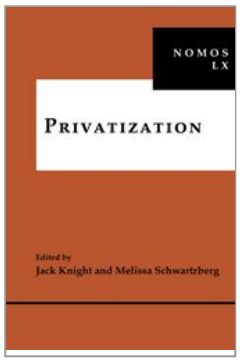

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Privatizing War

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[–] Abstract and Keywords

Friends and foes of the privatization of norm enforcement share a commitment to the rule of law. Its moderate friends believe that norm enforcement can comply with the rule of law even if it is carried out by private actors. Its radical friends hold that the rule of law obtains only if private actors are given an essential role in the enforcement of norms. Contrastingly, enemies of privatization object to it on the grounds that private actors are simply unable properly to enforce norms in compliance with the rule of law. This chapter argues that Hadfield and Weingast's radical defense of the privatization of norm enforcement does not translate well to the use of war as a means to enforce international norms, whatever its merits in municipal contexts. It then rejects one of the most plausible arguments against all forms of privatized norm enforcement in general, and of war enforcement in particular, recently developed by Alon Harel. Drawing on the criticisms of those two views, the author provides an argument for the moderate privatization of war.

Keywords: Privatization, Norms, Rule of law, War, International law, Enforcement

I. Introduction

Privatization is commonly defined as the outsourcing to non-state actors of the financing and/or provision of services and goods which are, or have hitherto been, normally regarded as within the remit of state action—such as garbage collections, telecommunications, health care, school provision, energy and transports, law enforcement, and war.[1] It is common to assume that a state privatizes the financing or provision of a good/service when and in so far as it explicitly and deliberately outsources either or both to for-profit organizations. Strictly speaking, however, this need not be the case. For example, within the context of a welfare state, a decision to entrust a charity with the task of providing food for the needy is an act of privatization; likewise, a state which is committed to capital punishment for murder engages in privatization when it knowingly lets non-state agents such as Mafia gangs engage in the punitive killing of murderers. As those examples suggest, beneficiaries of privatization can be non-profit actors, and privatization itself

can proceed either by an act of explicit conferral of rights to the beneficiary, or in virtue of the fact that the state does not perform its functions and thus creates space for other agents to do it.

In this paper, I focus on the privatization of war as a means to enforce morally justified norms. Although war is traditionally seen as a means to protect the rights of state or individuals, it has more recently been conceptualized as a means to enforce international law.[2] Hence my question here: may war construed as a form of policing be privatized? By privatization, I mean not the outsourcing of war to for-profit actors such as private military corporations **(p.300)** but, rather, its outsourcing to non-state actors in general, whether individuals or organizations, and whether they act for profit or not.[3]

Friends and foes of the privatization of norm enforcement share a commitment to the rule of law. Its moderate friends believe that norm enforcement can comply with the rule of law even if it is carried out by private actors. Its radical friends hold that the rule of law obtains only if private actors are given an essential role in the enforcement of norms. Contrastingly, enemies of privatization object to it on the grounds that private actors are simply unable to properly enforce norms in compliance with the rule of law.

I argue in favor of the moderate view, in the specific context of war. To do so, after setting the stage in section II, I adapt to the case of war Gillian K. Hadfield and Barry R. Weingast's defense of the radical view. In section III, I argue that whatever its merit as an account of private enforcement in the municipal realm, Hadfield and Weingast's argument does not translate well to the enforcement of international norms by means of war. In section IV, I reject one of the most plausible arguments against all forms of privatized norm enforcement—recently developed by Alon Harel. Drawing on my criticisms of those two views, in section V, I provide an argument for the moderate privatization of war as a means to enforce international moral norms. Section VI concludes.

II. Setting the Stage

The Violent Enforcement of Moral Norms

By focusing on the use of violence to enforce morally justified norms, I exclude from my inquiry the enforcement of egregiously unjust practices such as slavery in the antebellum American South. I also exclude the enforcement of norms which, though morally justified, nevertheless ought not to be enforced, such as the duty to keep promises. The moral norms I have in mind are norms which ought in principle to be turned into legal norms, whether or not they are, as a matter of fact, currently enforced. With this claim in hand, I ask whether the state may justifiably, indeed must, allow private actors to decide whether or not to enforce international moral norms by means of war.[4]

(p.301) To answer that question, we must have a working account of the justified violent enforcement of moral norms. Descriptively, I posit that to enforce a norm violently is to threaten putative wrongdoers with physical and/or psychological harm as a means to deter breaches of the norm, or to harm active wrongdoers as a means either to stop them from breaching the norms or, ex post, as a means to punish them for such breaches. Enforcement, in other words, can be defensive or punitive. In this paper, in so far as my concern is with war, and as punishment is not an adequate justification for war, I focus on defensive enforcement.[5]

Now, in this paper, I posit that the enforcement of moral norms by means of war is morally justified only if it meets two sets of conditions. First, it must meet the requirements of justified war in general. More precisely, war must enforce a morally justified legal norm (the just cause

requirement); the harms resulting from it must not be out of proportion to the goods it brings about; it is a necessary means to the end of defending the norm/punishing breaches thereof; it has a reasonable chance of success; combatants must not deliberately target the innocent.

Second, violent enforcement, in this context, is the violent enforcement of moral norms which ought to be turned into legal norms, it is justified only if it complies with the rule of law broadly construed—so long as conditions are propitious for the establishment of, and compliance with, the rule of law (I shall return to this proviso in section V). The rule of law is a contested notion. Still, I will adopt the following, relatively uncontroversial, definition. The rule of law obtains only when (a) relations between individuals are regulated and constrained by enforceable moral norms which are publicly available, prospective, predictable, and determinate; (b) the enforcement of those norms is itself constrained and regulated by rules which are publicly available, prospective, predictable, and determinate; (c) those norms apply equally to all and are enforced by agents who act impartially in the light of the rules of enforcement, rather than on the basis of their own personal preferences.[6]

Although the rule of law is not a particularly controversial ideal in the context of municipal law enforcement, not all scholars accept that there is an *international* rule of law—even though there is such a thing as a body of international law in general, and a **(p.302)** body of international public law (of which the laws of war are a subset) in particular.[7] One of the main objections to the idea of an international rule of law is that there is no overarching arbiter and enforcer of international enforceable moral norms, at the cost of predictability and transparency. As many legal theorists have countered, however, the charge is somewhat overstated. After all, there are many international non-judicial and judicial institutions, each with the ultimate authority to interpret norms and adjudicate conflicts in their own areas of competence (viz. the UN Security Council, the ICC, the ICJ, to name but a few), and it makes sense therefore to hold that their decisions should comply with and reflect the core ideals of the rule of law. Moreover, to the extent that states incorporate those international norms in their municipal legal system, they too can plausibly be held to those ideals when so acting. Generally put, states' decisions have a far-reaching impact on the lives of millions of individuals within *and* outside their borders; so do decisions taken by supranational organizations. It is thus a requirement of governance in the international sphere that it should be characterized by the aforementioned features of the rule of law.[8]

Privatization

On my reading of their works, proponents and foes of privatization whose arguments I shall review in sections III and IV would (I believe) agree with the foregoing points. The question, thus, is whether the nature of the enforcers, as state agents or private agents, makes a difference to the justifiability of the enforcement of norms by means of war (henceforth, *per bellum* enforcement.) To answer that question, we need to have a firm handle on what is meant by the privatization of war. Generally, when one talks of the privatization of a service, one might have in mind the act by which the state entrusts a private actor with the task of deciding whether or not to provide that service, or the mere fact that the state lets a private actor provide that service without explicitly authorizing her to do so. Or we might mean the act by which the state, having decided that the service will be provided in general, entrusts a private actor with the task of actually providing it, or simply lets private actors provide it without explicit authorization. To illustrate: **(p.303)** the state might decide that the norm against insulting other heads of state is not one that it will itself enforce through war, yet leave it to non-state actors to decide whether the norm will be enforced. Or it may decide that the norm against

unwarranted military aggression does warrant enforcement in principle by way of a military response, and leave subsequent decisions (whether actually to enforce that norm in a given case, and if so how to enforce it) to non-state actors such as private military corporations and/or private individuals acting in their own capacity. Or it may decide that the moral norm against non-aggression does warrant enforcement and reserve itself the right to decide in a given case whether to respond in kind, yet entrust the task of fighting that war to non-state actors.

In the remainder of this paper, in so far as I am concerned with enforceable moral norms, I take it for granted that the state, and the state alone, either on its own or in partnership with other states, decides to turn a moral norm into a legal norm. The question is whether the task of enforcing that legal norm must be performed solely by non-state actors, may be carried out solely by private actors, or may/must be carried out by both—where enforcement denotes (as the case may be) either the act of determining that a breach has occurred, or the act of inflicting violence in response to the breach, or both. For lack of space, I shall restrict my remarks to cases where the state explicitly authorizes private actors to wage or fight in war and set aside cases of passive acquiescence.

III. Private War and the Rule of Law: Against Radical Privatization

Consider the moral norm against unjustified military aggression—one of the least controversial that there is. It has been turned into a legal norm by the international community of states via a number of international documents such as Chapter VI of the UN Charter, violations of which expose wrongdoers to defensive military responses and to punishment ex post by relevant international courts. Suppose, then, that state A (Aggressor) unwarrantedly invades state D (Defender), in violation of the legal norm against aggression. Enforcing the norm, in this scenario, takes the form of a military response aimed at repelling Aggressor's troops.[9]

(p.304) To what extent does such a decision comply with the rule of law? In section II, I averred that an enforcer complies with the rule of law only if her actions are constrained and regulated by rules which are publicly available, predictable, prospective, and determinate, and if she acts in the light of those norms rather than on the basis of her own personal preferences. Accordingly, Defender complies with the rule of law by resorting to a war of self-defense against Aggressor only if its decision to do so is constrained and regulated by publicly available, predictable, prospective, and determinate legal rules that enshrine the conditions under which war is morally justified. Those norms are necessity, proportionality, and the prohibition on targeting the innocent—in other words, something like international humanitarian law and its instantiation in municipal law.[10] When deciding to repel Aggressor's invasion by force, and in so doing to authorize the deliberate killing of Aggressor's soldiers and the likely collateral killing of some of its innocent civilians, Defender—or, rather, its leaders and citizens—must act in the light of those norms and not on the basis of their individual preferences. This requires of Defender, first, that it should be able to determine, fairly, impartially, and beyond reasonable doubt, that Aggressor is indeed acting in breach of the legal norm against aggression; second, that once it has so determined and decided to enforce that norm by violent means (*per bellum*), the resulting war should be constrained by the law of armed conflict.

Suppose that Aggressor *has* been found to breach the norm against military aggression. Who can enforce that norm? In other words, who can go to war in defense of Defender? To many, the answer is obvious: well, Defender itself and, indeed, any other state willing to step in, since in the world as we know it, there simply is no overarching, international army to interpose itself in between the two parties.

Note, though, that this response would not on its own satisfy friends of the rule of law: after all, they might rejoin that entrusting to Defender and anyone willing to do it the task of defending that particular norm because there is no overarching enforcer gives us no reason to trust that they will comply with the rule of law when going to war.

But perhaps this would be too hasty a response. Perhaps the absence of an overarching enforcer *is* guarantee of compliance **(p.305)** with the rule of law. Or so Gillian K. Hadfield and Barry R. Weingast would argue. In a number of recent articles, including their contribution to this volume, they claim that compliance with the rule of law requires that private, decentralized actors be given an essential role in norm enforcement.[11] Two features of their account are worth highlighting here. First, they are not concerned with privatization understood as outsourcing to *for-profit* actors. Rather, they seek to defend the outsourcing of enforcement to non-state actors in general—whom they sometimes call private actors, sometimes decentralized actors. Second, theirs is a descriptive, social-scientific account of what a legal system is *qua* legal system—namely, a system of rules characterized by the rule of law. Contrastingly, my concern in this paper is to assess the normative case for and against privatization. Nonetheless, in so far as justifiably enforcing international moral norms requires adherence to the rule of law, if Hadfield and Weingast are right, justifiably enforcing those norms by means of war does require that an essential role be given to private actors.

Their argument for radical privatization goes like this. Each and every one of us is a self-interested maximizer, with competing understandings of the rules under which we can best live. It is in the interest of each and every one of us to live under a system that classifies those understandings into norms that warrant coercive enforcement and norms that do not warrant it. At the same time, in so far as specific enforcement decisions might go against our individual interests, we need incentives to comply with those decisions. Enter the rule of law. The rule of law obtains when rules and processes of norm-shaping (what they call classification), together with the enforcement of those norms, display the attributes of publicity, clarity, stability, and generality. It is important for two reasons. First, it is in our interest to live under the rule of law, in so far as those features of the legal system make it easier to pursue our own interests. Second, the fact that the legal system abides by the rule of law gives us a strong incentive to respect its pronouncements.

Herein lies the rub. Centralized classification institutions—for short, the state—with full control over enforcement processes in general and the use of violence in particular need not act transparently, impartially, and predictably when enforcing norms. This is **(p.306)** because they have monopoly over the use of violence and can thus ensure compliance from transgressors and induce third parties to cooperate by threatening, coercing, and terrorizing those who are subject to their directives. By contrast, decentralized, private actors have no choice but to provide other private agents with incentives to cooperate with them when they enforce those norms—precisely because they lack such monopoly. The best way for them to do so is precisely to comply with the rule of law: if I know that private enforcer E does not so comply, I will have no incentive to abide by and cooperate with its decisions—and every incentive to abide by and cooperate with the decisions of rule of law–compliant private enforcer E*.

From the point of view of per bellum enforcement, Hadfield and Weingast's account is particularly interesting. Admittedly, they do not explicitly construe their argument as an argument about the international legal system, the international rule of law, and the enforcement of international moral norms through war. However, the international system can

be aptly described as a system of states all of which are, in some important sense, self-interested maximizers. Moreover, there is no overarching norm-enforcer, in the form (for example) of an international army under the auspices of a world state with monopoly over the resort to war. Accordingly, the international system as it is closely resembles the domestic societies to which their argument is primarily intended to apply—and thus provides a natural habitat, as it were, for their model.

And yet, there are reasons to doubt that their model would work well in the case of war.[12] For a start, in so far as it relies on the importance of providing agents with incentives to comply with collective enforcement, and thereby of enforcers having incentives to act in such a way as to maximize compliance, the relevant distinction is not between state and private actors; rather, it is between centralized and decentralized actors. But as Alex Gourevitch notes, equating private —or non-official—actors with decentralized actors and *vice versa* is problematic.[13] In the context of war, in fact, it is *particularly* problematic. If the worry is that a *centralized* state or state-like classification system with monopoly over the use of violence lacks incentives to comply with the rule of law, and as there is no such system currently (the UN does not have monopoly of violence), there are no reasons *not* to entrust the task **(p.307)** of enforcing the norm to decentralized *state* actors such as, in this instance, Defender itself under Chapter VI of the UN Charter.

Hadfield and Weingast might be willing to accept that point and be tempted to respond that so long as there are several states willing and able each to enforce international norms in any given case, the rule of law will obtain. To properly respect the rule of law, in this case, would mean that Defender's *state* would not have monopoly of the use of force as a means to defend its members from Aggressor: other states would be able to come to those members' defense, would have an incentive to comply with the rule of law, etc.[14]

I can see the force of this putative reply. It seems to me however that Hadfield and Weingast must commit themselves to understanding privatization not just as decentralization, but as the process by which enforcement decisions and tasks are devolved to, and taken up by, agents who are not acting in an *official* capacity—who are not, in other words, *state actors* of any kind. For if privatization so construed is a requirement of the rule of law in the domestic realm, it seems arbitrary not to think of it as a requirement of the rule of law in the international realm.

If I am right, their account calls for a decentralized *and private* enforcement system along the following lines: Defender, via its membership in the United Nations, has classified the protection of states' territorial integrity and national sovereignty as a norm, transgressions of which warrant defensive enforcement. If Defender has exclusive control over both the processes and institutions by which a putative aggressor is deemed to be in breach of international norms and the armed forces whose deployment will serve to enforce those norms, it has no incentive to comply with the rule of law, since it need not act in such a way as to incentivize third parties to comply with its decisions. By contrast, private actors would have such incentives and thus would maintain the rule of law even if they alone were authorized to decide whether to enforce the norm against aggression, so long as there would be several such enforcers *and* as they would comply with Defender's (and the UN's) authoritative guidance both on the conditions under which Aggressor is justifiably found in breach of the relevant moral norms and on the conditions under which defensive war is justified.

(p.308) However, this application of the Hadfield-Weingast model to per bellum enforcement is not without problems. First, a decision to wage war exposes a number of agents to harm—not least the harm of reprisals at the hands of the enemy, but also the harms of an unsuccessful, badly conducted war. Although the consent of those agents is not required for enforcement to be justified in situations of extreme emergency (where, for example, a decision has to be made now whether to repel a rapidly advancing aggressor, failing which vast numbers of people will die), it is required in less urgent cases. I shall elaborate on this point in section V, but let me simply note here that this is why, in most countries, the decision to go to war is entrusted to elected representatives of the people.

Second, the Hadfield-Weingast model requires that private enforcers be able and willing to abide by the norms which are constitutive of the rule of law at all stages. It is not clear why, in a world of fully decentralized private enforcers, the latter would comply with the rule of law rather than outgun each other into terrorizing all of us into complying with their enforcement decisions (however haphazard and conflicting those decisions might be.) Moreover, even if private enforcers are able and willing to comply, it is imperative, first, that their decisions be open to appeal and, second, that there be only one ultimate, authoritative arbiter of the validity of those decisions.

Could Hadfield and Weingast object to the last point that such is the role of the state as a *classification* system, not as an *enforcement* system? I doubt it. For if, in a given case, the state finds that a private enforcer's decision to go to war was not in fact made transparently and by appeal to publicly shared norms, respect for the rule of law requires that they be stopped. In so deciding, the state does not merely pronounce on the soundness of that decision: it interferes in the enforcement process itself.[15]

Finally, state officials themselves may well have incentives to comply with the rule of law (as applied to war) when deciding whether to go to war in defense of the norm of aggression. Most clearly, on the international stage, they may well have strong incentives so to comply vis-à-vis other states, whose cooperation is needed in the form of non-interference with collective enforcement. At home, they might also have incentives to comply with the rule of law vis-à-vis their compatriots. In so far as *elected* state **(p.309)** officials in the end vote for or against the war, their reelection prospects might well depend on how well they are seen by their constituents to respect the rule of law. Even if they are not elected, their continuing political survival might depend on their willingness to subject their decision to go to war to the rule of law.[16]

Hadfield and Weingast are not convinced by this very last point: as they see it, more enforcers would themselves be needed to sanction state officials, who would themselves have to be induced or threatened to do their job properly, failing which they would have to be sanctioned by yet another layer of enforcers—and so on, endlessly, in an expensive infinite regress.[17] By way of reply: having one set of "secondary enforcers" to control and sanction "primary enforcers" might be enough; if it is not enough, it might be the best that we can do. As has long been responded to those who raise a similar objection to the very idea of binding a sovereign to his own laws, sovereignty need not reside in one unitary actor but can vest in a multiplicity of institutional actors who check and balance one another. This does not solve the problem of regress, but it does somewhat alleviate it.[18] To evaluate Hadfield and Weingast's response, we would need to compare this state of affairs with one in which violent enforcement is devolved to private

enforcers. They give us no reason to think that the latter would always do better than the former irrespective of the contingent features of the case.

To recapitulate, I am not persuaded that the Hadfield-Weingast model applies to the *per bellum* enforcement of international moral norms. However, even if I am right, it does not follow that private *per bellum* enforcement is morally objectionable. In fact, I make a qualified case for it in section V. Beforehand, however, it is worth considering an influential and recent argument against privatization.

IV. Against the Privatization of War: Harel's Argument

The claim that war should not be left to private agents is not new—though it has not always been held.[19] It applies both to the decision to wage war in the first instance and to the decision to entrust the task of fighting the war to this or that agent. As applied to the first decision, it is best expressed by the just war requirement of **(p.310)** competent authority, to the effect that the right to wage war vests in a state, coalition of states, a quasi-state such as a national liberation movement, or in a people as a whole rising up against a foreign invader. As applied to the second decision, it is most often couched as a prohibition on the use of private soldiers such as mercenaries, and private armies such as private military corporations. The literature on mercenaries and germane phenomena is vast; the literature on legitimate authority less so.[20] Of the many objections leveled against the privatization of the resort to war and the privatization of armed forces, one in particular recurs which has been powerfully articulated by Alon Harel—to wit, in so far as war is morally justified as a means to defend the state's interests and is thus an essentially public enterprise, it can be conducted only by state agents—failing which it would no longer *be what it is*.[21]

This objection to privatization differs from other, standard objections that advert to the supposed instrumental failures of privatized war (such as the fact, for example, that mercenaries are supposedly less likely than regular soldiers to abide by the laws of war.) Rather, it adverts to the intrinsic feature of war of national defense.[22] As it is somewhat complex, it is worth formalizing as follows:

> (1) A war of national self-defense is by definition waged for the sake of the state's interests and in the name of the state, and every one of its constitutive acts must be carried out in the light of that fact.
> (2) Agents who act in the interests and name of the state must (if they are to succeed in doing so) act out of "fidelity of deference" to the state's judgment in the matter, and not out of "fidelity to [their own] reason."
> (3) Fidelity of deference "requires the existence of a practice which integrates the political and the bureaucratic in the execution of the relevant functions."[23]
> (4) Private agents are not able to fulfill this integrative function. Therefore, (5) the privatization of war cannot deliver the good of national security.[24]

This is an interesting argument, particularly in the light of claims (2) and (3). For the practice that enables agents to defer to **(p.311)** the state's judgments has features that closely resemble the rule of law: agents that take part in the practice (here, the practice of war) abide by norms that have been deliberated upon over time, that are predictable, action-guiding, and adopted on the basis of those agents' impartial judgments as to what is in the state's interests, and not on the basis of their own, private, individual preferences. Thus, although Harel would not dissent from Hadfield and Weingast's construal of the rule of law and its importance, he draws the

radically different conclusion that private actors ought not to be given *any role* in the enforcement of moral norms in general and international moral norms in particular. His claim applies to the decision to resort to war as well as to the decision to entrust the task of fighting the war to specific agents; it also implies that a state simply ought not passively to let private actors fight in the war (as when paramilitary forces outside state control fight alongside the regular army without authorization to do so.)

Is Harel on surer footing than Hadfield and Weingast? Consider claim (1). It assumes that, in so far as a war of national defense is just, it aims to protect the state's legitimate interests in the political communal goods of territorial integrity and political sovereignty. However, there are reasons to resist his statist construal of wars of national defense. A state *qua* state does not have interests that are not reducible to the interests of its individual members. Thus, to say that the state has a particular interest can only be a shortcut to express the view that individual members of that state jointly have that interest, which they collectively further through state institutions. Second, even if we grant Harel his understanding of the state, it does not follow that a war in defense of those interests *ipso facto* has a just cause. War kills, and as many just war theorists have noted, one can legitimately wonder whether the protection of those interests *alone* justifies killing. Suppose that Aggressor can invade Defender *without shedding a drop of blood*. Would Defender's soldiers be morally entitled to kill Aggressor's? I do not think so. Soldiers, on the battlefield, defend their lives and limbs, and those of their comrades, as much as if not more than the communal values of territorial integrity and state sovereignty. As a matter of principle, for a Defender soldier to kill an Aggressor soldier *merely* on the grounds that the latter is contributing to encroaching on the integrity of Defender's territory and self-governing institutions **(p.312)** is wholly out of proportion to his individual, marginal contribution to the resulting harm. What justifies this act of killing, rather, is the fact that the Aggressor soldier will kill the Defender soldier if the latter makes any attempt to resist by force, even non-lethal force, instead of surrendering his legitimate interests in political communal goods.[25]

If I am right, a war of national self-defense should be construed and morally assessed, not as a war in defense of the state's interests in territorial integrity and political sovereignty but, rather, as a war in preemptive defense of its individual members' (soldiers' and civilians' alike) *combined* interests in those communal goods, as well as in their life and bodily integrity. Accordingly, such a war is not waged in the name of the state so much as in the name of its individual members taken singly (in so far as their lives and bodily integrity are at stake) and jointly (in so far as communal political goods are at stake.)

Those remarks point to a crucial difference between Harel's understanding of war and mine. On my account, as I noted in section III *pace* Hadfield and Weingast, there is considerable space for the articulation and expression of collective political judgments regarding the resort to war—precisely because some of the interests at issue, and the norms which protect those interests, are communal and political—whose defense is likely to expose the citizenry as a whole to the harms of war. At the same time, there is also considerable space for the articulation and expression of individual judgments in the matter—precisely because some of the interests are individual interests.

If so (*contra* claim (2)), it is by no means clear that agents who act in defense of all of those interests (who use force, in other words) must always and in every single one of their war-related acts defer to the state's judgments. If my life is under threat from a wrongdoer, as it will be on the battlefield, I may use my own judgment to evaluate the soundness of the orders that I

am given. I may not have reason to believe that those order are unlawful and/or immoral. But I may have reason to believe that my commanding officer, though acting in good faith, has made an erroneous judgment call, as a result of which I (and indeed my comrades) may well die needlessly. It is hard to see why I may nevertheless not draw on my judgment to query those orders. The same **(p.313)** considerations apply, *a fortiori*, when I have reasons to believe that the orders I am giving are unlawful and/or immoral, and that I might be led to compromise my moral integrity by killing people who ought not, in fact, to be killed. State officials, after all, might and indeed often do get it wrong, and using my own judgment is my ultimate safeguard against being turned into an instrument for wrongful killings.

The claim that there is space for the expression of private judgments in war opens two fruitful lines of inquiry. First, it raises the question of whether and when soldiers rightfully disobey orders. There is a rich literature on this issue, which I will set aside here.[26] Instead, I want to focus on a second, less obvious question, to wit, whether and when agents whose individual fundamental interests in remaining alive, not being aimed, and not being oppressed by Aggressors, may rightfully entrust the task of self-defense to actors other than state officials. I believe that they may—a claim on which I shall expand in the next section. At this juncture, let me highlight a difficulty with Harel's argument. He would resist the claim that individuals have a rightful say in who is best placed to defend them, on the grounds (affirmed by claim (3)) that only Defender's officials are sufficiently meshed into the practices and processes of the state itself to act out of fidelity of deference. By his own admission, his argument against privatization does not apply to other kinds of wars, for example wars of humanitarian intervention against another state. This is because interveners, who by definition are outsiders in relation to that state, are not integrated in the latter's bureaucratic and political war-making institutions; nor are they integrated in the state structures of the intervention's beneficiaries, since those individuals precisely do not have a state to begin with. Now, he seems willing to concede that such wars *can* be just, notwithstanding the fact that they are fought privately (on his own conception of "private.")[27] Let us assume that he is right. Let us also concede that a war of national self-defense, if it is to *count as such* as opposed to a private war, must be waged and fought by public agents acting out of fidelity to deference. Here is the difficulty: why should that *matter*? If wars of intervention can be just though they are by definition private, why must wars of national self-defense be fought by state actors on pain of being unjust? After all, in the end, we want to know whether that **(p.314)** war is morally justified all things considered. Whether it is fought in accordance with their nature, as it were, is relevant. If a conflict fought in defense of those national interests by private agents (understood as agents who act out of fidelity to reason and out of fidelity of deference) would in fact succeed at securing those goods, we would have no intrinsic reason to object to it as unjust. For what it is worth, I suspect that Harel would resist the thought that such a war would succeed. But if so, he would have no choice but to rely on precisely the kind of instrumental reasons which he seeks to eschew.[28]

V. Privatizing War: A Hybrid View

Whereas Hadfield and Weingast claim that the rule of law can obtain only if private enforcers are given an essential role in enforcing moral norms in general and (on my reconstruction of their position) international moral norms in particular, Harel argues that it can obtain only if they are given *no* such role—at least in cases of national defense. In this section, I draw on my objections to both positions to defend a hybrid normative account of the privatization of war.

Pace Hadfield and Weingast, the state, or as the case may be state-like institutions, acting on behalf and at the behest of those who are subject to their directives, ought to decide whether or

not war should be waged—in most cases. The qualification is crucially important. Recall that on my account, the enforcement of moral norms that ought to be turned into legal norms is justified so long as it complies with the rule of law broadly construed (section II). Sometimes, however, the rule of law proviso cannot be met. Suppose for example that in the face of Aggressor's invasion, Defender's institutions have collapsed, leaving it to Defender's citizens and residents to take matters in their own hands—not *qua* citizens necessarily, but rather *qua* individuals acting in a private capacity. Under those circumstances, in the absence of any institutional oversight, even if the individuals left behind do as much as they can to comply with the norms of war, the acts by which they enforce the norm against aggression do not comply with the rule of law (or at any rate are very unlikely to comply with it.) To conclude that they are not justified in defending themselves is to **(p.315)** condemn them to moral ignominy as a result of factors over which they have no control. A proponent of the view that war ought to be construed and justified as an operation of norm enforcement can and should concede, then, that in such cases, compliance with the rule of law is not a necessary condition for just enforcement. Put more generally, and as I argue elsewhere, it is not a necessary condition of a just war of defensive enforcement that it be waged by a legitimate authority such as a state, quasi-state, or coalition thereof: when institutions have collapsed, for example, war can be just even though there is no state-like institution to declare it and authorize its constitutive acts in compliance with the rule of law.[29]

However, in non-emergency cases, matters are somewhat different. An agent, be it individual or collective, who wages war against Aggressor *on behalf of* the latter's victims (his compatriots or, as the case may be, distant strangers) exposes those victims themselves as well as third parties to the harms of war. Unless those individuals are under a duty to allow themselves to be so harmed, their consent is required. This point applies to the case of war the deeper anti-paternalistic principle that I may not be harmed for my own good unless I do not, or would not, consent to it. To be sure, there are huge difficulties in determining what it means for a set of individual agents to consent, or not, to a war: whether they can in a given case be deemed truly to have consented; whether their explicit consent to the war is necessary, or whether their presumptive consent is sufficient.[30] These difficulties are not unique to war, however: they inhere in any and all accounts of democratic decision-making. That being said, decisions that are likely to cause innocent people supererogatory severe hardship albeit for their own good must, if they are to be legitimate, somehow elicit those people's consent, whether presumptive or explicit, whether direct or indirect. If this is right, it must be devolved either to those individuals themselves, or to their properly elected representatives.

On this point, thus, I agree with Harel that not all acts of enforcement can be legitimately carried out by private actors. The crucial question, at this juncture, is whether, once the *decision to wage war* has been made, private actors may be authorized to *fight the war*. I believe that they may. War harms—sometimes grievously so—individuals in their life and limbs—both those who fight and those on whose behalf they fight. It is precisely for that reason **(p.316)** that, as I have just noted, they should have a say in the decision to wage in the first instance. But if that is correct, then there is no reason to rule out from the outset, as a matter of principle, the possibility that non-state actors might be in as good a position as—indeed, a better position than—state actors, to fight that war and thereby protect those individuals. Put differently: the imperative of enforcing international moral norms that protect collective interests is itself rooted in the imperative of protecting individuals' fundamental moral rights. That imperative underpins a conclusion that Harel does endorse, namely that only the state can decide whether to go to war in non-emergency cases (though he defends that conclusion on different grounds). However,

it *also* underpins the claim that *instrumental* considerations are decisive when working out who may actually fight the war. Suppose that, in a given case, private actors are better able than official actors to protect those norms. For example, Defender's armed forces are not able on their own to thwart Aggressor's unwarranted attack; however, Defender can enlist help from private actors such as for-profit firms, perhaps, and also foreign volunteers, and in so doing successfully defend itself while respecting legally enshrined, morally justified requirements of the just war. Given that, *ex hypothesi*, it thereby succeeds at protecting individuals' fundamental moral rights, it is hard to see why it is morally unjustified in doing so. By that token, note, it is not clear at all that private soldiers *must* be given an *essential* role in fighting wars, as Hadfield and Weingast would have it. For in just the same way as private fighters might in a given case be better than state soldiers at fighting a just war, state soldiers might in another case be better at doing so than private soldiers.

Of course, whether private fighters can help defend Defender's territorial integrity and political sovereignty and thereby its individual members' fundamental human rights while abiding by the rule of law, is contingent on whether or not they act in the light of the rule of law as opposed to their private judgment; it also depends on whether the just war requirements are enshrined in publicly available, transparent, prospective, and predictable rules. If Defender's legal system does display those qualities (for example, through clearly articulated military law), it may be that those private fighters ought to be incorporated into Defender's armed **(p.317)** forces, or at any rate be clearly subject to their command—and treated in exactly the same ways as regular combatants. If Defender's legal system does not display those qualities, private fighters can always refer to the international law of armed conflict.

None of this is to deny that, perhaps more often than not, private fighters act contrary to the rule of law—but then again, so do regular combatants. None of this is to deny, either, that incorporating private fighters into regular state armed forces raises serious difficulties—particularly when those fighters are employed by for-profit military corporations. In particular, the latter's involvement in wars might lead politicians who depend on their financial support to start or prolong wars for reasons that have nothing to do with the national interest. Less repugnantly, there is a risk that, under the terms of their employment contract, individual private fighters are accountable primarily to their employer, and not to the state on whose behalf they are in fact supposed to fight. Those are well-documented difficulties, to which greater regulation is an equally well-documented response.[31] *If* regulation fails, and if, therefore, the private *per bellum* enforcement of international norms simply cannot comply with the rule of law, or, less strongly, is less likely to comply with the rule of law than state *per bellum* enforcement, then we ought to rule it out in favor of the latter. That, however, is (to repeat) a contingent point, which does not condemn private enforcement as a matter of principle.

VI. Conclusion

Let us conclude. Both Hadfield and Weingast on the one hand, and Harel on the other hand, would on my reconstruction endorse the following two claims: (1) the *per bellum* enforcement of international moral norms is morally justified only if it complies with the rule of law; (2) the rule of law obtains when (2a) relations between individuals are regulated and constrained by moral norms which are publicly available, prospective, predictable, and determinate; (2b) the enforcement of those norms is constrained and regulated by publicly available, prospective, predictable, and determinate rules, and (2c) enforcers act impartially in the light of those rules rather than on the basis of their personal preferences. From that premise, Hadfield and Weingast draw the conclusion that a system **(p.318)** of enforcement must (if it is to secure

individuals' cooperation with enforcement) give an essential role to private actors, indeed that an enforcement system need not give any role to state enforcers so long as the state complies with (2a). This is anathema to Harel, who claims, on the contrary, that functions essentially discharged for the sake of the state's interests can only be properly carried out by state agents. In the case of war, their respective arguments pertain both to the decision to go to war in the first instance and to the decision to authorize private actors to fight (in) the war.

I have argued that those arguments do not support their purported conclusions. Whether or not private enforcers may decide to wage war, or fight in the war, depends on whether the consent of those who are wrongfully harmed by the war must be sought on pain of the war being unjust, and on the extent to which they do as well as, or better than, state soldiers at fighting a just war. However, I have not denied, nor sought to deny, that the Hadfield- Weingast model works for the case of municipal enforcement; nor have I denied, or sought to deny, that Harel's skepticism of private enforcement might well be warranted in the case of punishment. For what it is worth, I suspect that war is no different from municipal enforcement in general and punishment in particular, and that those cases also call for a hybrid account of privatization. That, however, is a task for another paper.

Notes:

(1) An earlier version of this paper was presented at the Oxford Jurisprudence Discussion Group on May 12, 2016, and at an informal discussion group on privatization in June 2016. I am grateful to participants in both groups for very helpful discussions, in particular Hasan Dindjer, Timothy Endicott, John Gardner, Ian Loader, Francesca Menichelli, and Lucia Zedner. Max Harris, Melissa Schwartzberg, and Frederick Wilmot- Smith provided a raft of written comments, for which I also thank them.

(2) Iain Atack, *The Ethics of Peace and War: From State Security to World Community* (Edinburgh, UK: Edinburgh University Press, 2005); A. J. Coates, *The Ethics of War* (Manchester, UK: Manchester University Press, 1997): 127; Helen Dexter, "The 'New War' on Terror, Cosmopolitanism and the 'Just War' Revival," *Government and Opposition* 43, no. 1 (2008): 55–78; David Held, "Violence, Law and Justice in a Global Age," (2001), available at www.theglobalsite.ac.uk; Mary Kaldor, *New & Old Wars*, 2nd ed. (Cambridge: Polity, 2006); David Rodin, *War and Self-Defense* (Oxford: Clarendon Press, 2002); Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations*, 4th ed. (New York: Basic Books, 2006): 59; Paul W. Kahn, "The Paradox of Riskless Warfare," *Philosophy and Public Policy Quaterly* 22, no. 3 (2002): 1–7.

(3) I offer a qualified defense of for-profit privatization of war in Cécile Fabre, "In Defence of Mercenarism," *British Journal of Political Science* 40, no. 3 (2010): 539–59.

(4) I am grateful to Hasan Dindjer for helping me circumscribe the paper in this way.

(5) I reject punitive wars for the same reasons as adduced by David Luban and Jeff McMahan. (See David Luban, "War as Punishment," *Philosophy & Public Affairs* 39, no. 4 (2011): 299–330; Jeff McMahan, "Aggression and Punishment," in *War-Essays in Political Philosophy*, ed. Larry May (Cambridge: Cambridge University Press, 2008).) Note that the distinction between punitive and defensive force does not make sense if one endorses a defensive conception of punishment, such as Warren Quinn's or Victor Tadros's. I assume that punishment is not the same at all as defense. (See Warren Quinn, "The Right to Threaten and the Right to Punish," *Philosophy & Public Affairs* 14, no. 4 (1985): 327–73; Victor Tadros, *The Ends of Harm: The*

Moral Foundations of Criminal Law (Oxford: Oxford University Press, 2011).) I should say at the outset that I am generally skeptical of the view that wars ought to be understood as operations of norm enforcement, but that view is widely held, so I shall take it for granted here. I express my skepticism in Cécile Fabre, "Cosmopolitanism and Wars of Self-Defence," in *The Morality of Defensive War*, eds. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014).

(6) Of the many characterizations of the rule of law, I loosely draw on Jeremy Waldron's. See Jeremy Waldron, "The Concept and the Rule of Law," *Georgia Law Review* 43, no. 1 (2008): 1–61.

(7) Or so I assume, though the idea of international law was not by any means uncontroversial fifty years ago. For a recent philosophical account thereof, see Ronald Dworkin, "A New Philosophy for International Law," *Philosophy & Public Affairs* 41, no. 1 (2013): 2–30.

(8) See, e.g., James Crawford, "International Law and the Rule of Law," *Adelaide Law Review* 24, no. 1 (2003): 3–12; Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?," *European Journal of International Law* 22, no. 2 (2011): 315–43; Peter Rijpkema, "The Concept of a Global Rule of Law," *Transnational Legal Theory* 4, no. 2 (2013): 167–96; Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2006), ch. 10; Mattias Kumm, "International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model," *Virginia Journal of International Law* 44, no. 1 (2003): 19–33.

(9) I use the case of a war of self-defense against aggression to illustrate my points, but the latter also apply, *mutatis mutandis*, to wars of humanitarian intervention.

(10) I say "something like" international humanitarian law, because there is one sense in which humanitarian law does not adequately reflect the morality of war: it permits the deliberate killing of all combatants, irrespective of the justness of the war for which they fight. Many just war theorists, notably Michael Walzer, hold that humanitarian law has got it right, morally speaking (Michael Walzer, *Just and Unjust War: A Moral Argument with Historical Illustrations*, 5th ed. (New York: Basic Books, 2015). But many others claim, on the contrary, that combatants who fight for a just cause ought not to be killed (Jeff McMahan, *Killing in War* (Oxford: Oxford University Press, 2009); Cécile Fabre, *Cosmopolitan War* (Oxford: Oxford University Press, 2012); C. A. J. Coady, *Morality and Political Violence* (Cambridge: Cambridge University Press, 2008); Helen Frowe, *Defensive Killing* (Oxford: Oxford University Press, 2014); Rodin, *War and Self-Defense*).

(11) Gillian K. Hadfield and Barry R. Weingast, "Is Rule of Law an Equilibrium Without (Some) Private Enforcement?," in this volume. See also Gillian K. Hadfield and Barry R. Weingast, "Law without the State: Legal Attributes and the Coordination of Decentralized Collective Punishment," *Journal of Law and Courts* 1, no. 1 (2013): 3–34; Gillian K. Hadfield and Barry R. Weingast, "Microfoundations of the Rule of Law," *Annual Review of Political Science* 17, no. 1 (2014): 21–42; Gillian K. Hadfield and Barry R. Weingast, "What Is Law? A Coordination Model of the Characteristics of Legal Order," *Journal of Legal Analysis* 4, no. 2 (2012): 471–514.

(12) This is in addition to doubts raised about the model in general by Alex Gourevitch and Alex Guerrero. See Alex Gourevitch, "What is Politics without the State? A Reply to Hadfield and Weingast," in this volume; Alex A. Guerrero, "Comments on 'Is Rule of Law an Equilibrium Without Private Ordering?,'" presented at original conference.

(13) Gourevitch, this volume.

(14) I am grateful to Melissa Schwartzberg for suggesting this argumentative move.

(15) This point applies to the model in general, and not merely to its application to war.

(16) On the question of whether rulers in general, and wicked rulers in particular, have incentives to comply with the rule of law, see the debate between H. L. A. Hart and Lon Fuller, and the debate between Matthew Kramer and Nigel Simmonds. H. L. A. Hart, *The Concept of Law*, 1st ed. (Oxford: Clarendon Press, 1961); Lon Fuller, *The Morality of Law*, 1st ed. (Yale: Yale University Press, 1964); Matthew H. Kramer, *In Defense of Legal Positivism: Law without Trimmings* (Oxford: Oxford University Press, 1999); Nigel E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights*, 1st ed. (London: Sweet and Maxwell, 1986).

(17) Hadfield and Weingast, this volume. Of course, to the extent that they would agree that private enforcers do need to be kept in check by the state, their position also suffers from the problem of infinite regress.

(18) The point is well put in Waldron, “Are Sovereigns Entitled,” 318.

(19) Grotius famously allows that private wars can be morally justified. Hugo Grotius, *The Rights of War and Peace*, ed. Richard Tuck. (Indianapolis, IN: Liberty Fund, 2005[1625]), bk I, ch. 4. For a fascinating history of the process by which Western states gradually restricted the privatization of war (particularly mercenarism), see Sarah Percy, *Mercenaries: The History of a Norm in International Relations* (Oxford: Oxford University Press, 2007).

(20) For recent exceptions, see Fabre, *Cosmopolitan War*, ch. 4; Jonathan Parry, “Just War Theory, Legitimate Authority, and Irregular Belligerency,” *Philosophia* 43, no. 1 (2015): 175–96; Christopher J. Finlay, “Legitimacy and Non-State Political Violence,” *Journal of Political Philosophy* 18, no. 3 (2010): 287–312.

(21) Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014), ch. 3. This chapter is based on a paper he co-authored with Avihay Dorfman (Avihay Dorfman and Alon Harel, “The Case against Privatization,” *Philosophy & Public Affairs* 41, no. 1 (2013): 67–102.) I refer to the views set out therein as his rather than theirs partly because he has made some changes to the article itself.

(22) I reject those and other objections in Fabre, “In Defence of Mercenarism.” For other intrinsic objections to privatization in general, see Michael Sandel, *What Money Can’t Buy: The Moral Limits of Markets* (London: Penguin Books, 2013); Debra Satz, “Markets, Privatization, and Corruption,” *Social Research* 80, no. 4 (2013): 993–1008; Debra Satz, “Some (Largely) Ignored Problems with Privatization,” in this volume.

(23) Harel, *Why Law Matters*, 89.

(24) On Harel’s account of a private agent, a state official in fact acts as a private agent just if she acts, not on the basis of the aforementioned features, but rather on the basis of her own reasoned judgment—and this even if she acts in defense of her state’s interests. By implication, being in the employ of a non-state actor is not a necessary condition for being a private agent—contrary to my own account of privatization. In line with my account however, it is a sufficient

condition, simply because, as per the combination of (3) and (4), only state agents can act out of fidelity to deference.

(25) For a fuller argument, see Fabre, “Cosmopolitanism and Wars of Self-Defence.” The bloodless invasion problem was first raised by Richard Norman and David Rodin. See Richard J. Norman, *Ethics, Killing, and War* (Cambridge: Cambridge University Press, 1995); David Rodin, *War and Self-Defense*; David Rodin, “The Myth of National Self-Defence,” in *The Morality of Defensive War*, eds. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014). See also Thomas Hurka, “Proportionality in the Morality of War,” *Philosophy & Public Affairs* 33, no. 1 (2005): 34–66; Jeff McMahan, “What Rights May be Defended by Means of War,” in *The Morality of Defensive War*, eds. Cécile Fabre and Seth Lazar (Oxford: Oxford University Press, 2014).

(26) For Harel’s view on this, see Harel, *Why Law Matters*, 104–5. See also David Estlund, “On Following Orders in an Unjust War,” *Journal of Political Philosophy* 15, no. 2 (2007): 213–34. For a classic defense of the view that soldiers must exercise their own judgment about the moral status of the war they are asked to fight, see McMahan, *Killing in War*.

(27) Harel, *Why Law Matters*, 99 fn. 59.

(28) For a powerful defense of instrumental objections to privatization, in response to Harel’s view, see John Gardner, “The Evil of Privatization,” *Social Science Research Network* (2014), available at papers.ssrn.com.

(29) See Fabre, *Cosmopolitan War*, ch. 4. I am grateful to Timothy Endicott and Melissa Schwartzberg for helping me clarify my thoughts here. Interestingly, Harel would agree with me on this point. See Harel, *Why Law Matters*, ch. 4.

(30) See Fabre, *Cosmopolitan War*, sections 4.3 and 5.5.2.

(31) I develop those points at some length elsewhere, specifically in the context of mercenarism. See Fabre, “In Defence of Mercenarism.”