



1st lecture (Tuesday 7th March 2017): Conceptual foundations and privatisation in states under the purview of international law

Outline

Introduction: “International public law belongs to the *genus private law*” (H. Lauterpacht)

1. The publicisation of international law
2. The privatisation of international law
3. Privatisation under international law
 - a) Privatisation shaping international law
 - b) International law shaping privatisation
4. International law limits on privatisation
 - a) Inherent state functions?
 - b) The state monopoly on the legitimate use of force and the privatisation of prisons
 - c) International human rights limits?
 - d) Procedures to reign in privatisation
5. The responsibility to regulate
6. Collapsing the public/private split?

Main message

Privatisation processes in states have decisively shaped new institutions and regimes of public international law such as the human right to water and the international law of foreign investment. Inversely, public international law is shaping privatisation processes. In the era of recurring financial and debt crises to which IFIs and states react with privatisation programmes, the focus of attention has shifted from institutional concerns such as democracy and the state monopoly on the legitimate use of force to international human rights law.

Notably international social rights are increasingly viewed as giving rise to numerous procedural obligations of privatising states, ranging from human rights impact assessments over due diligence to granting participation and review. So privatisation modifies the substance and structure of state obligations under international law in two dimensions: shifting from state obligations to fulfil to state obligations to protect and ensure, and from substantive requirements to procedures. Both shifts increase social risks. However, in pluralistic societies, the only way to identify the public interest seems to be proper procedures. Upholding a residual responsibility of the state vis-à-vis private actors furnishing public goods and services postulates that state (public) regulation and private “regulation” through the market offer two distinct, competing and potentially complementary paths towards justice.

Key documents for lecture 1

Art. 4 (2) Optional Protocol on CAT (of 18 Dec. 2002; A/RES/57/199): "For the purposes of the present Protocol, deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority."

Supreme Court of Israel sitting as High Court of Justice, *Academic Center of Law and Business v. Minister of Finance*, judgment of 19 Nov. 2009, HCJ 2605/05.

German Constitutional Court (*Bundesverfassungsgericht*), BVerfG, judgment of 18 Jan. 2012, 2 BvR 133/10, on detention in a privatised corrective facility ("*Maßnahmevollzug*").

Committee on Economic, Social and Cultural Rights, Letter of Chairperson (Ariranga G. Pillay) to state parties (on austerity measures) of 16 May 2012, Doc. ECSR /48th/SP/MAB/ SW).

Human Rights Council, Report of the Special Rapporteur on the right to education, Kishore Singh, *Protecting the right to education against commercialization* (UN Doc. of A/HRC/29/30 of 10 June 2015).

Committee on Economic, Social and Cultural Rights, *General Comment on State Obligations under the International Covenant on Economic, Social and Cultural Rights in the Context of Business Activities*, Draft prepared by Olivier De Schutter and Zdzislaw Kedzia, Rapporteurs (UN Doc. E/C.12/60/R.1) of 17 Oct. 2016 (adoption projected for summer 2017):

Para. 22: "This General Comment is adopted at a time when **privatization** is a growing trend in many parts of economic, social and cultural life worldwide. The private sector has long played an important role in the sectors closely related to certain Covenant rights, such as the right to work and the right to food. However, it is also gaining importance in other areas relating to social protection, water, sanitation, health, education and cultural life. The increased role and impact of private actors in what used to be predominantly public sectors pose new challenges for States Parties in complying with their obligations under the Covenant. It poses particular challenges as regards the affordability of goods and services that are necessary for the enjoyment of basic economic, social and cultural rights. In this regard, States Parties should ensure that privatization does not lead to a situation in which the enjoyment of Covenant rights is undermined by the inability to pay, at the risk of creating new forms of socio-economic segregation. They retain the obligation to **regulate** and **ensure** that private actors provide **affordable access to quality services to all**."

Key literature for lecture 1

Koen De Feyter (ed.), *Privatisation and Human Rights in the Age of Globalisation* (Antwerpen: Intersentia 2005).

Daphne Barak-Erez, "Three Questions of Privatization", in: Susan Rose-Ackerman/Peter Lindseth (eds), *Comparative Administrative Law* (Cheltenham: Elgar 2010), 493-510.

Laura Dickinson, *Outsourcing War and Peace – Preserving Public Values in a World of Privatized Foreign Affairs* (Yale University Press: New Haven 2011).

Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Cambridge: Intersentia 2012).

Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (University of Pennsylvania Press 2017).