



## **Privatisation *under* and *of* Public International Law**

### **A summary of the three lectures**

International law has emerged out of (Roman) private law sources and analogies, as Hersch Lauterpacht has shown. One might call this the publicisation of private law-bits and pieces to shape a *droit public européen* and a *public* international law.

The last decades have brought about counter-trends of privatisation. First, states have radically and often under pressure by international and regional financial institutions divested themselves of infrastructure and handed over tasks and services to the private sector. This is the privatisation *under* public international law.

Second, global markets, global corporations, and global supply chains have begun to shape not only the substance of international law but also its structure (in terms of legal subjects and legal sources/instruments). This is the privatisation *of* public international law.

Privatisation *under* international law and privatisation *of* international law are linked, because the rise of the private sector (business), the concomitant shrinking of states, and the deep engagement of international organisations (IOs) with private partners have been transforming the international legal persons themselves, the international law-making processes, and the legal outcomes, too.

Lauterpacht's original intention of strengthening the element of law, and of countering lawlessness in international relations was in 1927 served by drawing on private law as the best available model of law existing at the time. Ninety years later, Lauterpacht's quest for a "reign of law" in what we now call global governance can be best satisfied by acknowledging and carving out the public-law quality of international law while accommodating and integrating the increasingly important private actors into global governance.

#### **1st lecture (Tuesday 7<sup>th</sup> March 2017): Conceptual foundations and privatisation in states under the purview of international law**

Lecture 1 states the problem, defines the key concepts, and examines privatisation (selling infrastructure and outsourcing tasks) within states. Contrary to what is often assumed, public international law is not blind or neutral towards privatisation programmes.

International organisations pushing states to privatise must not undermine a state's capacity to comply with international human rights obligations. And where a state takes a sovereign decision to pursue privatisation, the state's responsibility to protect (R2P) which is attached to its sovereignty prohibits the state to completely relinquish responsibility for tasks connected to the state's monopoly on the legitimate use of force. Besides these *specific means* at the disposal of the state, a substantive, inalienable essence of statehood can today only be constituted by international human rights. The privatising state remains obliged to guarantee a human rights minimum for all persons under its jurisdiction and maybe even beyond. This will mainly be satisfied through the proper regulation of providers and contractors. It is an open question how far the state's responsibility to regulate private actors in an extraterritorial fashion stretches.

#### **2nd lecture (Wednesday 8<sup>th</sup> March 2017): The privatisation of international organisations**

Lecture 2 deals with the privatisation of international organisations (IOs). Recently, IOs are under financial stress and follow the model of their member states, reorganising themselves according to the private-law oriented model of New Public Management (NPM). They also increasingly procure goods and services of all kinds, including military and security services, in order to fulfil their missions. Another

novel type of privatisation are “private sector partnerships” of IOs, notably in the fields of environmental action, humanitarian action, development, refugees, and health.

The burgeoning engagement of IOs with the private sector raises similar problems as within states, but a layer of complexity is added. We here see a double delegation of public functions: From states (as principals) to IOs, and from there to the private sector. This duality does not demand totally novel principles governing privatisation but adaptations, e.g. regarding human rights obligations of IOs. To fill accountability gaps, the immunities of organisations should be limited to *acta iure imperii* of IOs.

### **3d lecture (Thursday 9<sup>th</sup> March 2017): The private actors’ public functions and public international law constraints**

Lecture 3 examines the counterpart, i.e. the private (business) side. The exercise of public governance functions by private actors (law-making, law-application, and law-enforcement) raises the question how to prevent the circumvention or scooping out of the “public” values of security, freedom, equality, and decent livelihood of natural persons. It is submitted that this goal can be reached without subjugating private actors completely to public international law, notably to international human rights law.

The public and the private spheres, the powers of the state and the corporation, sovereignty and property, are mutually constitutive and are both constituted by (international) law. The variants of capitalism, the rise and fall of state-like companies and commercialised states, the waves of deregulation, reregulation, privatisation and nationalisation are continuously blurring and shifting the various public/private boundaries.

Nevertheless, the basic idea of public/private distinctions remains a useful analytic tool and a normative guideline for assessment and action. It leaves room for approximating justice on two complementary trajectories of *iustitia distributiva* and *iustitia compensativa*. Collapsing public/private distinctions would render the pursuit of global justice even more difficult than it already is.

### **General Reading**

Hersch Lauterpacht, *Private Law Sources and Analogies in International Law* (London: Longman 1927), § 34 (81-82) and Chap. IX, Conclusions (297-306).

Anne Peters, “Transnational Law Comprises Constitutional, Administrative, Criminal, and Quasi-private Law”, in: Pieter Bekker/Rudolf Dolzer/Michael Waibel (eds), *Making Transnational Law Work: Liber Amicorum Detlev Vagts* (Cambridge: Cambridge University Press 2010), 154-173.

Horatia Muir Watt, “Private International Law Beyond the Schism”, *Transnational Legal Theory* 2 (2011), 347-427.

Philipp J. Stern, *The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India* (Oxford: OUP 2011).

Christine E. Schwöbel, “Whither the Private in Global Governance?”, *International Journal of Constitutional Law* 10 (2012), 1106-1133.

Joshua Barkan, *Corporate Sovereignty: Law and Government under Capitalism* (Minneapolis: University of Minnesota Press 2013).

Cormac Mac Amhlaigh/Claudio Michelon/Neil Walker (eds), *After Public Law* (Oxford University Press: Oxford 2013).

Lorenzo Casini, “‘Down the Rabbit-Hole’: The Projection of the Public/Private Distinction beyond the State”, *International Journal of Constitutional Law* 12 (2014), 402-428.