction.

IV. International Human Rights Law: A Thicker Account of ISFs?

In this Part, I turn to the possibility that international human rights law might provide a more potent account of ISFs, one that is less concerned with how interstate relations refract on the nature of the state than with the very normative finality of the state; less worried about the state as a component of international order than as a fundamental component of rights protection; and one that largely transcends the domestic/international divide in the process of addressing the public/private one. The significance of international human rights law is notoriously that it turns the international legal gaze away from horizontal duties between states to obligations that states potentially owe to persons within their jurisdiction—the area that has proved to be the true testing ground for privatization globally, yet also the hardest to reach.

The foundation for there being inherently sovereign functions thus changes potentially radically in ways that were already arguably announced by the regulation of violence's own *pro hominem* turn, but that also go beyond it quite significantly. On some level, international human rights law might seem less committed to vindicating a sort of essence of the state. After all, human rights are traditionally seen as about *restraining* the sovereign and perhaps even under some conditions transcending it. Moreover, on one account, human rights are merely about promoting whatever arrangements are seen as conducive to human rights—arrangements which may or may not entail a strong concept of the state. The agnosticism of rights on the question of the state's organization was highlighted earlier as a necessary component of an international law of coexistence. But it also arguably flows from a fundamental indecisiveness of human rights law itself about how it should be implemented and a reluctance to be drawn, via the state, into what are perceived to be ideological controversies.

Yet the suspicion has increasingly become that the claim about absolute regime indifference is too strong a claim for human rights and may even stretch credibility. This is especially so in a context where international law and organizations have not otherwise been shy about stipulating a certain form of the state, whether it comes to promoting democracy, the rule of law or, indeed, human rights more generally, often in remarkably consistent and even repetitive ways.[123] The suspicion, then, is that human rights are also, albeit perhaps differently than general international law, highly dependent on a certain concept of the state and its functions, although it remains to be seen how this intersects with the privatization debate. Indeed, international human rights law has increasingly been deployed specifically to both uphold and criticize certain forms of privatization. Contra the claim that "certain institutional arrangements were traditional State practices in earlier periods," for example, it has insisted that "this is in no way conclusive as to the modern international law of human rights" which alone "must be determinative of the legality of questioned State practices."[124] In this Part,

[123] Tanja A. Börzel & Thomas Risse, *One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law*, 4, *in* Workshop on Democracy Promotion 509 (2004).

[124] Sub-Commission on Prevention of Discrimination and Protection of Minorities, The Possible Utility, Scope and Structure of a Special Study on the Issue of Privatization of Prisons, para. 28, UN Doc. E/CN.4/Sub.2/1993/21 (June 25, 1993) [hereinafter Privatization of Prisons Report].

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I begin by tracing a growing international human rights law wariness with privatization (Section A) but then suggest that a more explicit theory needs to be developed of what specifically in human rights might require that certain functions be exercised by sovereigns (Section B).

A. A Growing Rights Wariness with Privatization?

1. Early Intimations

The decades that followed the adoption of the Universal Declaration on Human Rights were marked by a kind of Cold War-imposed truce within the human rights movement on the desirability of particular political and economic regimes. The end of the Cold War, by contrast, made it less necessary to insist stridently that human rights were not committed to either of the political models that had dominated until then, when one model seemed to no longer be a contender. The model that "lost," as it happens, was the one that entertained the fewest doubt about ISFs: it, in fact, believed in that notion so wholeheartedly in its sometimes-totalitarian zeal, that it decided that virtually every function ought to be inherently sovereign; by contrast, the model that can be understood to have "won" is the one that has been most skeptical, in its neoliberal zeal, that anything is inherently sovereign. At the same time, the excesses of globalization and notably the massive waves of privatization it inaugurated as a result of debt-fuelled structural adjustment and deregulatory competition have increasingly problematized the role of outsourcing through the lens of human rights, as one of the more obvious sites of resistance, particularly in the Global South.[125]

One detects a constant back and forth between simply demanding more regulation of outsourced services and finding that they should not be outsourced in the first place; in other words, between a weak sense of *a priori* public functions and a strong sense of inherently public functions. In turn, the debate oscillates between arguments that private actors are merely more likely to violate human rights (as a result of what they may do) and a finding that private actors will inherently violate human rights (as a result of what they are). These oscillations are familiar from domestic constitutional debates, and well within what one would expect of an international human rights movement that engages fundamentally the same themes, albeit from its own more universal standpoint.

A certain pragmatism tended to reign at first, with reformist concerns at the forefront. In relation to policing, for example, one worry was the risk of civil unrest but more generally the inappropriate degree of supervision of privatized policing. A 1991 report of the Inter-American Commission on Human Rights about Panama, for example, expressed concerns about "the current proliferation of private security agencies, which now amount to about 105 enterprises with a total of 12,000 armed members, who number more than the personnel of the three branches of the Public Force (air, sea and police)" and urged the government to do something about that development.[126] This is not a position, however, that was necessarily

[125] Karen Bakker, *The "Commons" Versus the "Commodity": Alter-globalization, Anti-privatization and the Human Right to Water in the Global South*, 39 ANTIPODE 430 (2007).

[126] Inter-Am. Comm'n H.R., Annual Report on Human Rights in Panama 1991, OEA/Ser. L/V/II.81, Doc. 6, Rev. 1., Ch. IV (1991), *at* http://www.cidh.oas.org/annualrep/91eng/chap.4e.htm. *See also* Inter-Am. Comm'n H.R., Annual Report on Human Rights in Guatemala 1996, OEA/Ser. L/V/II. 95, Doc. 7, Rev., Ch. V (1996), *at* http://www.cidh.oas.org/annualrep/96eng/chap.5b.htm.

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linked to a strong theory of ISFs.[127] Consider for example the Committee on Economic, Social and Cultural Rights' quite neutral General Comment on the Right to Adequate Housing:

> Measures designed to satisfy a State party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some States public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of Governments to fully satisfy housing deficits with publicly built housing. . . . In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realize the right for every individual in the shortest possible time in accordance with the maximum of available resources.[128]

The risk is nonetheless that rights beneficiaries will find themselves with the worst of both worlds: a state that has relinquished some of its core functions, and private actors that are not bound to guarantee rights.[129] As a result, much of the concern with privatization has led to the broad warning that states, at least, cannot escape their obligations simply be outsourcing services.[130] For example, the CESCR has frequently asked states to specify how privatization of the health system might affect the fulfilment of the right to health, and emphasized the state's continuing responsibilities:

> While there is no reason why the private sector should not be fully involved in the provision of health services, the Committee emphasis that such an approach does not in any way relieve the Government of its Covenant-based obligation to use all available means to promote adequate access to health-care services, particularly for the poorer segments of the population.[131]

This is surely a central pillar of the international law of state responsibility, evocative of the complementary notion that states cannot elude responsibility by invoking their domestic law. It is not, however, the same thing as an explicitly ISF based theory.

Over time, nonetheless, a more robust approach has gradually begun to develop. This was evident in relation to the use of force in national settings as early as the 1990s. The Concluding Observations of the Human Rights Committee on Algeria, for example, hinted at a strong preference against outsourcing to so-called "defense groups" and noted that:

> Serious questions arise as to the legitimacy of the transfer of such power by the State to private groups, especially in view of the power which the State itself confers on them and the very real risk to human life and security entailed by the exercise of that power, coupled with the risks of unsanctioned abuse. The Committee recommends that the Government

[127] Stephanie Palmer, *Public Functions and Private Services: A Gap in Human Rights Protection*, 6 INT'L J. CONST. L. 585 (2008).

[128] CESCR, General Comment No. 4: The Right to Adequate Housing, para. 14, UN Doc. E/1992/23 (Dec. 13, 1991).

[129] Palmer, *supra* note 127.

[130] *See, e.g.*, Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, para. 18 (Jan. 22–26, 1997).

[131] CESCR, Concluding Observations to the Philippines' Initial Periodic Report, paras. 11, 20, UN Doc. E/C.12/1995/7 (June 7, 1995).

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> urgently take measures to maintain within its police and defence forces the responsibility of maintaining law and order and the protection of the life and security of the population and, in the meantime, to ensure that these defence groups are brought under the strict and effective control of responsible State organs, and that they are promptly brought to justice in the case of abuse.[132]

Another area in which the question of ISFs was tackled early on by international human rights bodies, perhaps unsurprisingly given the centrality it has assumed domestically at around the same time, is that of the privatization of prisons. As early as 1988, the question was raised in the then Sub-Commission on Human Rights' Working Group on Detention, culminating in a landmark report by Claire Palley that raised a number of arguments characteristic of ISF theory.[133]

2. Privatization and Poverty

In other words, *sotto voce*, international human rights law can be seen to have long militated for a recentering of the state around sovereign functions in at least certain crucial areas typically associated with traditional Regalian functions. It is only in 2018, however, that a major report directly tackling the issue of privatization from the point of view of human rights was published, authored by UN Special Rapporteur on Extreme Poverty and Human Rights Philip Alston.[134] This was an unusual report in that, instead of focusing on discreet human rights violations or indeed a specific rights-violating subject, it emphasized privatization as a broad, cross-cutting phenomenon that could affect a variety of rights. It was notable, moreover, for its move away from questions concerning the use of force to a broader critique of privatization, specifically as it impacted poverty. The rapporteur's treatment of the question of ISFs was, on one level, still quite ambiguous.

On the one hand, Alston acknowledged defining certain functions as "inherently sovereign" as an existing practice domestically but described this as merely one "mitigation technique" of the effects of privatization, among others. Moreover, he expressed skepticism about the practice:

> The identification of criteria by which to separate inherently public activities from others that might be privatized has proved to be very elusive. Despite the appeal of the concept, the reality is that an almost limitless range of public functions has been entrusted to profit-making corporations in one jurisdiction or another, and human rights bodies have rarely condemned such transfers outright.[135]

This wariness with the absence of bright lines, whilst perfectly understandable in view of the already mentioned evolution of what counts as ISFs, is somewhat strange when it comes to human rights. Rights have historically been associated with the attempt to draw such lines, difficult as the exercise may be. The argument offers a rather weak rebuttal to the concept of

[132] Human Rights Committee (HRC), Concluding Observations of the Human Rights Committee on Algeria, para. 8, UN Doc. CCPR/C/79/Add.95 (Aug. 18, 1998).
[133] Privatization of Prisons Report, *supra* note 124.
[134] Alston 2018 Report, *supra* note 62.
[135] *Id.*, para. 51.

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ISFs based on the difficulty of defining them (as if, for example, defining human rights in general or the human rights responsibilities of corporate actors were easy). It does, of course, resonate well with a familiar principled neutrality when it comes to the very organization of the state: "in theory," as Alston puts it, "privatization is neither good nor bad."[136]

On the other hand, Alston's wariness with the notion of ISFs seems strangely at odds with his own emphasis on the need to "reassert basic values" and "reclaim the high ground," as well as to reverse the notion that privatization should be the "default setting." He emphasizes, in particular, the need, in a context where "[t]he logic of privatization assumes no necessary limits as to what can be privatized," for the human rights community to:

> reassert the centrality of concepts such as equality, society, the public interest and shared responsibilities. Although international law addresses primarily the rights of individuals, human rights are also clearly embedded within and inseparable from society and community. . . . [h]uman rights law is premised upon the existence of a competent and benign State. . . . The human rights community needs to highlight the many reasons why government should be best placed to carry out community responsibilities. . . . While civil society has a vital role to play, it cannot possibly shoulder the burden on its own, with neither adequate resources nor authority. There is no substitute for the public sector to coordinate policies and programmes to ensure respect for human rights.[137]

Although perhaps not the same thing as specifically acknowledging that some functions are inherently sovereign, this does sound strikingly compatible with the goal of delineating an irreducibly public sphere. Others in the international human rights world have adopted a similar if even more explicit tone. For example, Manfred Nowak has challenged "a widely held belief among human rights scholars that human rights are 'neutral' toward privatization," arguing that "while it is true that human rights may be fulfilled in different economic systems, effective implementation of international human rights obligations requires states and the international community to develop, maintain, and progressively improve a certain level of public infrastructure in order to enable all human beings to effectively enjoy and exercise human rights."[138]

3. A Change of Mood?

This change of mood, furthermore, is visible across a range of issue areas where the human rights movement has recently attempted to reinscribe the role of the state. For example, the UN special rapporteur on adequate housing, despite recognizing the role that the private sector serves in realizing that right, has described housing as "not just a commodity," and denounced the fact that under the "financialized model" housing is not "viewed as a home or a place where families grow . . . . Housing is an asset. It's a place to park capital."[139] This is part of a broader movement against the financialization of the housing sector on human rights

[136] *Id.*, para. 87.
[137] *Id.*, paras. 68–70, 82.
[138] Manfred Nowak, Human Rights or Global Capitalism: The Limits of Privatization 2 (2016).
[139] OHCHR, *Housing Is a Human Right, Not Just a Commodity* (Mar. 22, 2019), *at* https://www.ohchr.org/EN/NewsEvents/Pages/AdequateHousing.aspx.

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grounds,[140] which is also visible in various country reports by the rapporteur.[141] As a result, it has been argued that the "State must ensure that all aspects of [the private sector's] involvement are consistent with States' obligations to realize the right to housing for all."[142] Although certainly not going as far as to suggest that states should build housing themselves, "a new relationship between governments and the investors currently dominating the housing landscape must be forged."[143]

This connects to similar complaints that the right to health can be made particularly precarious by privatization. Although the Committee's General Comment on the Right to Health treats public and private healthcare as both conceivable, it also emphasizes the need for states "to ensure that privatization of the health sector does not constitute a threat to the availability, accessibility, acceptability and quality of health facilities, goods and services."[144] Moreover, states have the obligation to grant "equal, affordable, and physical access" to water even when operated or controlled by (presumably private) third parties by ensuring adequate regulation.[145]

Such concerns find broader resonance within the international human rights movement and have been expressed forcefully in the context of the COVID-19 pandemic. For example, a group of UN special rapporteurs published an op-ed in which they took issue with "the catastrophic fallout of decades of global privatisation and market competition" in a context where "vital public goods and services have been steadily outsourced to private companies . . . further marginalising poorer people."[146] The largely private search for a vaccine, in particular, means that it is unlikely to be delivered to all without charge. In short, the six rapporteurs argued that "States can no longer cede control as they have done" and "are not absolved of their human rights obligations by delegating core goods and services to private companies and the market on terms that they know will effectively undermine the rights and livelihoods of many people."[147]

These concerns may not signal the same degree of adherence to a notion of ISFs that uses of force do for example. However, they do indicate a distinctive and expanding human rights wariness with privatization in relation to economic and social rights that comes remarkably close to an indictment of the market as a rights-worthy mechanism in all circumstances. They

[140] Ingrid Leijten & Kaisa de Bel, *Facing Financialization in the Housing Sector: A Human Right to Adequate Housing for All*, 38 NETH. Q. HUM. RTS. 94 (2020).

[141] Leilani Farha, Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Visit to France, paras. 31–33, UN Doc. A/HRC/43/43/Add.2 (Aug. 28, 2020).

[142] Guidelines for the Implementation of the Right to Adequate Housing, Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, para. 64, UN Doc. A/HRC/43/43 (Dec. 26, 2019).

[143] *Id.*, para. 67.

[144] CESCR, General Comment No. 14: The Right to the Highest Attainable Standard of Health, para. 35, UN Doc. E/C.1/2000/4 (Aug. 11, 2000).

[145] CESCR, General Comment No. 15: The Rights to Water (2002), para. 24, UN Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment No. 15].

[146] Leilani Farha, Juan Pablo Bohoslavsky, Koumbou Boly Barry, Léo Heller, Olivier De Schutter & Magdalena Sepulveda Carmona, *Covid-19 Has Exposed the Catastrophic Impact of Privatising Vital Services*, GUARDIAN (Oct. 19, 2020), *at* https://www.theguardian.com/society/2020/oct/19/covid-19-exposed-catastrophic-impact-privatising-vital-services.

[147] *Id.*

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also potentially significantly extend the scope of ISFs to a range of areas that have less to do with maintaining a certain sovereign primacy for the sake of it, than with the ability to fulfill pre-existing rights mandates. In short, the broad arc of the international human rights movement is one that has slowly moved from a position of claimed neutrality in relation to privatization understood as merely one modality among others of organizing social life, to a reckoning with the actual and near-systematic impact of privatization on a range of rights.

B. Writing the State Back in Through Rights?

But what is one to make of these impressive but still relatively scattered manifestations of human rights indignation vis-à-vis privatization? This is a tenuous moment for international human rights law as it might seem to align it with an underlying social-democratic ethos, thus threatening its prized claim to neutrality and exposing it to the suspicion of engaging in politics under the guise of merely "doing" human rights.[148] Indeed, how comfortable can one be with Manfred Nowak's blanket affirmation that the International Bill of Rights, adopted as it was against the background of the Keynesian consensus, "is based on the model of the advanced social welfare state and requires all states parties to these treaties to take measures aimed at the progressive realization of the goals of the advanced social welfare state," except as betraying a no doubt defensible social-democratic sensitivity but one that cannot be easily smuggled into the language of rights?[149]

In what follows, I seek to reconstruct such a theory on the basis of available fragments in the broad corpus of international human rights law. I want to suggest that the answer may lie specifically in an understanding of what in international human rights law itself can already be argued to militate for ISFs. In this, I draw on the idea, most clearly associated with the European continental tradition, that fundamental rights "do not produce effects only at an individual level, but also form an objective system of values that have a 'radiating effect,' obliging all state authorities (legislative, executive and judiciary) to act in conformity with them in all spheres of public action."[150] It is this gradual "radiating effect" (from rights to the very organization of the state) that has the potential to help the human rights movement overcome its aversion to taking a position on political and economic organization. This can then help face the reality that "[w]hile it true to say that traditionally human rights law professes not to prescribe a particular economic or political philosophy, it is nevertheless neither agnostic, nor neutral, as to the outcomes that result from any particular philosophy that is adopted,"[151] especially when such outcomes are a logical consequence of policies.

1. Inherently Public Rights?

In order to develop a human rights-based theory of ISFs that is not merely instrumental, it may be useful to first explore what in the promotion of at least certain rights already contains an explicitly or implicitly sovereign dimension. The Israeli Supreme Court's assumption of a

[148] Frédéric Mégret, *Alston in Alabama: Towards a Theory of International Human Rights Law Praxis*, *in* THE STRUGGLE FOR HUMAN RIGHTS – LAW, POLITICS, PRACTICE. ESSAYS IN HONOR OF PHILIP ALSTON (Nehal Bhuta, Florian Hoffmann, Sarah Knuckey, Frédéric Mégret & Margaret Satterthwaite eds., 2021).

[149] NOWAK, *supra* note 138, at 4.

[150] Katrougalos, *supra* note 10, at 415.

[151] SAUL, KINLEY, AND MOWBRAY, *supra* note 27, at 913–14.

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particularly deontological standpoint in the form of dignity was an intriguingly appropriate argument in the narrow context of commodification of human lives in prisons. But it is almost too high a ground from which to mount a challenge to privatization broadly understood on the international plane (for the most part, it would be hard to argue that, as a matter of international human rights law and in a range of domains, privatization is an affront to human dignity).

Consider, instead, the protection of the security of persons, including the right to life. That protection is typically understood to require the use of force (or at least the possibility thereof) and the ability to punish those responsible for rights violations, characteristics which are hard to reconcile *a priori* with privatization. The increasing emphasis on investigating and prosecuting grave violations of human rights, for example, seems to reinscribe the central role of the state, given how implausible normatively it is that core criminal functions would be outsourced to the private sector. By contrast, according to the Interamerican Commission on Human Rights:

> The privatization of the functions involved in citizen security is a departure from the concept of human rights, where the State is responsible for guaranteeing that citizen security is defended, protected and ensured. Instead, citizen security becomes a mere product to be bought on the market and, in most cases, is available only to those sectors of society with the means to buy it.[152]

Although the Commission found that private forces could "offer security for assets and valuables," they were "not intended to augment or supplant the member states' obligations in the area of citizen security, as the State's responsibility for the protection of human rights is a nondelegable duty."[153]

Consider, next, protection from arbitrary detention. Guaranteeing that persons will only be detained if they have received a "fair trial" requires a judicial system, particularly in the criminal justice realm, and it is difficult to imagine how that could be anything else than the byproduct of a state system. In other words, the right to a fair trial is not simply a right to tried fairly by whatever organ one happens to be tried by, but arguably a right to be tried by an independent and impartial tribunal understood as a tribunal that is an emanation of the state. As Claire Palley once put it in one of the earliest international human rights reports on the issue: "Symbolically speaking, only the State should have powers of administration of justice and of executing it by coercion."[154] Indeed, by contrast, some of the more dramatic manifestations of the privatization of justice have manifested a genuine collapse of the sort of public service that the state is mandated to provide under human rights.[155]Although not as specific as the Israeli Supreme Court, the Human Rights Committee has expressed "concern" as to "whether [privatization of prison management] in an area where the State Party is responsible for the protection of human rights of persons

[152] Inter-Am. Comm'n H.R., Report on Citizen Security and Human Rights, para. 72, OEA/Ser.L/V/II. Doc. 57 (2009).

[153] *Id.*, para. 73.

[154] Privatization of Prisons Report, *supra* note 124, para. 45.

[155] Rachel Sieder, *Legal Globalization and Human Rights: Constructing the Rule of Law in Postconflict Guatemala?*, *in* HUMAN RIGHTS IN THE MAYA REGION: GLOBAL POLITICS, CULTURAL CONTENTIONS, AND MORAL ENGAGEMENTS 83–84 (Pedro Pitarch, Shannon Speed & Xochitl Leyva-Solano eds., 2008).

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deprived of their liberty effectively meets the obligations of the State Party under the Covenant."[156]

Perhaps even more importantly, privatization can be understood to undermine the right to equality, to the extent that it disproportionately affects racialized persons.[157] This is a complex area for human rights law given that it might draw it into seemingly political controversies on the nature of market driven inequalities. However, it is also precisely on account of its inability to have such conversations that the discourse of human rights has sometimes been dismissed as potentially irrelevant.[158] Of late, UN human rights experts at least seem to have manifested a renewed willingness to tackle the intersection of privatization, poverty, and discrimination. As the special rapporteur on education put it: "Private providers do not respect the prohibited grounds of discrimination and violate fundamental principles of non-discrimination in human rights law: social origin, economic condition, birth or property are the preponderant factors in allowing access to private schools."[159] This led him to insist on the necessity of "preserving and strengthening education as a public good" and "promoting the view that the State is the custodian of quality education."[160] Alston has also mentioned that privatized care is "especially susceptible to racial and other forms of discrimination," in a context where "profit is the overriding objective, and considerations such as equality and non-discrimination are inevitably sidelined."[161]

In the case of economic and social rights, a central place for the state is even more explicitly encouraged when it comes to particularly crucial resources such as water. The Committee on Economic Social and Cultural Rights' report on the right to water, for example, argues that "water should be treated as a social and cultural good, and not primarily as an economic good."[162] Through their distinct paths, therefore, each of these rights can be reconstructed as leading back to at least some necessary component of state implementation.

2. The Obligation to Protect and Fulfill and ISFs

Beyond what can be inferred from discrete rights, it is arguably the whole apparatus of international human rights law which suggests that at least some state responsibilities cannot be privatized or can only be privatized under onerous conditions. The so-called obligation to protect in itself delineates a dimension that is inherently governmental, in that at least that obligation cannot be outsourced and suggests the need for specifically public measures to deal with the consequences of privatization. As per the Ruggie Principles:

> States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to

[156] HRC, Concluding Observations of the Human Rights Committee on New Zealand, para. 11, UN Doc. CCPR/C/NZL/CO/5 (Apr. 7, 2010) [hereinafter Concluding Observations on New Zealand].

[157] Although that dimension has not yet had internationally the echo that it has long had domestically. Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, PUB. ADM. REV. 461–67 (1987).

[158] SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018).

[159] Kishore Singh, Special Rapporteur on the Right to Education, Protecting the Right to Education Against Commercialization, para. 57, UN Doc. A/HRC/29/30 (June 10, 2015).

[160] *Id.*, para. 63.

[161] Alston 2018 Report, *supra* note 62, paras. 35, 82.

[162] General Comment No. 15, *supra* note 145, para. 11.

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> prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.[163]

Specifically, states should "[e]nforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps."[164] This enforcement of laws, then, in and of itself, would seem to presume a natural realm for public intervention, namely that of guaranteeing that ISFs outsourced to private actors are to be monitored closely as part of a theory of ISFs. Failure to rise to their own obligation to protect is by contrast often credited with having allowed encroachments of privatization on the sovereign's regulatory sphere, with potentially devastating consequences for human rights. The state, in particular, should guard against any temptation to outsource that might compromise its ability to ensure the protection of human rights. As made clear by the CESCR, monitoring itself involves the exercise of ISFs:

> Where water services . . . are operated or controlled by third parties, States parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses an effective regulatory system must be established, in conformity with the Covenant and this General Comment, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.[165]

Similarly, the so-called "obligation to fulfill" (or "ensure") has long been understood to entail positive measures, across the whole range of human rights, which themselves cannot be outsourced. The obligation to fulfill suggests that states should be fully accountable for their decision to privatize.[166] Although this is somewhat different from saying that certain functions cannot be outsourced at all, there is an occasional slippage toward more principled arguments. As Claire Palley put it: "Although . . . arguments of principle may to some extent be met by safeguarding arrangements . . ., they remain relevant as additional reasons why a system of State contracting out of management of prisons might be an unlawful subdelegation of power."[167]

Commenting on the UK report in 1995, the Human Rights Committee expressed the concern "that the practice of the State party in contracting out to the private commercial sector core State activities which involve the use of force and the detention of persons *weakens the protection of rights under the Covenant*."[168] Following New Zealand's periodic report in 2010, the Committee wondered "whether such privatization in an area where the State party is responsible for the protection of human rights of persons deprived of their liberty effectively meets the obligations of the State party under the Covenant and its accountability for any

[163] John Ruggie, Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, Prin. 1, UN Doc. A/HRC/17/31 (Mar. 21, 2011) [hereinafter Ruggie Principles].

[164] *Id.*, Prin. 3(a).

[165] General Comment No. 15, *supra* note 145, para. 24.

[166] Aoife Nolan, *Privatization and Economic and Social Rights*, 40 HUM. RTS. Q. 815 (2018).

[167] Privatization of Prisons Report, *supra* note 124, para. 45.

[168] HRC, Concluding Observations of the Human Rights Committee on the United Kingdom, para. 423, UN Doc. A/50/40 (Oct. 3, 1995) (emphasis added).

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violations, *irrespective of the safeguards in place*."[169] Positive human rights obligations, in particular in the economic and social fields, have also been noted as requiring something more than a "hands off" approach in a context where "the quest for limited government, which sometimes fuels the privatisation agenda, would appear to run counter to the responsible state that underpins positive obligations."[170]

Further arguments for a correlation between ISFs and human rights have emerged at the intersection of discourses of human rights and good governance that emphasize the need for a certain human rights infrastructure. The Committee on Economic, Social and Cultural Rights argued in 1999 that the elimination of poverty on the part of states "requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary."[171] This has been prolonged in the Human Rights Council mandated report to the High Commission for Human Rights on "the role of the public service as an essential component of good governance in the promotion and protection of human rights."[172] The report emphasizes the "role of the public sector as service provider or regulator of the private provision of services [that] is crucial for the realization of all human rights, particularly social and economic rights."[173] The language used suggests, again, a range of legislative, administrative and judicial measures which are solidly understood to lie within the realm of the state.

The obligation to protect and fulfill, moreover, is crucially connected to an obligation to remedy, which it is difficult to imagine could itself be outsourced even if everything else was privatized. To cite the Committee on the Rights of the Child:

> States must take all necessary, appropriate and reasonable measures to prevent business enterprises from causing or contributing to abuses of children's rights. Such measures can encompass the passing of law and regulation, their monitoring and enforcement, and policy adoption that frame how business enterprises can impact on children's rights. States must investigate, adjudicate and redress violations of children's rights caused or contributed to by a business enterprise.[174]

Regardless of whether certain functions can legitimately be outsourced, then, the specific supervisory and remedial features of such a regime of delegation must itself be public. This may ultimately be one of the most incontrovertible proofs that certain functions are inherently sovereign under international law. This includes "the passing of law and regulation" for example as well as investigating and adjudicating, and a host of measures associated with

[169] Concluding Observations on New Zealand, *supra* note 156, para. 11 (emphasis added).

[170] Catherine Donnelly, *Positive Obligations and Privatisation Special Issue: Positive Obligations and the European Court of Human Rights*, 61 N. IR. LEG. Q. 209, 211 (2010).

[171] CESCR, General Comment No. 12: The Right to Adequate Food, para. 23, UN Doc. E/C.12/1999/5 (May 12, 1999).

[172] Report of the United Nations High Commissioner for Human Rights on the Role of the Public Service as an Essential Component of Good Governance in the Promotion and Protection of Human Rights, UN Doc. A/HRC/25/27 (Dec. 23, 2013).

[173] *Id.*, para. 11.

[174] UN Committee on the Rights of the Child (CRC), General Comment No. 16: State Obligations Regarding the Impact of the Business Sector on Children's Rights, para. 28, UN Doc. CRC/C/GC/16 (Apr. 17, 2013).

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remedying rights violations.[175] Even if private remedies are available and encouraged by the state, they should ultimately themselves be reviewable. Thus, one sees the state as, in extremis, the ultimate stop gap measure in a chain of human rights protections that can be extended to involve private actors but not to a breaking point.

3. *The Authority to Limit Human Rights*

A third line of justifying ISFs from the perspective of human rights more broadly reflects on qualitative differences between states and private actors, and how this impacts on their authority to implement human rights. This is relevant, to begin with, specifically in relation to *limitations* to rights which have become so central to the human rights machinery. International instruments emphasize the need to adopt *laws*, if at all, to limit rights which suggests that, ultimately, all significant and authorized limitations of rights should be sanctioned by the legislature. The adoption of laws, then, would seem to signal toward something in the very implementation machinery of rights that legitimizes state intervention in ways that may be hard to reconcile with private outsourcing.

Moreover, human rights may be system-neutral, but they do evidence over time a strong connection to at least one particular regime, democracy.[176] Leading human rights instruments, for example, protect the exercise of the rights to vote and stand for public office. In fact, democracy is weaved intimately into rights limitation analysis, with the standard referent being, notably in the European Convention on Human Rights, that limitations should be "necessary in a democratic society." This notion refers back to the state and its "capacity to adopt rules that are rendered fair and equitable through processes of consultation and feedback, its embrace of systems of checks and balances designed to avoid capture by any particular group."[177] By contrast, for example, philanthropic giving has been described as "not a democratic or transparent process, moving efforts to address poverty behind closed doors . . . a form of private political power."[178]

The underlying democratic ethos of human rights is also expressed through appeal to notions such as the right to self-determination and the assumption that "the legitimacy of . . . inherently governmental powers entrusted to the State by the people depends upon their exclusive exercise by the State."[179] Although presumably international law is less invested than constitutional law in states exercising functions that have been entrusted to them domestically, cases where privatization runs afoul of self-determination and procedural obligations attached thereto would seem to compromise a key international legal interest in protecting popular will, notably when it comes to indigenous peoples' land.[180] A particular concern when it comes to self-determination is with public ownership of land resources and the risk that privatization will directly

[175] Stéphanie Lagoutte, *New Challenges Facing States Within the Field of Human Rights and Business*, 33 NORD. J. HUM. RTS. 158 (2015).

[176] Conor Gearty, *Democracy and Human Rights in the European Court of Human Rights: A Critical Appraisal*, 51 N. IR. LEG. Q 381 (2000).

[177] Alston 2018 Report, *supra* note 62, para. 70.

[178] Philip Alston, Special Rapporteur on Extreme Poverty and Human Rights, *The Parlous State of Poverty Eradication*, para. 73, UN Doc. A/HRC/44/40 (July 2, 2020).

[179] Privatization of Prisons Report, *supra* note 124, para. 45.

[180] Peter Manus, *Sovereignty, Self-Determination, and Environment-Based Cultures: The Emerging Voice of Indigenous Peoples in International Law*, 23 WIS. INT'L L.J. 553 (2005).

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infringe collective rights. For example, in 1997, the CESCR complained that it was "unable to assess to what extent the general public is able to participate in the privatization process" in Azerbaijan, and that it was "important that the privatization process should be conducted in an open and transparent manner and that the conditions under which oil concessions are granted should always be made public."[181]

Many of the criticisms of outsourcing emanating from human rights bodies take issue with the very nature of private actors and their tendency to fundamentally depart from the characteristics of states. Alston has wondered rhetorically whether "private entities dedicated to maximizing their own profits [are] best placed to protect the rights of the community."[182] It has been pointed out that "[f]rom the human rights perspective, the financialization of the water and sanitation sector creates a disconnect between the interests of company owners and the goal of realizing the human rights to water and sanitation."[183] Although it is not inconceivable to think of corporations as exhibiting pseudo-democratic structures, that is not, for the most part, how corporate governance functions in the absence of a demos that is the hallmark of democratic organization, and the evident drive toward profit.[184]

Inductively, therefore, one seems to arrive through human rights at the idea of the state (rather than to the idea of rights through the state), a perhaps unsurprising conclusion given the fact that human rights is a discourse that has, at least since the eighteenth century, been obsessed with sovereignty. At the very least, then, international human rights law would seem to require the state to guarantee human rights and to assume that this cannot be done without the state being a state and in a position to itself exercise a range of implementation and supervisory functions that then deeply taint the activities in question. It is certainly conceivable that other actors would be bound to respect rights, but only that specifically public actors would be in a position to implement them broadly. This suggests that the state owes it to human rights, as it were, to conserve a certain governmental and democratic aptitude and not surrender the discharge of functions central to the enjoyment of rights to private actors.

V. Conclusion

This Article set out to investigate whether international law could be said to be the repository of at least an implicit theory and practice of ISFs. Overall, it has found that it is possible to distinguish the contours of such an international law of ISFs, based on both an earlier history of horizontal relations between states and late developments connected to human rights. The body of evidence that international law is implicated in the propping up of a relatively thick conception sovereign functions is consistent over time and quite compelling.

At the same time, one needs to emphasize the limitations of an ambitious theory of ISFs in a context where both sovereignty and human rights can and have at times been interpreted as wholly consonant with extensive privatization arrangements. For example, the increasing tendency to "privatize" international human rights law itself, as seen notably in the tendency to grant broad human rights responsibilities to corporations including in terms of norm

[181] CESCR, Concluding Observations on Azerbaijan, para. 29, UN Doc. E/C.12/1/Add.20 (Dec. 22, 1997).
[182] Alston 2018 Report, *supra* note 62, para. 3.
[183] Privatization of Water Report, *supra* note 182, para 15.
[184] Stephen R. Barley, *Corporations, Democracy, and the Public Good*, 16 J. Mgmt. Inq. 201 (2007).

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development (transnational private regulation) or adjudication (private grievance mechanisms), suggests a real ambiguity about whether the state is still considered the locus *par excellence* of human rights responsibilities. Beyond a broad range of supervisory functions that implicate the very democratic apparatus of the state, it remains more difficult to argue that ISFs are any more than a domestic constitutional preference.

Concerns about the status and concrete applicability of a theory of ISFs in international law may be alleviated by a sophisticated understanding of the different ways an international ISF argument might be deployed. The more ambitious but perhaps in the end not the most useful way is as a sort of mandatory international law requirement that certain functions not be privatized at all (ISFs in the "strong" sense). There are probably a few areas—the use of force, legislation, or adjudication—where such a prohibitionist approach makes sense and finds some authority in international law. Outside these limited cases, however, it may be that a blanket ban on outsourcing goes further than a pluralist international legal regime can sustain.

The better view may be that an international law regime of ISFs can be understood as operating as a tier system. Aside from the already mentioned tier of functions that can never be outsourced, there clearly exists a tier of functions that can easily be outsourced (for example a range of economic activities for which it is perfectly acceptable and perhaps even desirable that the state not get involved in directly). In the middle, however, this Article has delineated a range of areas where identifying ISFs should at least trigger strong expectations that privatization will only occur, if at all, under the most demanding conditions—for example on the basis of a compelling case that rights will not be sacrificed, the state will maintain a strong supervisory role, and private actors will be kept on a tight regulatory leash.

Such an approach based on a relatively "weak" understanding of ISFs has the advantage that it does not foreclose the possibility of experimentation in line with states' diverse political traditions, and yet does not give up on the intuition that privatization in such cases warrants a heightened degree of international legal scrutiny. A complementary view is that the ISF argument, rather than being used to *force* states to exercise certain functions publicly, might be invoked "defensively" to resist a demand that a country privatize a certain service by alleging the fundamentally sovereign character of said function. For example, in one domestic illustration of such a strategy that might be replicated internationally, a court in Argentina found that constitutional guarantees of access to adequate water prevent private sector water corporations from cutting off supply to customers following an inability to pay for the service.[185]

An international legal theory of ISFs, at any rate, would recast the role of international law quite significantly as the continued guarantor of states' "publicness." Rather than merely regulating the relations between sovereigns or of sovereigns with persons within their jurisdiction, international law could be reassessed as part of an ongoing process of constitution of the sort of sovereign subject on which its continued existence depends. Inasmuch as sovereignty is a performance rather than merely an essence or a virtuality, it needs to be manifested as such. The sovereign of international law, it turns out, is more than a liberal empty shell whose exercises of power international law contemplates from an agnostic distance. Instead, it is a certain idea of the sovereign, one characterized in equal part by independence and a pre-existing sense of how states should behave in certain sovereign ways.

[185] Juzgado de Primera Instancia [1a Inst.] [Civil and Commercial First Instance Court], 8/4/2002, "Quevedo, Miguel Angel y otros c/ Aguas Cordobesas S.A., Amparo" (Arg.).

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This suggests a vision of international law as not only committed to ruling sovereigns but also deeply implicated in constituting them: "not a law occurring between states but . . . a law *of* states."[186] Human rights law specifically may act as a sort of backstop against the temptation of sovereign dissolution, reading back the state, as it were, from the very exigencies of rights and a basic *demande d'Etat*.[187] Caught between the elusiveness of ontology and the Sisyphean task of filling the sovereign empty vessel with meaning, international law could confirm and embed its own commitment to publicness in the process of affirming ISFs. Indeed, the question may reasonably be asked: if international law does not commit to a notion that anything is "inherently sovereign," then what is left of the historical project to specifically regulate sovereigns through law?

[186] EMMANUELLE JOUANNET, THE LIBERAL-WELFARIST LAW OF NATIONS: A HISTORY OF INTERNATIONAL LAW 180 (2012).

[187] Julien Bauer & Philippe Le Prestre, *Chapitre 2. Ménage à trois : L'État entre la société civile et le système international*, *in* QUI A PEUR DE L'ÉTAT ? 39–97, 104 (Gordon Smith & Daniel Wolfish eds., 2018).

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