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

THE INTERNATIONAL PUBLIC: A FAREWELL TO FUNCTIONS IN INTERNATIONAL LAW

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Frédéric Mégret's extremely rich and interesting article implicates a wide range of issues.[1] Luckily, a lot has already been written about some of them elsewhere.[2] In any case, the limited scope of this essay precludes engaging with them all again here.[3] What it will do instead is explore ways of contributing further to the article's important, timely and, I would like to argue, providential project, which is to reflect over and develop the publicness of the international legal order. I will present comments on three dimensions of that project: the language, the scope, and the institution of what one may refer to as "the international public." My claim is that, to succeed, the article's argument should move away from the functional approach to publicness, embrace public institutions of international law other than states, and focus on the institutional dimension of international public law.

The Language of the International Public

The first set of comments I would like to make pertains to the terms used. The article resorts to the very language pervading the practice of privatization of the public under international law it purports to criticize. In doing so, it partly endorses the latter's instrumental framing of the issues and makes it more difficult to escape the predicament it later criticizes.

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

[2] On the publicness of international law, see Armin von Bogdandy et al., *From Public International Law to International Public Law: Translating World Public Opinion into International Public Authority*, 28 EJIL 115 (2017). On the public/private distinction in international law, see Claire A. Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 Rev. Int'l Political Econ. 261 (1997); Alain Supiot, *The Public-Private Relation in the Context of Today's Refeudalization*, 1 Int'l J. Const. L. 129 (2013); Matthias Goldmann, *A Matter of Perspective: Global Governance and the Distinction Between Public and Private Authority (and not Law)*, 5 GlobCon 48 (2016). On the dangers of the analogies between corporations' rights and duties and those of either individuals or states under international law, see Fleur Johns, *Theorizing the Corporation in International Law*, *in* The Oxford Handbook of the Theory of International Law 635 (Anne Orford & Florian Hoffmann eds., 2016).

[3] *See* Samantha Besson, *International Courts and the Jurisprudence of Statehood*, 10 Transnat'l Leg. Theory 30 (2019) [hereinafter Besson, *International Courts*]; Samantha Besson, *Investment Citizenship and Democracy in a Global Age: Towards a Democratic Interpretation of International Nationality Law*, 29 Swiss Rev. Int'l & Eur. L. 525 (2019) [hereinafter Besson, *Investment Citizenship*]; Samantha Besson, *Sovereign States and Their International Institutional Order: Carrying Forward Dworkin's Work on the Political Legitimacy of International Law*, 2 Jus Cogens 111 (2020) [hereinafter Besson, *Sovereign States*]; Samantha Besson, Reconstructing the International Institutional Order (2021).

Thus, the article refers to the public and private "actors" of international law, including states, without drawing any legal and especially institutional distinctions between them, and thereby encouraging their interchangeability. This is made worse by two further linguistic choices: the reference to state "functions," and the personalization of states.

First, the article addresses states' "functions," functions that may in the end be exercised by public as well as private actors. That implication is confirmed by the later reference in the article to those public functions being "outsourced" as private ones would, and to their ordering in the corresponding public "sector."

Of course, the article's argument aims at identifying and emphasizing the inherently public (that is, "sovereign") nature of some of those functions. However, by referring to them as "functions," it perpetuates the nineteenth century idea that public powers actually are of a functional nature, and hence instrumental.

As a matter of fact, not only does their qualification as functions ease the transferability and potential privatization of what is public, but it also conversely makes the "publicization" of the private possible.[4] This is even more the case when those functions are considered to be "inherent," and private institutions have to be "publicized" in order to exercise them. Such a publicization of the private underpins, for instance, the analogy between states' and corporations' duties under international human rights law,[5] and is, to that extent, rightly criticized by the article. However, it is also a more general development across domestic and international law and institutions.[6] Think, for instance, of how the separation of powers principle is increasingly considered applicable to corporations under comparative antitrust law.[7] The publicization of the private actually leads to an even greater confusion between the public and the private than privatization alone. What it does, indeed, is dilute the public/private distinction while prima facie relying on it and therefore maintaining it as an empty shell. Some astute observers have described this as contributing to a "refeudalization" project.[8]

So, instead of focusing only on what makes public functions "inherent" to states, as the article does, it is important to broaden the critique and to question what one may refer to as the "ordinary functionalism" in which most contemporary international law discussions are framed. In short, functionalism is the theory or approach to international institutions that understands them as entities created to execute functions through various (sovereign or specifically conferred) powers.

True, functionalism has been criticized mostly in the context of the law of international organizations (IOs).[9] However, that approach to powers originally stems from the late nineteenth century's international law of statehood itself. Nowadays, in any case, the two international legal regimes have come to reinforce each other. There is a closed interpretative loop at play between them, one that originally went from the international law of statehood to the law of IOs, but has now affected the law of statehood in return in a movement of "reverse functionalism."[10] It suffices here to mention how the European Union's delegated powers qua functions have molded its member states' original powers, especially in areas of EU competence such as the internal market. In turn, this functional

[4] For a similar critique, see Avihay Dorfman & Alon Harel, *Against Privatization as Such*, 36 Oxford J. Leg. Stud. 400, 404 (2016).

[5] *See also* Cristina Lafont, *Sovereignty and the International Protection of Human Rights*, 24 J. Polit. Philos. 427 (2015); Samantha Besson, *The Bearers of Human Rights Duties and Responsibilities for Human Rights: A Quiet (R)Evolution*, 32 Soc. Philos. Policy 244, 251–53 (2015).

[6] *See, e.g.*, Jay Butler, *The Corporate Keepers of International Law*, 114 AJIL 189 (2020).

[7] *See, e.g.*, Cary Coglianese, *Legitimacy and Corporate Governance*, 32 Del. J. Corp. L. 159, 162 (2007).

[8] *See* Supiot, *supra* note 2, 140.

[9] *See* Jan Klabbers, *The EJIL Foreword: The Transformation of International Organizations*, 26 EJIL 9 (2015).

[10] *See* Besson, *International Courts* (2019), *supra* note 3, at 35 & 58; Besson (2021), *supra* note 3, at 52. *See also* Luis Eslava & Sundhya Pahuja, *The State and International Law: A Reading from the Global South*, 11 Humanity 118 (2020); Guy F. Sinclair, To Reform the World: International Organizations and the Making of Modern States (2017).

molding through IO law has reinforced the blurring of the public/private distinction by defining member states' public functions by reference to the private rather than the other way around.[11]

A second terminological feature of the argument that may be regarded as problematic is the personalization of states. Throughout the article, one finds references to states' "persona" or to their "dignitas." True, this used to be the language of international law. However, it is precisely those original anthropomorphic understandings of states and their relations that account, at least in part, for the present state of the public/private distinction in international law.[12] What their contemporary invocation entrenches is a horizontal approach to international law, conceived as the law of private interstate relations.[13] This is an approach that makes the reference to the international public dispensable or, at least, invisible. In turn, this may explain why privatization has been so easy under international law.

In sum, and in order for the article's proposed argument about the publicness of international law to be as successful as it deserves to be, one needs to pay more attention to the choice of terms and concepts when addressing the international public under international law. This would actually allow for a more nuanced treatment of the specific legal and institutional dimensions of states' "powers," "competences," "authority," and "sovereignty" (rather than "functions") and the ways in which the latter are either "delegated" or "transferred" (rather than "outsourced"). I will come back to this question of the institutional specificity of the international public, including the state, in my third set of comments below.

The Scope of the International Public

There is a second dimension of the article's argument that I would like to comment upon: its identification of publicness with statehood. While it is correct to see them as intimately related historically and, by extension, conceptually[14] and, accordingly, to emphasize the duality of the law of statehood that is both domestic and international in its sources,[15] reducing publicness to statehood today has two consequences.

First, that identification leads to the assimilation, within the characteristics of statehood, of various features that all share in publicness, but do not entertain the same relationship to the privatization criticized in the article.

While all things public may, by definition, be privatized, the privatization of each of those does not necessarily raise the same issues. Thus, the article refers interchangeably to (states') "powers," "sovereignty," and, later, to "government" being privatized. It would be interesting to understand exactly what is at stake in the privatization process, and on that basis to reflect more precisely on what could be done about it. For instance, the privatization of taxation and that of adjudication do not, presumably, raise the same issues.

A second consequence of the identification of publicness with statehood under international law is the exclusion of other public institutions of international law from the scope of the argument.

To the extent that those institutions both rule by international law and are (or at least should arguably be) ruled by international law, their privatization may raise issues akin to those discussed with respect to states in the article. I am thinking here of certain IOs whose decision-making processes, activities, and/or resources are increasingly

[11] *See, e.g.*, Miguel Poiares Maduro, *The Chameleon State: EU Law and the Blurring of the Private/Public Distinction in the Market*, *in* CONFLICT OF LAWS AND LAWS OF CONFLICT IN EUROPE AND BEYOND: PATTERNS OF SUPRANATIONAL AND TRANSNATIONAL JURIDIFICATION 279 (Rainer Nickel ed., 2010).

[12] *See also* Cutler, *supra* note 2.

[13] *See* BESSON (2021), *supra* note 3, at 50 & 64.

[14] *See* BESSON (2021), *supra* note 3, at 71 & 83 on "methodological statism" in international law.

[15] *See* Besson, *International Courts*, *supra* note 3, at 36 & 40; Besson, *Investment Citizenship*, *supra* note 3, at 528 & 542; BESSON (2021), *supra* note 3, at 55-56.

privatized.[16] The problem is that their publicness remains largely unaccounted for, thereby making a discussion of their privatization even more difficult. Those IOs are indeed routinely referred to as "public," based on the mere fact that they are intergovernmental and have states as members. At other times, it is because they are said to exercise "public functions" or pursue a "public interest."[17] However, the latter accounts merely beg the question since, under our current predicament, private institutions may also exercise public functions or pursue public interests. Further, there are other international institutions whose public nature needs to be addressed seriously by international lawyers. One may think of global cities, for instance, especially if we are to prevent further privatization of their government and, by extension, of their increasing international lawmaking activity.[18]

As a matter of fact, by leaving out those other public institutions, the article may be said to fail to address what has become the main locus of privatization of states' powers today. As I explained in the previous section, IOs are indeed the institutional frameworks to which states' powers have first been delegated as "functions" and which have re-delegated them further to private persons or institutions. State privatization has been facilitated, therefore, by the fact that those powers had first been functionalized through IOs.[19] Not only has functionalism eased that process of privatization, but defining certain state functions as "inherent" has not, and actually cannot, prevent privatization from taking place in IOs. Indeed, the other "public" international institutions, and especially IOs, were instituted precisely to enable states to exercise some of those inherent functions (such as the use of force) together, or jointly delegate their exercise.

As a result, if one is to limit the further privatization of states' "functions" under IO law, and even by order of that law,[20] it is the public nature of those institutions, such as IOs and cities, we need to work on urgently. This may only be done by understanding how those institutions contribute to the re-institution of states and, by extension of their peoples as an international public,[21] and, accordingly, by re-thinking and re-organizing the latter's representation.[22] This requires focusing on the institutional continuum of the international public, as I explain in my third set of comments.

The Institution of the International Public

Last but not least, I would like to question the exclusively legal focus of the article's argument for the strengthening of the international public. The article rightly emphasizes that there is not one, but many states sharing our international institutional order.[23] However, the further fact that there is not just one type of public institution in

[16] *See* Georg Kell, *Relations with the Private Sector*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 731 (Jacob Katz Cogan et al. eds., 2016); Christer Jönsson, *The John Holmes Memorial Lecture: International Organizations at the Moving Public-Private Borderline*, 19 GLOBAL GOVERNANCE 1 (2013).

[17] *See, e.g.*, Angelo Golia & Anne Peters, *The Concept of International Organizations*, *in* CAMBRIDGE COMPANION TO INTERNATIONAL ORGANIZATIONS LAW (Jan Klabbers ed., forthcoming 2021).

[18] *See* Michael Riegner, *Development Cooperation and the City*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CITIES 251 (Helmut Philipp Aust & Janne E. Nijman eds., 2021); Samantha Besson & José L. Martí, *Cities as Democratic Representatives in International Law-Making*, *in* RESEARCH HANDBOOK ON INTERNATIONAL LAW AND CITIES 341 (Helmut Philipp Aust & Janne E. Nijman eds., 2021).

[19] *See* BESSON (2021), *supra* note 3, at 79.

[20] On decentralization and privatization by order of the World Bank and the International Monetary Fund, see, for instance, Eslava & Pahuja, *supra* note 10; Sinclair, *supra* note 10.

[21] *See* BESSON (2021), *supra* note 3, at 34, 58 & 76.

[22] *See* Samantha Besson & José L. Martí, *Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation*, 9 JURISPRUDENCE 504 (2018); SAMANTHA BESSON & JOSÉ L. MARTÍ, LEGITIMATE INTERNATIONAL LAW-MAKING (forthcoming 2022).

[23] On the "mirror-image" dimension of the Westphalian international institutional order, see Besson *Sovereign States* (2020), *supra* note 3, at 121 & 129.

the background, i.e., states, but also many others, such as IOs, should open our eyes to the role of all those institutions for the publicness of international law.

Of course, the article rightly emphasizes that international law does not only "regulate" or "bind" the public, but actually "constitutes" it in the first place (a public which the article identifies too readily with the state, as I mentioned before). The article seems, however, to underestimate the corresponding institutional dimension of the constitution of the state and, more generally, of the international public whose institutionalization is key.

I have explained elsewhere how and why, and with what consequences, institutions (that are not only ruled by international law, but also rule by it, and should therefore be considered together with international law) have become a blind spot for many contemporary international lawyers.[24] That neglect becomes particularly problematic when the topic is as fundamental to international law as statehood. Indeed, what is at stake with the (international) public, be it a state or another institution, is a "position," a way of "standing" (hence the term "state") and, therefore, of "in-stituting" and, by extension, of representing ourselves by law.[25] It is not something that may be defined within the law only, as a result. What this also means is that caring for the publicness of international law has to go beyond organizing the "legality" of privatization within international law (even under international human rights law, as the article rightly argues it should).

To that extent, moreover, I am not sure it is right to qualify the kind of argument we need in this discussion as "normative" (understood as legally normative), as the article does (by opposition to what it refers to—just as inexactly, I think—as the alternative "ontological" approach to inherent state functions). Rather, what we are looking for here is better described as a "foundational" dimension of the international (legal and institutional) order. It is a dimension of that order which one may also refer to as "dogmatic" in the sense that the order posits it and relies on it.[26] In this respect, it is interesting to remember that the "public" posited by Roman law in the latter's public/private distinction was also referred to as "sacred."[27] In fact, the article incidentally refers to international law's role as a "guarantor" in its conclusion. This is exactly the direction that future arguments about the publicness of states and international institutions should take.

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The three points raised in this short essay have been that international legal scholars concerned about the international public should move away from the functional approach to publicness, embrace public institutions of international law other than states, and focus on the institutional dimension of international public law. A more detailed discussion of what has now become a crucial question for the future of the international legal and institutional order, together with a full treatment of the various points raised in the course of this essay, will have to await another occasion.[28] It is a great merit of Frédéric Mégret's article to have started that conversation.

[24] *See* Besson (2021), *supra* note 3, at 30.

[25] *Id.* at 34, 70 & 83.

[26] Others have resorted to different terms, and referred to the public/private distinction (in the legal context) as a "regulatory idea" (Goldmann, *supra* note 2, 50) or as a "legal archetype," "a quasi-metaphysical notion," or a "deeply rooted social imaginary" (Cormac Mac Amhlaigh, *Defending the Domain of Public Law (Against Three Critiques of the Public/Private Divide)*, *in* After Public Law 103 (Cormac Mac Amhlaigh et al. eds., 2013)).

[27] *See* Supiot, *supra* note 2, at 130-31.

[28] *See* Samantha Besson, The Private & Public Distinction and International Law (forthcoming 2023).