

SYMPOSIUM ON FRÉDÉRIC MÉGRET, “ARE THERE ‘INHERENTLY SOVEREIGN FUNCTIONS’ IN INTERNATIONAL LAW?”

ARE THERE ANY INHERENTLY PUBLIC FUNCTIONS FOR INTERNATIONAL LAW?

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In “Are There ‘Inherently Sovereign Functions’ in International Law?”¹ Frédéric Mégret provides a deeply insightful reflection on “the essence of the state” from the point of view of international law, outlining a theory about the inherently sovereign functions in international law. He carefully identifies existing norms of international law that articulate certain public functions to be performed solely by the state rather than delegating them to private actors.² Mégret offers functional and intrinsic rationales, suggesting that individuals have a right to benefit from certain public functions exercised by state authority, such as legislation and adjudication, what perhaps could be termed “the human right to the state.” In this essay, I suggest that it is indeed possible to derive such demands from the requirements of stable and sustainable governance that are embedded in the concept of sovereign responsibility, as well as from the rights associated with democracy and self-determination. I further argue that Mégret’s inquiry can and must be extended also to explore the other side of the coin: the role of international law in facilitating (and possibly limiting) the delegation of public authority to unaccountable international organizations and other global governance bodies.

Sovereignty as Responsibility

Mégret’s project is based on the premise that international law shapes and molds states’ power. According to Mégret, international law serves as the “external . . . constitution of the . . . sovereign subject.”³ To substantiate this point, and, more specifically, to outline the limits imposed by international law on privatization, Mégret refers to several doctrines that insist on state monopoly in the recourse to force.⁴ Mégret is correct in highlighting such doctrines for the principled argument: key norms of international law reflect a keen interest in maintaining effective and stable governmental authority within the state. What is less certain is whether all those doctrines were equally intended to address the issue of privatization. Some were in fact designed to consolidate governmental authority and protect the bourgeoisie against domestic challengers to the social order.⁵

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

² *Id.*

³ *Id.* at 461-91

⁴ *Id.*

⁵ Eyal Benvenisti & Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874*, 31 EJIL 127 (2020).

Mégret is right to dwell on state responsibility as a key concept in delineating inherent state functions. This emphasis echoes a foundational approach to international law that refers to sovereignty not only as a right but also as entailing responsibility. Famously articulated by Max Huber in the *Island of Palmas* award,⁶ that approach envisions international law as “divid[ing] between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian.”⁷ Probably the primary responsibility is to exercise sovereign authority: “Territorial sovereignty . . . involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States.”⁸ Huber immediately follows by stating what can be helpful in outlining the limits of privatization. According to Huber, “[w]ithout manifesting its territorial sovereignty in a manner corresponding to circumstances, the State cannot fulfil this duty.”⁹

Importantly, the “manifestation” of sovereignty “in a manner corresponding to circumstances” is not only designed to protect the rights of other states. Huber believes that international law, and the states system it generates, ultimately serves individuals and promotes justice among them. Accordingly, in the *British Claims in the Spanish Zone of Morocco* award,¹⁰ he explains state responsibility as required to prevent “injustices that amount to the negation of the human personality.”¹¹

The key, then, is to inquire how states should “manifest” their territorial sovereignty in a manner that would correspond with their responsibility to other nations and to justice among individuals and communities. What are the circumstances that require states to act *as sovereign*, rather than rely on private actors (or other non-state actors, including international organizations)? This perspective yields a possible first line of inquiry into the limits of privatization: privatization must not diminish the sovereign’s ability to meet its international responsibilities and compromise the law’s aspirations for justice among individuals and communities.

In seeking a response to this query, Mégret identifies a clue to the answer: the Montevideo Convention’s definition of statehood, which insists on the existence of a “government.” This is immensely fruitful, because the Montevideo formula identifies the necessary traits of the unique entity that is worthy of being allocated the authority and the responsibility to govern territorial space. Why is it that only entities that exercise government over a population within a certain territory enjoy this exclusive right? The answer, probably, is that such entities are more likely than all others to identify and promote the interests of the populations they govern in light of the resources that are available to them. That rootedness holds the promise that such entities will manage “the space upon which human activities are employed”¹² in a relatively stable and sustainable manner. Unlike private corporations that can effortlessly relocate once they are done plundering the natural resources of areas they exploit, having immiserated the local population, governments exercising control over their population within their territory are more likely to be invested in their population’s long-term welfare—and hence more likely to serve as reliable agents of humanity.¹³

⁶ [Island of Palmas](#) (Neth. v. U.S.) 2 UN REP INTL. ARB. AWARDS 829 (1928).

⁷ *Id.* at 839.

⁸ *Id.*

⁹ *Id.*

¹⁰ [Rapport sur les responsabilités de l’État dans les situations visées par les réclamations britanniques](#) (Report on the responsibility of the state under the situations contemplated by the British claims) 23 Oct. 1924, *Affaire des biens britanniques au Maroc espagnol* (Espagne contre Royaume Uni), 2 UN REP INTL. ARB. AWARDS 615, 639 (1925).

¹¹ *Id.* at 641 (“injustices équivalant à la négation de la personnalité humaine”).

¹² [Island of Palmas](#), *supra* note 6, at 839.

¹³ See generally Eyal Benvenisti, [Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders](#), 107 AJIL 295 (2013).

This leads to a possible first limitation on privatization that is refracted in the doctrine: a state may not privatize governmental tasks and services in ways that might undermine its responsibility to serve its citizens and humanity at large in a stable and sustainable manner.

Sovereignty as the Embodiment of Personal and Collective Self-Determination

Mégret rightly searches for another ground for limits on privatization, one that is not based on reasons of functionality. He elaborates on what may be called “the right to the state,” namely, the right to benefit from public rather than private decision-making processes, such as the right to public proceedings, rather than having one’s rights determined by private arbitrators. While this right might indeed be derived, as Mégret suggests in his inductive approach, from specific human rights, such as the right to a fair trial, it may also find more general support in the broad notion of “government of the people, by the people,”¹⁴ derived in turn from the right to individual and collective self-determination.

As Doreen Lustig and I have suggested, following the writings of John Stuart Mill,¹⁵ privatization carries direct consequences for democracy. Every delegation of authority away from the public carries two potentially adverse consequences: the shrinking of the space for public deliberation, and the reduced capacity of voters to monitor private actors due to weak accountability mechanisms that private actors are traditionally subjected to.¹⁶ “The public is demoted to an on-looker, able at the most to monitor and to comment on the company’s practice, but never part of those who decide.”¹⁷ Following Mill’s metaphor of the omniscient and well-meaning “Good Despot,” we suggest that even if the private actors performed like “good private despots,” they would still deny the voters’ voice and agency. Hence it is necessary to ensure that privatization does not undermine robust democratic processes that protect individual and collective self-determination, by putting limits to it or by complementing it by remedial procedures that secure the effective participation of all those affected by it.¹⁸

A similar conclusion about the need to ensure voice and accountability may be derived from another foundational precept of international law, the idea of human dignity. For Immanuel Kant, human dignity meant treating every person not merely as a means, but also a purpose. As he observed, most probably in reference to the American Revolution (and obviously inspired by the French one), only in an organized state with functioning “legal authorities, etc.” can this categorical imperative become the governing norm.¹⁹ It is the publicness of the decision-making processes, and public checks and balances, that can ensure that even “a race of devils” can commit itself to following the universal law.²⁰

These observations about the requirements of publicness of decision-making processes as a prerequisite for securing personal and collective self-determination yield a second limitation on privatization: a state may not

¹⁴ U.S. President Abraham Lincoln, [Gettysburg Address](#), 1863.

¹⁵ JOHN STUART MILL, [CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT](#) (1861)

¹⁶ Doreen Lustig & Eyal Benvenisti, *The Multinational Corporation as “The Good Despot”: The Democratic Costs of Privatization in Global Settings*, 15 THEORETICAL INQUIRIES L. 125 (2014); Alfred C. Aman, *Privatization, Prisons, Democracy, and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511, 517 (2005).

¹⁷ [Lustig & Benvenisti](#), *supra* note 16, at 141.

¹⁸ *Id.* 156.

¹⁹ IMMANUEL KANT, [CRITIQUE OF JUDGMENT](#) 254 n. 38 (1987); on this aspect see also HANNAH ARENDT, [LECTURES ON KANT’S POLITICAL PHILOSOPHY](#) 15–19 (Ronald Beinder ed., 1992); Katrin Flikschuh, *Kant’s Sovereignty Dilemma: A Contemporary Analysis*, 18 J. POL. PHIL. 469 (2010).

²⁰ IMMANUEL KANT, [PERPETUAL PEACE](#) (1795).

privatize governmental tasks and services that might undermine human agency and deplete the space for public deliberation. In addition, private regulation must remain subject to effective public scrutiny.

The Inherent Public Functions of International Regulation

The convincing focus on the role of international law in identifying core sovereign functions holds important conclusions beyond the immediate question of delegating state functions to private actors. The same concerns—of relying on irresponsible and unaccountable actors—cast a shadow over international law’s own practice of relying on non-state actors to perform public functions, and more generally, in facilitating the processes through which private actors dominate decision-making within international organizations (IOs).²¹ International law is often part of the problem of suppressing public control of private regulation. As Doreen Lustig has shown, from the late nineteenth century, international law has served as an effective tool for private corporations to hide their activities from public scrutiny.²² And Melissa Durkee has observed that international lawmaking processes open up ways for business actors to shape policies without accountability.²³ One consequence of such private leverage is the replacement of national regulatory authority with international regulation that is prone to pressure by private actors, and is overseen by private adjudication.²⁴ The consequences for public welfare can be dire, as demonstrated by the systematic lobbying of the World Health Organization by the pharmaceutical, tobacco, baby-formula, and soft-drink industries.²⁵ As Tim Dorlach and Paul Mertenskötter have recently shown, the threat of private dispute settlement by investment tribunals has been used by such industries to chill national regulation.²⁶

But international law could also be part of the solution to this problem, facilitating states’ resolve to withstand such pressures by powerful state and non-state actors. Both Mégret’s inductive approach and the principles identified above for limiting states’ privatization can be invoked to constrain the delegation of state authority to IOs. Under the approach sketched in this essay, IOs exercising delegated state functions are required to serve the citizenry of the member states and indeed humanity at large in a stable and sustainable manner, while ensuring human agency and providing for effective public participation and scrutiny. Among the several ramifications radiating from these principles would be the obligation of IOs to provide “reasonable alternative means to protect effectively” the internationally recognized human rights of their employees,²⁷ to regulate the involvement of

²¹ Melissa J. Durkee, *Astroturf Activism*, 69 STAN. L. REV. 201 (2016) (“Astroturf activism, facilitated by dysfunctional legal rules, obscures business influence in international lawmaking”); Rachel Brewster, *The Domestic Origins of International Agreements*, 44 VA. J. INT’L L. 501, 502 (2004); Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 168–70 (1999).

²² DOREEN LUSTIG, *VEILED POWER: INTERNATIONAL LAW AND THE PRIVATE CORPORATION, 1886–1981* (2020).

²³ Melissa J. Durkee, *The Business of Treaties*, 63 UCLA L. REV. 264, 267–68 (2016) (“businesses no longer simply exert domestic leverage. Instead, they form transnational coalitions, address their concerns directly to international lawmakers who are not subject to domestic political checks, and assume lawmaking roles previously held only by states.”).

²⁴ The ultimately scuttled Trans-Pacific Partnership agreement attests to the perils of privatization facilitated by treaties and international organizations: *Id.* at 303–05, Eyal Benvenisti, *Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law*, 23 CONSTELLATIONS 58 (2016).

²⁵ See Ayelet Berman, *Between Participation and Capture in International Rule-Making: The WHO Framework of Engagement with Non-State Actors*, 32 EJIL 227 (2021); Tine Hanrieder, *Priorities, Partners, Politics: The WHO’s Mandate Beyond the Crisis*, 26 GLOBAL GOVERNANCE 534 (2020); Abigail C. Deshman, *Horizontal Review Between International Organizations: Why, How, and Who Cares About Corporate Regulatory Capture*, 22 EJIL 1089 (2011).

²⁶ Tim Dorlach & Paul Mertenskötter, *Interpreters of International Economic Law: Corporations and Bureaucrats in Contest over Chile’s Nutrition Label*, 54 LAW & SOC’Y REV. 571 (2020).

²⁷ *E.g.*, *Case of Waite and Kennedy v. Ger.*, App. No. 26083/94 (Eur. Ct. H.R., 1999) (state parties to the European Convention for Human Rights that confer immunity to international organizations operating in their jurisdiction must ensure that the latter avail their employees “reasonable alternative means to protect effectively their rights under the Convention” vis-à-vis their employer).

lobbyist operating within IOs,²⁸ to impose procedural and substantive constraints on their process of decision-making,²⁹ and to insist on public adjudication,³⁰ and even public review that transcends traditional doctrines on immunities.³¹

In other words, through the lens that identifies core sovereign responsibilities, it is possible also to identify core responsibilities of IOs, embedding them in a system of legal obligations, and recognizing continued state responsibility for certain acts or omissions of those organizations that the states are parties to.³² The same inquiry becomes pertinent in considering whether there are areas of human activity that states and IOs fail to regulate, and are hence subject to private power. In recent years this question arose in the context of global sports, an area that is subject to systems of private regulation and adjudication.³³ Attempts by several athletes to challenge the rules in national and international courts have demonstrated the promise of public intervention in private regulation when the latter is not sufficiently effective in protecting the rights of the athletes.³⁴ Obviously many questions result from such public intervention in private regulation—such as how much deference private regulators should have, or whose norms and perspectives should inform the public actors that scrutinize them—but the hope is that the discussion about the limits of privatization will spur greater attention to these matters. Indeed, it is high time for international law to address the pressing question of, “what are inherently public functions of international regulation.”³⁵

Conclusion

Although there are signs that national planning is making a come-back in response to the failure of the private sphere to address long-term concerns about climate, health, and even the economy, it is important to reflect on the role of international law in facilitating and constraining privatization. Mégret should be commended for putting on the agenda the search for the constraints imposed by international law on the state’s ability to privatize governmental functions and for his comprehensive inductive analysis of international legal doctrine that demonstrates the strong doctrinal support for his argument. In this essay I offered some thoughts for supporting Mégret’s theory with basic notions derived from the concepts of state responsibility and the right to personal and collective self-determination. I suggested that Mégret’s inquiry can and must be extended also to explore the other side of the coin: the role of international law in constraining the delegation of public authority to IOs and even to private global regulators.

²⁸ Melissa J. Durkee, *International Lobbying Law*, 127 YALE L.J. (2018).

²⁹ EYAL BENVENISTI, *THE LAW OF GLOBAL GOVERNANCE* (2014); Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005).

³⁰ Case C-284/16, *Slowakische Republik v. Achmea BV*, ELCI:EU:C:2018:158 (inability to refer matters related to the interpretation and application of EU law to private investor—state dispute settlement mechanism).

³¹ Fernando Lusa Bordin, *To What Immunities are International Organizations Entitled Under General International Law? Thoughts on Jam v IFC and the ‘Default Rules’ of IO Immunity*, 72 QIL ZOOM-IN 5 (2020) (arguing that the granting of immunities and other protections to IOs has to be carefully negotiated and convincingly justified).

³² See generally Eyal Benvenisti, *Why International Organizations are Accountable to You*, in RESOLVING CONFLICTS IN THE LAW: ESSAYS IN HONOUR OF LEA BRILMAYER (Chiara Giorgetti & Natalie Klein eds., 2019).

³³ On the indirect application of public law to the sports industry, see Michele Krech, *To be a Woman in the World of Sport: Global Regulation of the Gender Binary in Elite Athletics*, 35 BERKELEY J. INT’L L. 262 (2017).

³⁴ *Case of Ali Rıza v. Turk.*, App. Nos. 30226/10 & 4 others (Eur. Ct. H.R., June 22, 2020); *Case of Mutu and Pechstein v. Switz.*, App. Nos. 40575/10 & 67474/10 (Eur. Ct. H.R., Feb. 4, 2019).

³⁵ For an illuminating inquiry, see Benedict Kingsbury, *International Law as Inter-Public Law*, 49 NOMOS 167 (2009).