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SYMPOSIUM ON FRÉDÉRIC MÉGRET, "ARE THERE 'INHERENTLY SOVEREIGN FUNCTIONS' IN INTERNATIONAL LAW?"

OUTSOURCING MILITARY AND SECURITY FUNCTIONS

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In "Are There 'Inherently Sovereign Functions' in International Law,"[1] Frédéric Mégret suggests that the fact that international legal practice has sought to preserve a state monopoly over the use of force strengthens the argument that international law considers some functions to be inherently sovereign. Mégret's analysis goes much further than this in seeking to develop a thicker and broader understanding of inherently sovereign functions (ISFs) by reasoning inductively from international human rights law. This essay largely supports this approach through a case study of the approach taken by the United Kingdom to outsourcing military and security functions. It explores an understanding of inherently sovereign functions based on the state's monopoly on the legitimate use of force and claims that outsourcing military and security functions undermines state sovereignty.

The legitimate monopoly on the use of force remains crucial in understanding ISFs. This is not because maintaining that monopoly frees up states to use unlimited force but rather that the public nature of state-monopolized force ensures that it operates within a national and international constitutional legal framework. The argument is that the monopoly on the use of force explains at least some of the core functions of a state, including the regulation of state-monopolized force, and that it does not simply allow state organs and agents to use force, but requires the state to regulate its exercise through public laws adopted within national and international constitutional frameworks.

Specifically, this essay argues that the military and security functions performed by public bodies (principally, the military, the police, and security services) and the regulation thereof form the core of what can be considered ISFs. Outsourcing—in its modern guise of governments contracting with, or even simply hosting, private military and security companies (PMSCs)—undermines sovereignty by eroding the monopoly of the state. Outsourcing is accompanied by the regulation of private security largely outside the constitutional constraints of both public law and public international law that operate to control the use of force. The essay uses the United Kingdom as a leading example of outsourcing as it has a rich history, both recent and distant, in sanctioning the use of private violence and in failing to control that violence.

Outsourcing and Sovereignty

Sovereignty has both an internal aspect, namely the "supreme authority" of the state over everything in its territory,[2] and an external aspect, namely the "capacity to act on the international plane."[3] Outsourcing the state's

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[1] Frédéric Mégret, *Are There "Inherently Sovereign Functions" in International Law?*, 115 AJIL 452 (2021).

[2] Oppenheim's International Law 432 (Robert Jennings & Arthur Watts eds., 2008).

[3] James Crawford, Brownlie's Principles of Public International Law 12 (2012).

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military and security functions undermines both of these aspects, as it signifies a process whereby the government voluntarily transfers some of its monopoly on the use of force to the private sector. In the United Kingdom, this stage in the dissolution of the modern state has not been reached, although the continued shrinking of the military will lead to the private sector filling the inevitable void.[4] The private provision of security at the 2012 Olympics in London was a setback for private security, when the contractors were unable to deliver the services promised and the extra security urgently needed was supplied by the British armed forces. But this event did show the government's intention to transfer military and security functions to the private sector even for such events of national and international importance.

Outsourcing reduces the state's competence on the international plane including its ability to project its sovereign power abroad within the framework of international laws agreed by states on the basis of sovereign equality. By transferring some of its military and security functions to the private sector in its external uses of force, the state erodes the power of direct command and control it has over armed force essential for the state's monopoly. For example, in deciding that some of the protections provided by the European Convention of Human Rights applied to British soldiers in Iraq as well as to civilians under their control, Lord Hope in *Smith v. Ministry of Defence* stated that,

> it is not disputed that the United Kingdom has authority and control over its armed forces when serving abroad. It has just as much authority and control over them anywhere as it has when they are serving within the territory of the United Kingdom. They are subject to UK military law without any territorial limit.[5]

Thus, the state's command, control, and regulation of military force remains complete even when troops are deployed to combat missions overseas.

A significant shift away from public to private force, even when the latter is used for public purposes, would constitute the erosion of a command-based model whereby the state is able to order its troops and other state agents to fulfil military and security functions, towards a contract-based model under which the state relies on enforceable promises of military and security services. The command-based model is accompanied by a military justice system based on ensuring the obedience and discipline of soldiers, while providing procedural safeguards to soldiers accused of violations of military or criminal law.[6] In contrast, a contract-based model largely depends on a combination of liability in private law and self-regulatory forms of corporate social responsibility that purport to ensure that contractors comply with basic rules on the use of force. Outsourcing means that a strong vertical system of control over the use of force is replaced by a weaker horizontal one. There may be criminal prosecutions of the most egregious violations committed by individual contractors, but these are exceptional.[7] Furthermore, the privatization of force shifts the applicable national legal framework away from public law towards private law. While public law is the natural conduit for norms of international law to enter into a domestic legal system, private law is not. In this way, the privatization of force is shielded from both national and international constitutional laws that have been developed to empower, but also to restrict, the state in exercising its monopoly over the use of force.

PMSCs Unconstrained by Public Law in the United Kingdom

It is clear that in the United Kingdom the risks arising from the potential for private force that grew out of the "Peace Dividend" and the dwindling of the regular armed forces at the end of the Cold War were well known. In a

[4] The U.K. army is to be reduced to 72,500 personnel by 2025. *See* U.K. Ministry of Defence, Defence in a Competitive Age (CP 411, March 2021).

[5] *Smith and Others v. Ministry of Defence* [2013] UKSC 41, para 28. (U.K. Supreme Court).

[6] *R v. Stillman* 2019 SCC 40, para. 53 (Supreme Court of Canada).

[7] James Meikle, *British Contractor Jailed in Iraq for Colleagues' Murders*, The Guardian (Feb. 28, 2011).

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prescient Green Paper of 2002, the U.K. Foreign and Commonwealth Office reviewed the options for regulation of what was at that time a fledgling PMSC industry:

> Bringing non-state violence under control was one of the achievements of the last two centuries. To allow it again to become a major feature of the international scene would have profound consequences. Although there is little risk of a return to the circumstances of the 17th and 18th centuries, when privateers were hard to distinguish from pirates, and corporations commanded armies that could threaten states, it would be foolish to ignore the lessons of the past. Were private force to become widespread, there would be risks of misunderstanding, exploitation, and conflict. It would be safer to bring PMCs and PSCs within a framework of regulation while they are a comparatively minor phenomenon.[8]

Various options for regulation of the growth of UK-based PMSCs were explored in the Green Paper, ranging from outright prohibition, through licensing, to self-regulation. Only prohibition would fully protect the state's command and control over armed force used for external purposes, although a system of licensing would at least have the potential to reduce the chances of PMSCs acting against U.K. interests. However, licensing without vigorous oversight and enforcement by public authorities would not entail sufficient control and regulation of PMSCs to protect and constrain the state's monopoly over the use of force.

A system of licensing for the United Kingdom's largely unarmed domestic security industry was put in place in 2001 with the passing of the Private Security Industry Act, after an unsuccessful period of self-regulation, and the same was anticipated for PMSCs based in the United Kingdom but operating abroad.[9] However, by the time the government came to decide on the issue of regulation in 2009, the PMSC industry had become much more powerful and influential as a result of its involvement in the wars in Afghanistan and Iraq. This influence, combined with the ideology of privatization and the climate of austerity caused by the global financial crisis, "led the government to adopt the least burdensome, least interventionist and, moreover, least expensive option of self-regulation."[10]

Self-regulation at the national level has been combined with soft laws and self-regulation at the international level.[11] The United Kingdom established a system that gave the maximum freedom of action to U.K.-based PMSCs operating abroad, while at the same time undermining its ability to command and control the external use of force. It effectively freed PMSCs from the constraints of public law and public international law. A system of self-regulation for PMSCs is inherently flawed in that it is self-judging, voluntary, has limited sanctions, and the standards agreed upon by and for the PMSC industry contain self-interested understandings of domestic and international laws.[12] Such standards are neither national laws promulgated by a domestic legislature, nor international laws agreed in inter-governmental fora; rather, they are described by the International Organization for Standards (ISO) as the "distilled wisdom of people with expertise in their subject matter and who know the

[8] U.K. Foreign & Commonwealth Office, *Private Military Companies: Options for Regulation*, HC 577, para. 62 (Feb. 12, 2002).

[9] U.K. House of Commons Foreign Affairs Comm., *Ninth Report: Private Military Companies - Session 2001-2002*, HC 992, paras. 127-37 (July 23, 2002).

[10] Nigel D. White, *Regulation of the Private Military and Security Sector: Is the UK Fulfilling Its Human Rights Duties?*, 16 Hum. Rts. L. Rev. 590 (2016).

[11] The International Code of Conduct for Private Security Service Providers (Nov. 9, 2010).

[12] The applicable standards under this system of self-regulation are: PSC1 of 2012 (a U.S. national standard) ANSI/ASIS PSC.1-2012, *Management System for Quality of Private Security Company Operations – Requirements with Guidance*; and ISO 18788 of 2015 (an international standard formulated by the ISO), ISO 18788:2015, *Management System for Private Security Operations – Requirements with Guidance for Use* [hereinafter ISO 18788:2015].

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needs of the organizations they represent."[13] Essentially, the privatization of force is matched by the privatization of standards applicable to such force.

By way of justification for private actors to carry weapons and use force, the "Guidance" attached to the ISO standard declares that PMSCs help protect the "human right of people to be secure," and that in the absence of an effective government, recourse may be had to "commercial providers of security services."[14] This statement raises the specter of the private forces that roamed the world in the eighteenth and nineteenth centuries. The assumption that PMSC are entitled to carry and use lethal weapons while operating overseas represents a real risk to the sovereignty of the host state and has the potential to undermine the national interests of the home state and its capacity to act on the international plane.

Outsourcing and Responsibility in Public International Law

The secondary rules of international law purport to show that conduct constitutes an act of state if one of three tests is satisfied: (1) that it is performed by organs or agents of the state; (2) that the conduct itself is inherently governmental; or (3) if the state is in effective control of such conduct.[15] The latter two tests have limited traction over the conduct of PMSCs, even those contracted by the government, given high level of control required for the effective control test to be passed and the disputed nature of ISFs. It has been suggested that "combat" is a governmental function, one that should not be performed by PMSCs,[16] but even if there is such a proscription it does not stop the use of government contracted PMSCs operating at the peripheries of combat, for example, in guarding individuals, equipment, property, and convoys, or in operating weapons systems, meaning that they can easily be drawn into combat. Contractors might be viewed under the law of armed conflict as civilians who, if directly participating in hostilities, will lose their protected status as civilians and have no privileges as combatants.[17] However, this does not inhibit their use as the loss of protected status is a risk taken by PMSCs and their employees, not governments.

The actions of PMSCs are not per se acts of a state under international law, unlike the actions of a state's military and security forces. The U.K. government, along with other like-minded governments, has not accepted that PMSC misconduct can be attributed to a contracting state simply by the fact that a PMSC is operating under a government contract.[18] The unwillingness of governments to accept responsibility for the conduct of private armed actors even when operating under a government contract is not only an exercise in outsourcing liability; it is a recognition that the state's legal authority and control over force is receding.

Despite the absence of state responsibility for the conduct of PMSCs, it remains possible to argue that states have positive obligations under international law to prevent violence by private actors including PMSCs. Elsewhere, I have argued that the U.K. government-sponsored system of self-regulation is an abdication of the

[13] At https://www.iso.org/standards.html.

[14] ISO 18788:2015, *supra* note 11, Annex A, A.1 ("general").

[15] Int'l Law Comm'n, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts*, arts. 4, 5 & 8, UN Doc. A/56/10, Supp. 10 (Nov. 2001).

[16] Int'l Comm. of the Red Cross, *Montreux Document on Pertinent Legal Obligations for States Related to Operations of Private Military and Security Companies During Armed Conflict* (Sept. 17, 2008), pt. II (good practices relating to PMSCs), para. 1, which states that a "good practice for Contracting states" would be "to determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSCs to become involved in direct participation in hostilities".

[17] *Id.* at pt. I (pertinent international legal obligations relating to PMSCs), para 26(b).

[18] *Id.* at pt. I, para 7.

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United Kingdom's duties of due diligence under both general international law and human rights law to take measures to prevent companies operating from within its territory from causing harm and abuse in host countries.[19] But even if such measures were to be put in place, they would have to be part of a system of robust regulation of PMSCs, which would have to include vigorous oversight and enforcement by public authorities to ensure that the state's monopoly over the use of force is maintained. In building his account of inherently sovereign functions evident from the body of international human rights law, Mégret states that regardless of whether certain functions can legitimately be outsourced, "the specific supervisory and remedial features of such a regime of delegation must itself be public," and concludes that international human rights law requires the state to be in a position to "exercise a range of implementation and supervisory functions" related to human rights. As it is, the U.K. government has simply batted away human rights criticisms of its system of self-regulation by referring to non-binding international soft laws,[20] but these do not meet the human rights standards identified by Mégret, as they do not require a system of supervision and implementation by public authorities.

Conclusion

The monopoly on the use of force is a fundamental aspect of sovereignty. This means that both the use of force and its regulation within a framework of domestic and international public laws are core ISFs. Beyond this minimum core, the extent of what is inherently governmental remains contested. Although the sovereign state retains some freedom of choice in determining ISFs beyond the core, it is constrained by applicable international laws. Mégret's analysis shows the importance of international human rights law in determining ISFs. Indeed, his analysis supports the conclusions arrived at in this essay, particularly as regard the United Kingdom's failure to regulate its outsourcing to PMSCs in accordance with the requirements of human rights law.

Whatever the form of the social contract within the state, it needs to be reinforced by laws and regulations that clearly distinguish between public interests and acts from private interests and acts. The monopoly on the use of force, as an important element of state sovereignty, belongs within the public domain in the hands of state actors and regulated by the state. The activities of PMSCs should be limited to supporting roles only and then be strictly regulated by state authorities. If sovereignty is to be valued and core ISFs protected, those responsible for creating and enforcing laws need to be vigilant against the erosion of the public monopoly on the use of force by the privatization of military and security functions.

[19] White, *supra* note 10, at 596-97.

[20] *See*, *e.g.*, the Ministerial statement in the House of Commons: "We believe the twin-track approach of certification to agreed standards and ICoCA oversight can help fulfil the UK's commitments under the UN Guiding Principles on Business and Human Rights." *Hansard Col 51WS* (Oct. 15, 2013).

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