Transnational Legal Theory

ISSN: (Print) (Online) Journal homepage: www.tandfonline.com/journals/rtlt20

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To cite this article: Samantha Besson (26 Oct 2024): What can public international law do against privatisation?, Transnational Legal Theory, DOI: 10.1080/20414005.2024.2419711

To link to this article: https://doi.org/10.1080/20414005.2024.2419711

Published online: 26 Oct 2024.

TRANSNATIONAL LEGAL THEORY
https://doi.org/10.1080/20414005.2024.2419711

Routledge
Taylor & Francis Group

What can public international law do against privatisation?

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ABSTRACT

Privatisation is a challenge for international law. Against this background, this article purports to identify a minimal 'international public law'. Based on an account of publicness defended in the first section, the article's second section explains how, although the 'public' had only been a reference in passing in the early law of peoples, an international law 'of the public' has gradually developed since the nineteenth century. As discussed in the third section, however, that public dimension has never been very strong, and may even be considered a vector of public/private hybridisation. In response, the article's fourth section identifies the rights of States and other public institutions which may not be conferred to private persons and whose interpretation could be strengthened, while its fourth section turns to the States' and other public institutions' obligations that, when duly applied, set limits on the private exercise of these rights.

ARTICLE HISTORY Received 8 February 2024; Accepted 30 August 2024

KEYWORDS Public international law; privatisation; publicness; statehood; human rights

Introduction

May Switzerland be diplomatically represented by bankers when negotiating new international financial standards with other States?[1] Does the International Organisation for Migration have the right to demand that its Member States commission a private company to control their maritime

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*This article is based on a lecture given, in French, at the Collège de France on 10 March 2022 and at the University of Lausanne on 16 May 2023 and, in English, at the University of Uppsala on 12 December 2023. Many thanks to Shpresa Salihu for her editorial assistance, to Vincent Martenet and Patricia Mindus for their kind invitation and constructive feedback, and to Alain Papaux, Marie Linton, Eva Erman, Maarit Jänterä-Jareborg, Iain Cameron and two anonymous reviewers for very helpful comments. A full argument is forthcoming in Samantha Besson, The Private & Public Relation in and of International Law (Brill/Nijhoff, 2025).

[1] See eg, Frédéric Mégret, 'Are There "Inherently Sovereign Functions" in International Law?' (2021) 115 (3) *American Journal of International Law* 452, 468.

borders and manage asylum applications in the Mediterranean?[2] May Argentina submit to hybrid arbitration in investment matters and be judged, as an individual would, by a non-permanent, non-independent tribunal,[3] and ordered to pay reparations whose amounts are indexed on private scales and may strain the resources of an entire generation of that State's population?[4]

Reversing the question: does Facebook's Oversight Board have jurisdiction over Facebook users? Do private military security companies like Wagner enjoy the same immunities before foreign national courts as States do when intervening on their behalf abroad? Do non-governmental organisations (NGOs) like SOS Méditerranée incur the same obligations under international human rights law as the States in whose place they act during rescue operations on the high seas?[5]

Hardly a day goes by without a question being asked about the 'privatisation' of States' and other public institutions' rights and obligations. In short, privatisation is understood here as the conferral of these rights and obligations or, at least, of their exercise by public institutions to private persons. Ultimately, such a conferral or exercise of public rights and obligations could lead to the privatisation of these public institutions themselves, and to their apparent transformation into private persons. Note that what is at stake here is not solely, or even necessarily actually, the 'contractualisation', 'financialisation' or 'commodification' of public resources, goods or services, ie, their trade on the market,[6] but, more generally and normatively, the conferral of public institutions' rights and obligations to private persons or, at least, the authorisation of exercise of those public rights and obligations by private persons.

Conversely, and with reference to the second group of questions just raised, one should also be concerned about the progressive 'publicisation' of the rights and obligations of private persons.[7] In short, publicisation amounts to the invocation of public institutions' rights and obligations by those private persons. Ultimately, this invocation, if granted, may indeed lead to the publicisation of these persons themselves and to their apparent transformation into public institutions.

[2] See eg, Jan Klabbers, 'Notes on the Ideology of International Organizations Law: The International Organization for Migration, State-making, and the Market for Migration' (2019) 32 *Leiden Journal of International Law* 383.

[3] See eg, José E Alvarez, 'Is Investor-State Arbitration "Public"?' (2016) 7 *Journal of International Dispute Settlement* 534.

[4] See eg, Toni Marzal, 'Quantum (In)Justice: Rethinking the Calculation of Compensation and Damages in ISDS' (2021) 22(2) *The Journal of World Investment & Trade* 249.

[5] See eg, Frédéric Mégret, 'Activists on the High Seas: Reinventing International Law from the Mare Liberum' (2021) 23(4) *International Community Law Review* 367.

[6] See on this more specific understanding of privatisation Alex Mills, 'The Privatisation of Private (and) International Law' (2023) 76(1) *Current Legal Problems* 75.

[7] See eg, Letizia Lo Giacco, 'Private Entities Shaping Community Interests: (Re)Imagining the "Publicness" of Public International Law as an Epistemic Tool' (2023) 14(3) *Transnational Legal Theory* 270, 281–6.

Of course, these two movements of privatisation and publicisation are linked in their outcome: they bring about the hybridisation and the confusion of the public and the private through the exercise of public institutions' rights and obligations by private persons.[8]

In time, this progressive blurring of the public and the private may lead to an inversion of the hierarchical articulation and 'relation' of the public and the private,[9] whereby the public should be instituted first and then organise the private rather than the reverse.[10] Eventually, the blurring of the public and the private may also bring about the collapse of the public/private distinction itself. This collapse is one of the major challenges facing contemporary public law, but also, one may argue, law in general.[11] In particular, it risks undermining the rule of law as a principle and the further principles that justify the law's authority.

On the one hand, the distinction and relation between the public and the private underpin the principle of the rule of law. Indeed, at least in the Western legal tradition turned international, the public/private distinction is not only a distinction made *in* and *by* the law. It has also become inseparable from the (normative) concept of law itself and, to that extent, amounts to a distinction *of* law. What this means in turn is that the distinction has been identified with the principle of the rule of law. According to that principle, indeed, the rule *of* law is to be distinguished from the rule of men and hence of the mere rule *by* law. For this to be the case, the law should be that of a people instituted as a third-party or institution that is independent of those who govern by law and are governed by it, for example the law of the State that therefore also becomes a State 'of law'. In this sense, the French '*Etat de droit*' or German '*Rechtsstaat*' express this institutionalised and hence public dimension of law more clearly than the English term 'rule of law'. This is actually also the gist of Jeremy Waldron's republican argument for the

[8] On the importance of referring to private persons as 'persons' or 'institutions' of and in international law, and not as mere 'actors' or 'agents' and, it is related, as 'non-State' actors or agents, see Samantha Besson, *Reconstructing the International Institutional Order* (OpenEdition Books/Collège de France, 2021) https://books.openedition.org/cdf/12335 (accessed 3 January 2024).

[9] See Alain Supiot, 'The Public-Private Relation in the Context of Today's Refeudalization' (2013) 11(1) *International Journal of Constitutional Law* 129, 130–8. See also Samantha Besson, *The Private & Public Relation in and of International Law* (Brill/Nijhoff, 2025).

[10] See also Aemilius Papinianus, in Alan Watson (ed), *The Digest of Justinian*, Volume 1, Book 2 (University of Pennsylvania Press, 1985) 2.14.38: '*ius publicum privatorum pactis mutari non potest*', which may be translated as follows: 'public law cannot be altered by a private contract'.

[11] For a discussion, see Samantha Besson, 'The International Public: A Farewell to Functions in International Law' (2021) 115 *American Journal of International Law Unbound* 307, 311 (on the 'foundational' and 'dogmatic' nature of the public/private distinction); Cormac Mac Amhlaigh, 'Defending the Domain of Public law (against three critiques of the Public/Private Divide)' in Cormac Mac Amhlaigh, Claudio Michelon and Neil Walker (eds), *After Public Law* (Oxford University Press, 2013) 103–29 (referring to it as a 'legal archetype', 'a quasi-metaphysical notion' or a 'deeply rooted social imaginary'); Matthias Goldmann, 'A Matter of Perspective: Global Governance and the Distinction between Public and Private Authority (and not Law)' (2016) 5(1) *Global Constitutionalism* 48 (referring to it as a 'regulatory idea').

'public rule of law', whereby the principle of the rule of law implies the publicness of law.[12] Not in the sense of a law that is not hidden (although the 'publicity' of law is also an important dimension of the rule of law), but as the law of a people instituted as a public in the form of a public institution.

On the other hand, the ability to distinguish the private from the public and to articulate them also underpins the contemporary conception of sovereignty. The latter, indeed, may be defined as an authority of law, one that is inherently created and limited by law and hence is distinct from sheer power.[13] By extension, the collapse of the distinction also threatens the legitimate authority of law by undermining the most important contemporary justification of that authority: democracy.[14] This is because the possibility of the public/private distinction and relation underlie political equality *qua* fundamental relational status that is mutually recognised by law. In turn, it also underlies the two complementary principles of legitimacy that equality gives rise to, ie, democracy and human rights. Indeed, those principles aim at vesting public institutions, ie, the institutions that institute or reinstitute a people as a self-determining public and its citizens as equal citizens and as equal human right-holders, with the right to represent and thus bind that public and its citizens.

To the extent that privatisation is, albeit not exclusively, the result of globalisation and especially of global market pressure and development policy, it may be considered a global process. This explains the turn to international law, ie, that universally applicable law which takes precedence over and moulds the domestic law of States, in search of remedies.[15] Unfortunately, things are not that simple. Indeed, international law (at least in its current

[12] See Jeremy Waldron, 'Public Rule of Law' (2014) 14(41) *NYU School of Law, Public Law Research Paper*, https://ssrn.com/abstract=2480648 (accessed 3 January 2024).

[13] See Supiot (n 9) 145. See also Samantha Besson, 'The Politics of Regional International Organizations: A New Dawn for the Political Legitimacy of International Law' (2024) 21(1) *International Organizations Law Review* 87; Samantha Besson and José Luis Martí, 'Republican Sovereignty' in Mortimer Sellers and Franck Lovett (eds), *The Oxford Handbook of Republicanism* (Oxford University Press, 2025).

[14] On the criteria of international democratic legitimacy, including human rights protection, see Samantha Besson and José Luis Martí, 'Legitimate Actors of International Law-Making—Towards a Theory of International Democratic Representation' (2018) 9(3) *Jurisprudence* 504; Samantha Besson and José Luis Martí, 'No Democratic Representation without Institution. Lifting the Veil of Functionalist, Incorporation and Agency Theories of Democratic Representation by International Organizations' in Samantha Besson (ed), *Democratic Representation in and by International Organizations* (2025).

[15] See on the public/private distinction or, at least, on publicness in international law, Claire A Cutler, 'Artifice, Ideology and Paradox: The Public/Private Distinction in International Law' (1997) 4 *Review of International Political Economy* 261; Benedict Kingsbury, 'International Law as Inter-Public Law' in Henry S Richardson and Melissa S Williams (eds), *Moral Universalism and Pluralism: Nomos XLIX* (New York University Press, 2009) 167–204; Benedict Kingsbury and Megan Donaldson, 'From Bilateralism to Publicness in International Law' in Ulrich Fastenrath and others (eds), *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (Oxford University Press, 2011); Lorenzo Casini, '"Down the Rabbit-Hole": The Projection of the Public/Private Distinction beyond the State' (2014) 12(2) *International Journal of Constitutional Law* 402; Goldmann (n 11); Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International Law to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28(1) *European Journal of International Law* 115; Mégret (n 1); Besson (n 11); Eyal Benvenisti, 'Are There Any

interstate form) has always been a public-private law hybrid due to its late emergence in legal history. As a result, its public dimension has never been very strong. Worse, if international law itself has contributed to the universalisation of the public-private distinction and relation, it has also become one of the main vectors of privatisation.

While there is still time, this article proposes to set out in search of the 'public' in contemporary international law, and of what might constitute a minimal[16] public legal 'status' or 'position' therein. In using the terms 'status' or 'position', it refers to the distinction between the two 'positions' of the body of (Roman) law made in Ulpian's *Digest*:[17] on the one hand, the public or vertical position is the position, in and by law, which institutes the people and makes it stand upright, ie, the State (from the Latin *statum*) or the legal status of the republic (from the Latin *res [publica] romana*); and, on the other, the private or horizontal position, which relates to the first and prior public position of law by relying on it, is that which then makes it possible to organise inter-individual relations and secure the utility of private persons.

In short, the aim of this article is to identify and flesh out, through the interpretation of contemporary public international law, what could amount to a public 'position' or 'status' *in*, but also, as argued before, *of* international law. Its purpose then is to specify possible exclusions or, at the very least, limits in international law to the privatisation of the public and to the publicisation of the private. The article's method is interpretative: it proposes the best interpretation of contemporary public international law to both fit existing law and justify it in the light of the principles it embodies.[18]

The article's argument will unfold in five steps, which will constitute its five sections. The first section will flesh out the meaning of 'publicness' in and of law, and thereby set the conceptual framework of the article (1.).

Inherently Public Functions for International Law?' (2021) 115 *American Journal of International Law Unbound* 302; Lo Giacco (n 7), with a survey of the literature (298–304).

[16] This public position or status of international law may be considered 'minimal' by reference to the way in which international and domestic law are articulated with one another and especially the way in which international human rights law and international democracy law consolidate as common minima on the basis of a convergent State practice of public law developed domestically.

[17] See Domitius Ulpianus, 'Institutes' in Alan Watson (ed), *The Digest of Justinian*, Volume 1, Book 1 (University of Pennsylvania Press, 1985) 1.1.1., para 2: '*Hujus studii duæ sunt positiones, publicum et privatum. Publicum ius est quod ad statum rei romanæ spectat. Privatum quod ad singulorum utilitatem*', which may be translated as follows: 'Studying law implies studying two *positions*: the public and the private. Public law pertains to the *state* of the *res romana*, and private law to the utility of individuals'.

[18] To that extent, the proposed argument is not only an argument in democratic theory (eg, Chiara Cordelli, *The Privatized State* (Princeton University Press, 2020); Jean L Cohen, 'The Democratic Construction of Inherently Sovereign Functions' (2021) 115 *American Journal of International Law Unbound* 312). For a complete democratic interpretation of international law in favour of public representation by both States and IOs and of their multiple sovereign authority, see Samantha Besson, 'Democratic Representation within International Organizations. From International Good Governance to International Good Government' (2022) 19(4) *International Organizations Law Review* 489; Besson and Martí, 'No Democratic Representation without Institution' (n 14).

The second section will explain how from a simple reference to the 'public' in the international law of the seventeenth century, an international law 'of the public' has grown from the nineteenth century onwards (2.). Sadly, that international public law has remained embryonic. Indeed, the fact that international law developed as a public-private hybrid from the outset limits its ability to constrain privatisation today. The third section of the article will detail the perpetuation of that process of hybridisation of the public and the private, not only *in* contemporary international law, but also *through* and *by* this law as it has itself become a vector of privatisation of the public and of publicisation of the private (3.).

This public/private hybridisation in and by international law makes the question of identifying and consolidating the public position in international law all the more urgent. Only such an effort can lead to the identification and interpretation of those public institutions' rights which may not be conferred to, or even exercised by, private persons, on the one hand, but also of those public institutions' obligations that can limit the exercise of these rights, on the other. The fourth and fifth sections of the article will address these *rights* (4.) and *obligations* (5.) under public international law.

1. The public law of public institutions in and of international law

This article's topic is the 'international public law'[19] within public international law in general. In a nutshell, and by analogy to domestic public law, it is the international law that institutes or reinstitutes a given people into a 'public' (and hence, retrospectively, makes it a 'people'[20]). It does so by organising international institutions as institutions of that public and, in short, as public institutions (eg, States or other public institutions).[21]

In other words, what makes those institutions public institutions is their public legal 'status' or ensemble of legal rights and obligations. Literally, this status is what makes them 'stand' as public institutions by reference to Ulpian's public status mentioned earlier.

[19] On this term, see von Bogdandy, Goldmann and Venzke (n 15). See also on public international law as 'inter-public' law, Kingsbury (n 15) 174–5.

[20] See Ernst Wolfgang Böckenförde, 'Demokratie und Repräsentation: Zur Kritik der heutigen Demokratiediskussion' in *Staat, Gesellschaft und Freiheit. Studien zur Staatslehre, Verfassungstheorie und Verfassungsgeschichte* (Suhrkamp Verlag, 1991) 379–405; Samantha Besson, 'Democratic Representation in, through and by International Organizations. An Introduction' in Samantha Besson (ed), *Democratic Representation in and by International Organizations* (2025).

[21] See Samantha Besson, 'We the Peoples of the United Nations—From Single Separate Instituent Powers to Multiple Nested Instituted Publics' in Peter Niesen, Markus Patberg and Lucia Rubinelli (eds), *The Oxford Handbook of Constituent Power* (Oxford University Press, 2025). Of course, this does not mean that the 'civil society' created in the shadow of the institution of the corresponding public cannot itself be instituted legally and even represented politically, albeit this time by civil, social or private organizations (see Besson and Martí, 'Legitimate Actors' (n 14)).

In turn, this set of legal rights and obligations, and hence of authorisations and limitations on the power of public institutions, is what actually confers sovereignty or sovereign authority to them. On the one hand, the rights of these public institutions (for instance, their power or competence to make law, also known as their 'jurisdiction') justify their actions and decisions. It follows that those institutions are not authorised to confer these rights to private persons. Not even the exercise of these rights may always be delegated to private persons. Indeed, the obligations of those public institutions (for instance, their obligations grounded in the human rights of individuals under their control), on the other hand, limit their actions. In particular, they require that these institutions comply with their obligations even when they authorise private persons to exercise their rights, and, in some cases, even require that these institutions exercise these rights themselves for their authority to be justified.

It follows therefore that everything that is the topic of a right or an obligation of a public institution under international law comes under the purview of public institutions and may therefore be considered as 'public'. For instance, if education and health are to be considered to be 'public' services, it is because States incur legal obligations corresponding to the human rights to education and health, which require them to provide a minimum service of education and health and thus turn education and health into public goods (in the moral as opposed to economic sense).

This is what one may refer to as the 'normative-institutional' conception of the public.[22] The proposed conception is indeed both normative and institutional at the same time.[23] It reflects the complementary relationship (as opposed to the identity) between law and institutions,[24] a relationship that has too often been overlooked in international law.[25] Paying due attention to that relationship enables one to reaffirm not only the normative and jurisgenerative aspect of institutions, but also, conversely, the structuring and organising dimension of law, and hence its representing and instituting authority.[26]

Importantly, there is nothing circular about the proposed conception of publicness. On the contrary, the complementarity between law and

[22] See Besson (n 11). The proposed argument relies on and develops Alon Harel's argument: Avihay Dorfman and Alon Harel, 'Against Privatization as Such' (2015) 36(2) *Oxford Journal of Legal Studies* 400; Alon Harel, 'Why Privatization Matters: The Democratic Case against Privatization' in Jack Knight and Melissa Schwartzberg (eds), *Privatization: NOMOS LX* (New York University Press, 2019) 52–78. See for an 'alignment' with the normative-institutional conception proposed here, Lo Giacco (n 7) 304.

[23] For a related legal, albeit less institutional and hence less political conception of publicness, see Benedict Kingsbury and Nahuel Maisley, 'Infrastructures and Laws: Publics and Publicness' (2021) 17 *Annual Review of Law & Social Sciences* 353.

[24] See Besson (n 8).

[25] See, however, the seminal book by Richard Collins, *The Institutional Problem in Modern International Law* (Hart Publishing, 2016).

[26] On international law, institution and representation, see Besson (n 20).

institutions has actually been integral, ever since the twelfth century, to the Western concept of law, then turned international. It suffices here to mention the merging at that time of the Church's religious authority with the Empire's institutional power, so as to give rise to the sovereignty of a single public institution of law, that of the State, and its authorised power.[27]

Approaching international 'publicness' in this way differs from two alternative conceptions of the public in international law.[28] Those conceptions do not define publicness by reference to the legally authorised or required involvement of public institutions. On the contrary, the first conception of the public relies on the pre-existing nature of what is to be regarded to as public, and may hence be referred to as 'ontological'.[29] As to the second conception, it relies on functions or goals to be regarded as public, and may therefore be referred to as 'instrumental'.[30]

First of all, publicness should not be reduced to the pre-existing and law-independent 'nature' of an act (eg, punishment) or a good (eg, education) as public. That act or good, indeed, should only be regarded as public subsequently to its identification and specification as such by a public institution and by its public law. It is by virtue of the normative implication of an authorised public institution in its identification and specification that the act or good may be qualified as public.[31]

An example suffices to illustrate the inherent limitations of the ontological approach: that of the international law of immunities. That law has come full circle recently in its now traditional dissociation of the 'nature' of the act from that of its agent. Current debates reveal indeed to what extent, due to the privatisation of State activity, the 'nature' of a so-called sovereign act, also called a *jure imperii* act, has become almost impossible to define without reference to the public institution having the right and/or obligation to act in the first place.[32]

[27] See Supiot (n 9) 145. See also Samantha Besson, 'Sovereignty' in Rüdiger Wolfrum and others (eds), *Max Planck Encyclopedia of Public International Law*, Vol. IX (Oxford University Press, 2012) 366–91.

[28] Some non-legal and non-institutional conceptions of publicness mix ontological and instrumental conceptions of publicness. See eg, Goldmann (n 11), arguing for a mandate of public authority grounded in public interests.

[29] See eg, Angelo Golia and Anne Peters, 'The Concept of International Organizations' in Jan Klabbers (ed), *Cambridge Companion to International Organizations Law* (Cambridge University Press, 2022). The term 'ontological' to refer to such conceptions is borrowed from Mégret (n 1) 457–8 and 463–4.

[30] See eg, Mégret (n 1) 463–5. For a critique of the functionalism inherent in this instrumental conception, see Besson (n 11).

[31] See also Jacqueline Best and Alexandra Gheciu, 'Theorizing the Public as Practices: Transformations of the Public in Historical Context' in Jacqueline Best and Alexandra Gheciu (eds), *The Return of the Public in Global Governance* (Cambridge University Press, 2014) 15–44, 32–33.

[32] See eg, Alberto Oddenino and Diego Bonetto, 'The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law' (2020) 20(3) *Global Jurist* 1. As a matter of fact, the Latin expression *de jure imperii* actually signals the importance of law, and not only of 'functions' or 'agents', when qualifying the act as sovereign. See eg, the decision by the Geneva Court of Justice in the case *A AG v Airport Authority of B and Office cantonal des poursuites*, DCSO/310/2023, 6 July 2023, para 6.2.1.1.:

Second, it would be just as wrong to approach the notion of publicness from the descriptive and instrumental angle of the 'functions' or goals of public institutions, rather than from the normative and inherent angle of their rights and obligations. This second distinction is essential to grasp as it has become part of the problem of privatisation: the reference to the public 'functions' of States is indeed widespread in both international law and doctrine, and it has been so at least since the nineteenth century.

As a matter of fact, such a criterion of publicness is elusive.[33] Indeed, according to a purely instrumental approach, those functions can in themselves be performed by private persons or public institutions interchangeably, or even more efficiently or usefully by private persons in some cases.[34] It may actually also be criticised for accelerating the privatisation of the public by international law.[35] As a confirmation, it suffices to observe that authors and provisions often add both the normative terms 'sovereign' and 'inherent' or 'essential'[36] before being able to refer to those functions as public ones (eg, in the reference to 'inherent sovereign functions'[37]). What this additional normative reference does is link those functions to the set of rights and obligations of the State that constitutes its sovereign authority. It therefore brings back the very normative and institutional dimension of the public mentioned before, rendering the reference to functions perfunctory on its own.

Having presented the conceptual framework of this article, it is necessary to delimit its scope. As may already have become clear, the proposed argument focuses primarily on the international public law of the State. The first institutions of international public law to institute peoples into

> La plaignante souligne que les infrastructures et activités aéroportuaires sont de plus en plus confiées à des entités distinctes de l'Etat relevant du droit privé ce qui était la preuve qu'elles ne relèveraient pas de tâches de puissance publique. Le fait que l'Etat confie ces tâches à des entités privées ne signifie pas qu'elles ne relèvent pas de la souveraineté. Lorsque l'Etat concède ces activités, il impose un cahier des charges impliquant le respect des obligations de droit international public auxquelles il a souscrit dans le cadre de la Convention de Chicago.

[33] See Philip Alston, Special Rapporteur on extreme poverty and human rights, *Extreme Poverty and Human Rights*, Seventy-third session (26 September 2018), UN Doc. A/73/396.

[34] See eg, Dorfman and Harel (n 22).

[35] See Besson (n 11); Harel (n 22).

[36] See eg, Alston (n 33) para 51 (Characterising certain activities as inherently public):

> 51. Analysts commonly seek to identify services that are inherently public in nature and thus must always be guaranteed (whether or not provided) by the State. Even Adam Smith, an enthusiastic proponent of privatisation, singled out certain activities that should remain the responsibility of the State, including the post office and national infrastructure, such as "good roads, bridges, navigable canals, harbours". Although courts have occasionally characterised activities such as the operation of prisons as inherently governmental in nature, the identification of criteria by which to separate *inherently public activities* from others that might be privatised has proved to be very elusive. Despite the appeal of the concept, the reality is that an almost limitless range of public functions has been entrusted to profit-making corporations in one jurisdiction or another, and human rights bodies have rarely condemned such transfers outright.

[37] See Mégret (n 1). For a critique, see Besson (n 11).

publics were indeed States. No wonder they have also been the first public institutions of international law to be privatised.[38]

True, since the end of the nineteenth century, other public institutions, such as international organisations (IOs), have gradually also been instituted under international law and may therefore be said to have partly 'reinstituted' their Member States' peoples.[39] The publicness of IOs in public international law remains underdeveloped and controversial, however.[40] As will be explained in the third section, this unfortunately explains those IOs' contribution to the privatisation of the State and of State law. It will become clear in the course of the argument therefore that for a public law status to be consolidated under international law and for the international rule of (public) law to apply across the board, that status has to encompass States as much as the IOs those States have become members of and are institutionally continuous to.[41]

2. From the public in international law to the international law of the public

As mentioned earlier, the first institutions of international public law were States. Even the public institution of States by international law was late in coming, however, and arguably remains largely incomplete.

This section explains how from a passing reference to the 'public' of domestic law by the international law of the origins in the seventeenth century, this law has gradually become the international law 'of the public' and hence started to be referred to as 'public international law'. Schematically, this 'publicisation' of international law and the corresponding public reinstitution of States by international law may be said to have taken place in two stages: first, the development of the international law of statehood from the eighteenth century and especially the nineteenth century onwards and, second, that of the international law of peoples' and human rights in the twentieth century.

First of all, the *first reinstitution of States* by the international law of statehood.

[38] See Cordelli (n 18).
[39] See Besson (n 13).
[40] See Besson (n 18); Jochen von Bernstorff, 'Procedures of Decision-Making and the Role of Law in International Organizations' in Armin von Bogdandy and others (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010) 777–806. See also Georg Kell, 'Relations with the Private Sector' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press, 2016) 730–54; Christer Jönsson, 'The John Holmes Memorial Lecture: International Organizations at the Moving Public-Private Borderline' (2013) 19(1) *Global Governance* 1; Jan Klabbers, 'Of Round Pegs and Square Holes: International Law and the Private Sector' in Paulius Jurčys, Poul F Kjaer and Ren Yatsunami (eds), *Regulatory Hybridization in the Transnational Sphere* (Brill/Nijhoff, 2013) 29–48.
[41] See Besson (n 8); Samantha Besson, 'Sovereign States and their International Institutional Order: Carrying Forward Dworkin's Work on the Political Legitimacy of International Law' (2020) 2(2) *Jus Cogens* 111.

In the original international law of the seventeenth century, the *jus gentium* or law of nations, States were seen first and foremost as institutions of domestic public law. Indeed, it was their pre-existing internal public nature that enabled the international law governing their international relations to be considered 'public' by extension. International law did not affect the internal organisation of States, which belonged to the *domaine réservé* of each State. Where necessary, it could refer to domestic public law (for instance, when pointing to a State's organs). For the rest, international relations between States were regulated, on an anthropomorphic model, by analogy with horizontal relations between natural persons and in the mode of domestic private law.[42]

Gradually, however, the 'civilising mission' of international law,[43] including the export of the State model outside Europe, first through colonisation and later through development, and its forceful import into regions of the world where this public law institution did not exist as such in domestic law, made it necessary to specify a minimal international public law of statehood.[44] This occurred from the eighteenth century onwards and the international law of statehood was consolidated during the nineteenth century. This new international law of the State governed, and still does today, the birth, life and death of States –to use the anthropomorphic metaphor again. Original elements of contemporary international public law on the recognition, immunities, responsibility and succession of States date back to that period.

It is at that time that States became public institutions of both national and international public law at once, being first instituted under national law and then reinstituted under international law. It is also at the beginning of the nineteenth century that the expression 'public international law' finally replaced that of *jus gentium* or law of nations.

For a long time, however, this international law of statehood remained fairly minimal as it still largely relied on domestic public law. This was the case in the law of immunities, to determine what was a sovereign or *jure imperii* act of the State, or in the law of international responsibility, to identify what was an organ of the State.[45]

[42] See also Cutler (n 15); Alex Mills, 'The "Private" History of International Law' (2006) 55(1) *International and Comparative Law Quarterly* 1.

[43] See Samantha Besson, 'Du droit de civilisation européen au droit international des civilisations: instituer un monde des régions' (2021) 31(3) *Swiss Review of International and European Law* 373.

[44] See Besson (n 8); Samantha Besson, 'International Courts and the Jurisprudence of Statehood' (2019) 10(1) *Transnational Legal Theory* 30.

[45] This is still the case today as exemplified by the International Law Commission (ILC)'s *Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)*, reproduced in the General Assembly of the United Nations' Resolution, Fifty-sixth session (28 January 2002), UN Doc. A/Res/56/83, Art. 4:

> 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ

Moreover, given the private law origins of the law of nations, that new international law of statehood developed from the outset as a hybrid of public and private law. As a matter of fact, the nineteenth century was also the time of the first public/private institutional 'assemblages' under international law. A telling example from that period is that of the public-private partnerships between States and shipping or banking companies.[46] Later on, that hybridity was epitomised once more by the public/private constituency and institutions of the first IOs in the second half of the nineteenth century.[47]

This public/private hybridity in the international law of statehood and, more generally, of institutions should come as no surprise. Indeed, modern public international law consolidated at a time when the public/private distinction had resurfaced domestically following several centuries of public/private hybridisation[48] and hence at the end of what may be referred to as a full eclipse of the Roman law distinction.

This first eclipse of the public/private distinction spanned over a few centuries between the fifth and twelfth centuries. Even the rediscovery of Roman law through the reception of Justinian's *Institutes* in the twelfth century did not succeed in reintroducing the distinction before the sixteenth century, ie, at the time of the birth of the modern sovereign State. This is because the complex and hybrid institutional landscape of the Middle Ages prevented the public position and public law from growing new roots. This left ample room and time for Roman private law to take root autonomously in the Western legal tradition. By then, private law was indeed considered first a natural and then a rational, universal body of law following the multiple reinterpretations of the Roman notion of *jus gentium*.

Actually, as mentioned earlier, it was that liberal anthropomorphic analogy between private law and international law that presided over the conceptual formation of international law at the time of its emergence as the 'law of nations' or *jus gentium* in the seventeenth and eighteenth centuries. The choice of terms was not innocent: the original conception of international law was derived from the Roman *jus gentium*, a third type of private law in Ulpian's typology, albeit after multiple reinterpretations of that law first by scholastic thinkers, Enlightenment and, eventually, modern natural

of the central Government or of a territorial unit of the State. 2. An organ includes *any person or entity which has that status in accordance with the internal law of the State*.

[46] See Doreen Lustig, 'The Enduring Charter: Corporations, States, and International Law' in Melissa J Durkee (ed), *States, Firms and their Legal Fictions. Attributing Identity and Responsibility to Artificial Entities* (Cambridge University Press, 2024) 87–110; Lo Giacco (n 7) 292–8.

[47] See Jochen von Bernstorff, 'New Responses to the Legitimacy Crisis of International Institutions: The Role of "Civil Society" and the Rise of the Principle of Participation of the "Most Affected" in International Institutional Law' (2021) 32 *European Journal of International Law* 125.

[48] See David Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130(6) *University of Pennsylvania Law Review* 1349.

law theorists. According to that conception, States were assimilated to natural persons and their horizontal relations were organised according to private law modalities considered natural and universal. This explains how the legal relations between States in the modern international law of statehood were originally those of contract for treaties, of private property for titles on State territory, and of tort for the international responsibility of States.

Domestically, the start of the second life cycle of the public-private relation occurred in the sixteenth century with the birth of the territorially distinct and sovereign State. Those centuries of absence explain why the distinction is often wrongly traced back to the Renaissance rather than to the Roman Republic. However, this return to favour of the public-private relation in the sixteenth century was by no means easy. The distinction was quickly challenged, indeed. This was the case, first, by the scientific rationalism of the Enlightenment and by the laws of science in the eighteenth century, and, then again later on, by economic rationalism and the laws of the market in the nineteenth century. It is probably for this reason that some authors trace the contemporary public-private distinction back to the eighteenth and nineteenth centuries only. It may be better, however, to refer to this third period as the outset of a third cycle in the life of the distinction: that of the separation of the State from the market.

Echoing that domestic reemergence of the public/private distinction in the sixteenth century and it permutations in the eighteenth and nineteenth centuries, the aim of the public international law of statehood of the nineteenth century was not so much the protection of the public, and in particular of the State, against the privatisation of its rights. Rather, its aim was the protection of the private sector, and more specifically of the market, against the commercial activity of the State and its intervention in the market.

Second, the *second reinstitution of States and their peoples* by international human rights law.

It was not until 1945 that a second reinstitution of States by international law took place. The hallmark of this second stage in the development of public international law was the international guarantee of the equal rights of both human persons and peoples.[49]

These new guarantees of public international law place the equal dignity or equal fundamental status of the human person at the foundation of the international legal and institutional order. That order guarantees indeed both the human rights that constitute this status and the democratic right

[49] See the Preamble of the Charter of the United Nations (26 June 1945):

> We the Peoples of the United Nations determined […] to reaffirm *faith in fundamental human rights*, in the dignity and worth of the human person, *in the equal rights* of men and women and of *nations large and small* […]

to collective self-determination that ensures its mutual recognition. Doing so, public international law has reinstituted States as public institutions under international law, guaranteeing their sovereign equality.[50] This time, however, it is no longer in a way that emulates the natural equality of individuals in the anthropomorphic, horizontal conception of seventeenth century States. From 1945 onwards, indeed, international public law has grounded the equality of States in the equality of the peoples that these States represent and institute as publics through international law.

Unfortunately, those post-war guarantees of international public law and public institutions have not yet been fully realised. The sovereign equality of peoples and States has either not been respected at all, or only to a very limited extent. Moreover, throughout the Cold War, international law displayed a form of neutrality regarding all issues considered internal to the organisation of States such as democracy and human rights. This was true right up to the turn of the millennium, as will be discussed in the fifth and final section of this article.

With no real institutional counterparts to this core of minimal international public law more than seventy years after its adoption, the few advances just identified in international public law have mostly remained a dead letter.

Given what was explained earlier about the private law origins of the law of nations, ie, as a body of universalised private law applied to the relations between institutions of domestic public law, this should not come as a surprise. Indeed, international law developed precisely at a time when the public-private distinction had resurfaced in domestic law after several centuries of public-private hybridisation. Understanding that timing is decisive if one is to grasp the specificities of the public-private distinction and relation in and of international law and the late consolidation of international public law, and in particular the latter's tendency to hybridise the public and the private.

3. The privatisation of the public and the publicisation of the private in and by international law

Understanding how the so-called 'public' international law has in fact been a public-private hybrid from the outset sheds light on the state of contemporary international law. It certainly helps explain how the privatisation of the rights and obligations of public institutions has become so advanced despite the existence of a minimal international public law. How, after all, could a

[50] See Art. 2(1) of the Charter of the United Nations (n 49): 'The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. 1. The Organization is *based* on the principle of *the sovereign equality of all its Members*'.

legal order that began by treating public institutions by analogy with private persons be in a position to resist their privatisation? Conversely, how could that legal order prevent the treatment of these private persons by analogy with public institutions, and their publicisation?

This section of the argument addresses both processes of privatisation and publicisation in and by international law in turn. It turns out indeed that those processes are not only occurring in spite of international law, but are also actively encouraged by it.

First, the *privatisation of the public in and by public international law*. To borrow a distinction made by Anne Peters in her 2017 Lauterpacht Lectures,[51] the privatisation of the public may be said to take place both *in* public international law itself and *by* public international law within the public institutions it has instituted or reinstituted.

On the one hand, the privatisation *of* or *in* public international law. Today, international law-making procedures, mechanisms of international responsibility for breaches of that law and dispute-settlement under public international law are all characterised by an ever-increasing degree of public/private hybridisation.

This is the case, for example, of international responsibility law. Structured on a tort law or civil liability model, international responsibility has been conceived as a kind of responsibility by attribution to the State of the acts of public 'organs', but also of those of private 'persons' or 'entities'.[52] This is the case when the latter are authorised 'to exercise (elements of) governmental authority' (better referred to here as 'public' authority in general, for the reasons given in the first section of the argument)[53] under domestic law or, at least, are effectively controlled by the State in practice. Even

[51] Anne Peters, 'Private Law Instruments and Actors in International Law', *Hersch Lauterpacht Memorial Lecture 2017*, University of Cambridge, 7–10 March 2017, www.lcil.cam.ac.uk/press/events/2017/03/lauterpacht-lectures-2017-privatisation-under-and-public-international-law-professor-anne-peters (accessed 3 January 2024). See also Mégret (n 1) 458–60.

[52] Those are the terms of Arts. 4, 5 and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (n 45):

> Article 4. 1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State. 2. An *organ* includes *any person or entity* which has that status in accordance with the internal law of the State. Article 5. The conduct of *a person or entity which is not an organ* of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance. Article 8. The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

[53] See also ILC, Draft Articles on Responsibility of States for Internationally Wrongful Acts. Text of the Draft Articles with Commentaries Thereto in *Yearbook of the International Law Commission (2001)*, Volume II, Part Two, A/CN.4/SER.A/2001/Add.1 (Part 2), 30–143, Art. 5(1). More generally, on issues of translation around the 'public' and the 'private', see Ralf Michaels and Nils Jansen, 'Private Law

though, as shall be discussed in the final section of the article, this attribution mechanism makes it possible to hold the State responsible for conferring or merely delegating the exercise of its rights to private persons, it has also contributed to assimilating these private persons to public organs. Moreover, by deferring the specification of the notion of 'elements of governmental authority' entirely to domestic law, including in cases where that law authorises their privatisation, that mechanism of attribution has reinforced the very process of privatisation of the public it is seeking to address.[54] The situation is even more alarming in the international law on the responsibility of IOs, where the 'organs' of the organisation and its private 'agents' are placed on an equal plane.[55] This reflects the advanced state of public-private hybridisation of the internal law of IOs. As mentioned in the first section, indeed, that law was not originally developed as a public law status for those IOs.[56]

Speaking of which, on the other hand, privatisation is no longer confined to international law itself, but also occurs inside international institutions *by* virtue of international law. Nowadays, indeed, international law authorises, and sometimes even mandates, public institutions such as States or IOs to hybridise, or even privatise. This applies to their organs, their funding, their law-making processes, their remedial procedures and their dispute-settlement mechanisms.

In fact, this usually happens through the internal law of IOs, binding those organisations, but also their Member States. Indeed, most IOs, first instituted in the functionalist framework of the late nineteenth century, lack an international public law status and are organised in a public-private hybrid way. No wonder they have set this kind of hybrid internal organisation as an organisational standard for their Member States in return.[57] Over time, this has led to a self-reinforcing spiral of privatisation of States and IOs.[58] For example, international financial institutions such as the World Bank and the International Monetary Fund, and so-called development

Beyond the State? Europeanization, Globalization, Privatization' (2006) 54(4) *American Journal of Comparative Law* 843.

[54] See Alex Mills, 'State Responsibility and Privatisation: Accommodating Private Conduct in a Public Framework' (2021) *EJIL: Talk!*, www.ejiltalk.org/state-responsibility-and-privatisation-accommodating-private-conduct-in-a-public-framework/ (accessed 3 January 2024).

[55] See eg, Art. 7 of the ILC's 'Draft Articles on Responsibility of International Organizations' in *Yearbook of the International Law Commission (2011)*, Volume II, Part Two, A/CN.4/SER./2011/Add.1 (Part 2), 87–88:

> The conduct of an organ of a State or *an organ or agent* of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.

[56] For potential change in the right direction and the explicit reference to the 'organ' of an IO, see eg, General Assembly of the United Nations, *Report of the International Law Commission*, Seventy-fourth session (24 April–2 June and 3 July–4 August 2023), UN Doc. A/78/10, draft guideline 2.

[57] See Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press, 2017).

[58] See Besson (n 11); Besson (n 18).

organisations in general, have required the privatisation of the exercise of public authority by their Member States in the interest of greater economic efficiency.[59]

Second, the *publicisation of the private in and by public international law*. This confusion of the public and private positions through the privatisation of and by international law now also fuels the opposite movement: that of the publicisation of the private through the invocation by private persons of the very rights and obligations of States under public international law.

Privatisation, indeed, has gradually emptied the shell of public institutions of international law, be it that of States or IOs, however minimal that content was. Without surprise, that empty shell is now coveted by private persons seeking to justify their power, even if only *prima facie*, by acting as public institutions. If international law tolerates and even actively fosters privatisation, the same may be said about publicisation. This is the case, for instance, of the invocation of State immunities under international law by companies exercising prerogatives of public authority.[60] One may also mention the purported extension by claimants of international human rights law obligations to those very same companies, notably in the business and human rights movement.[61]

Could private international law help in this context? Sadly, to the extent that private international law has not yet been fully articulated with public international law, it has itself become a source of hybridisation of international law. Private international law has indeed developed in a largely autonomous way since the nineteenth century and turned into a body of transnational law in the service of self-determined private utility.[62]

While there have been recent evolutions, they are still insufficient and, for some of them, they have even become deleterious. In short, there have been two developments: a first, seemingly promising, joint evolution since 1945 between the 'publicisation' of the object of public international law mentioned earlier and the 'internationalisation' of private international law, and thus towards a certain differentiation between the two positions of international law. This evolution has been followed, however, by a second, more worrying, movement towards a 'privatisation' of public international law and a 'publicisation' of private international law, and thus towards a

[59] See eg, Luis Eslava and Sundhya Pahuja, 'The State and International Law: A Reading from the Global South' (2020) 11(1) *Humanity* 118; Saul Estrin and Adeline Pelletier, 'Privatization in Developing Countries: What are the Lessons of Recent Experience?' (2018) 33(1) The *World Bank Research Observer* 65.

[60] For a critique, see Oddenino and Bonetto (n 32).

[61] For a critique, see Fleur Johns, 'Theorizing the Corporation in International Law' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 635–54.

[62] See Mills (n 42); Horatia Muir Watt, 'Private International Law Beyond the Schism' (2011) 2(3) *Transnational Legal Theory* 347.

hybridisation of the two positions of the same body of international law. This has even led to competition and contradictions between them on certain topics of public international law such as jurisdiction or human rights.

Building real 'complementarity' between 'public international law' and 'private international law' would therefore require that they first be distinguished and then articulated in relation to one another. It will not simply occur by itself and by mere 'confluence'.[63] On the contrary, such an articulation requires reverting to the public-private distinction and relation. Without articulation with public international law and, above all, without establishing the priority of public international law over private international law, indeed, what passes for private international law would, in the long term, amount to no more than a transnational law at the service of the market order. Nothing can guarantee private autonomy in such an order that simply turns the rule of the strongest into a parody of the rule of law. Instead, only the priority of public international law could ensure the heteronomy of private international law and enable it to work as a true guarantor of private autonomy in private relations.

In light of this grim mapping of the privatisation of the public position under public international law and of the reverse publicisation of what should instead be constructed and protected as a private position under private international law, it should be clear that the identification and consolidation of a distinct public position or status of international public law has become urgent.

This may actually be done through the interpretation of the content of the existing rights and obligations that form the minimal public legal 'status' of the State in and of international public law. As mentioned before, those rights authorise that State's power *qua* sovereign authority, while its obligations limit it inherently. The next two sections of the article will address those public rights and obligations in turn and propose ways of bringing them to bear on privatisation in the future.

4. State rights and the absence of international justification for the conferral and delegation of rights to private persons

States bear rights under international public law. Taken together, these rights constitute State sovereignty or sovereign authority, insofar as the latter is regarded as the plenitude of State rights or competences authorised under international law. As this sovereignty is only guaranteed to States by

[63] Scope precludes addressing the complementary role of private international law in this article. On the necessary rearticulation of private international law by reference to public international law once the latter has been duly reinterpreted and hierarchically positioned, see Besson (n 13), by opposition especially to Alex Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009).

virtue of their equality –an equality that international public law has guaranteed since the second reinstitution of States in the twentieth century,[64] as explained earlier–, these various sovereign rights belong to all States equally.

These equal rights of sovereign States under international public law cover a whole range of 'prerogatives', 'competences', 'powers' or 'immunities'. Together, they constitute the regime known as the international law of statehood, as discussed in the second section of this article. They may be identified from the law relating to the institution, existence and succession of States (eg, their rights to territorial integrity, to determine the modalities of acquisition of nationality, or to enter into international relations with other States). Additional rights derive from the international law of immunities, international diplomatic law and international responsibility law. One should also mention the right to adopt and implement law, sometimes also referred to as 'jurisdiction' and 'adjudication'. Another example is the right to use force, including the right to detain and to punish.

Together, these equal sovereign rights may be conceived as constitutive of States' equal public status of international law. They are actually considered imperative under international law. Accordingly, they amount to rights that cannot be subjected to any justified restriction and, above all, to any waiver among States themselves, however consensual.[65] It is by strengthening these rights, therefore, that one may hope to curb privatisation in and by contemporary public international law.

Admittedly, these various rights of the State under international public law do not in themselves prohibit States from privatising the exercise of these rights. They do, however, make such privatisation 'unjustified' when it occurs and, in short, do not 'authorise' it. As mentioned before, indeed, States are the only institutions 'authorised' to exercise these rights under international public law. Does this mean that any form of privatisation of States' rights is unjustified? It is important here to distinguish between the conferral of these rights and the mere delegation of their exercise: 'conferral' is definitive, while 'delegation' is reversible.[66]

First, States are not authorised to *confer* their rights definitively to private persons. The reason for this lies in the sovereign equality of States. As

[64] See eg, Art. 2(1) of the Charter of the United Nations (n 49): '1. The Organization is *based* on the principle of *the sovereign equality of all its Members*'.

[65] See Samantha Besson, 'State Consent and Disagreement in International Law-Making—Dissolving the Paradox' (2016) 29(2) *Leiden Journal of International Law* 289, 310.

[66] Note, however, that the term 'delegation' is not appropriate here, as it is in principle used for delegations of public powers between organs of the same public institution (State and, by extension, IO), eg, from the legislature to the executive. On this conceptual shift from inter-public delegation to public-private delegation and for a critique, see Pieter Jan Kuijper, 'Delegation and International Organizations' (2022) 426 *Collected Courses of the Hague Academy of International Law* 21, 23–25. See also Besson and Martí, 'No Democratic Representation without Institution' (n 14).

mentioned earlier, their equality lies at the very foundation of their rights: together, those rights are constitutive of States' equal status. So, just as human persons are not entitled to renounce or waive their human rights at the risk otherwise of undermining the equal status constituted by those rights under international human rights law,[67] States are not authorised to renounce or waive their equal State rights. Without these rights, which constitute their equality or egalitarian 'status' under international public law, indeed, sovereign States would simply no longer be sovereign under international public law.[68]

Second, of course, States are entitled to *delegate* the exercise of their rights to private persons. This is the case as long as the delegation of their exercise is temporary, and States are able to control its reversibility. In any case, States remain guarantors of the exercise of their rights by these private persons, and in particular of the compliance with their obligations, including their obligations under international human rights law, as discussed in the next section of the article.

The fact is, however, that certain rights of the State do not lend themselves to such a delegation of their exercise to a private person without the rights themselves being irremediably affected. This is the case, for reasons one might call 'quantitative', when the exercise of these rights is delegated without any parallel public action being possible at the same time. Think of the use of force and the incompatibility of delegating its exercise with the very idea of a 'monopoly' in this field.[69] It is also the case when, due

[67] See Samantha Besson, 'Human Rights Waivers and the Right to do Wrong under the ECHR' in *Mélanges for Dean Spielmann* (Wolf Legal Publishers, 2015) 23–35; Samantha Besson, 'Human Rights in Relation' in Stijn Smet (ed), *Human Rights Conflicts* (Oxford University Press, 2017) 23–37.

[68] For a similar argument albeit on other grounds, see Mégret (n 1) 467.

[69] See UN Human Rights Council, 'Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council' in *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination*, Fifteenth session (5 July 2010), UN Doc. A/HRC/15/25, 19–43, Art. 2(i):

> Inherently State functions are functions which are consistent with the principle of the State monopoly on the legitimate use of force and that a State cannot outsource or delegate to PMSCs under any circumstances. Among such functions are direct participation in hostilities, waging war and/or combat operations, taking prisoners, lawmaking, espionage, intelligence, knowledge transfer with military, security and policing application, use of and other activities related to weapons of mass destruction and police powers, especially the powers of arrest or detention including the interrogation of detainees and other functions that a State party considers to be inherently State functions.

See also the Swiss Federal Department of Foreign Affairs and the International Committee of the Red Cross (CH-FDFA/ICRC), *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict* (2009), www.montreuxdocument.org/about/montreux-document.html (accessed 20 December 2023), Part Two (Good practices relating to private military and security companies) lit. A(I.):

> 1. To determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

to their nature and for 'qualitative' reasons this time, the rights of the State cannot be delegated in their exercise without this being irreversible and without a delegation leading to a definitive conferral of these rights. Think of the private exercise of diplomacy, which cannot take place once without jeopardising the diplomatic capacity of States in all other cases.[70]

Importantly, the same argument may be made, by virtue of the continuity between States *qua* primary public institutions and other public institutions they are members of, for other institutions of international law such as IOs. This is, however, provided those IOs have been instituted by their internal law as public institutions reinstituting their Member States' peoples internationally.

As argued in the first and third sections, however, this has not been the case so far. True, there have been a few exceptions such as the European Union (EU) or the International Labour Organisation whose constituencies are not only States, but their peoples and different other social groups.[71] This explains why, but for the latter, most IOs are not yet regarded as benefiting from sovereign rights to be shared with their Member States. By extension, they have not yet been considered as being limited in the conferral of those rights or the delegation of their exercise to private persons. Worse, as argued earlier, the conflation between States' sovereign powers once conferred to IOs and the 'functions' of those IOs has eased their subsequent delegation by IOs as 'functions' to private persons.[72] In short, it has facilitated the privatisation of States' sovereign rights.

Despite those arguments for the lack of justification of conferrals and of some delegations of the exercise of the equal sovereign rights of States, it should be noted that some of these rights have nonetheless been conferred to private persons or delegated in their exercise in practice. This actually applies to all those rights, including rights pertaining to security, defence, police, prisons, health, education, water, energy, road infrastructure, nationality or currency. To the extent that such privatisation actually takes place in practice, including in violation of international public law, it is important to explore, in the next and final section of the argument, what additional limits on privatisation could be posed by international public law and, more specifically, by States' obligations this time.

5. State obligations and the international limits on the conferral and delegation of rights to private persons

Most of the State's obligations that place limits on privatisation derive from what was referred to earlier as the second reinstitution of States in public

[70] See also Mégret (n 1) 468–9.
[71] For an argument in favour of multi-public sovereignty shared between States and other infranational and international public institutions, see Besson (n 13); Besson (n 21).
[72] See Besson (n 11); Besson and Martí, 'No Democratic Representation without Institution' (n 14).

international law: that brought about by international human rights law in the mid-twentieth century.[73]

Of course, there are other sources of obligations for States in international public law, and therefore of potential limits on privatisation inherent to their sovereign authority. Think, for instance, of obligations of international humanitarian law[74] placing limitations on the privatisation of the right to hold prisoners at war or of the right to armed self-defence.[75]

This section's focus on international human rights law may be explained by reference to that regime's centrality to the contemporary international public law status of public institutions such as States. Indeed, as mentioned earlier, international human rights constitute the fundamental equal status of human persons. International human rights law has instituted them both as individual human right-holders and as equal citizens of States. At the same time, and as explained in the second section of this article, international human rights law has also reinstituted States internationally as the primary public institutions of domestic peoples and, this is related, as the primary bearers of the obligations correlative to the rights of individuals and citizens. In short, international human rights law has reinstituted the State as guarantor of the equal rights of all members of that State's people, a people thereby also reinstituted as a new public of international law.[76]

[73] See eg, Koen de Feyter and Felipe Gómez Isa (eds), *Privatisation and Human Rights in the Age of Globalisation* (Intersentia, 2005); Antenor Hallo de Wolf, *Reconciling Privatization with Human Rights* (Intersentia, 2011); Manfred Nowak, *Human Rights or Global Capitalism: The Limits of Privatization* (University of Pennsylvania Press, 2017). See also Mégret (n 1) 478–90.

[74] See eg, Laura A Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (Yale University Press, 2011); Lindsey Cameron, *The Privatization of Peacekeeping: Exploring Limits and Responsibility under International Law* (Cambridge University Press, 2017); Mégret (n 1) 476–8; Nigel D White, 'Outsourcing Military and Security Functions' (2021) 115 *American Journal of International Law Unbound* 317.

[75] See eg, CH-FDFA/ICRC, *The Montreux Document* (n 69) Part One (Pertinent International legal obligations relating to private military and security companies) lit. A.:

> 1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, ie, exercise vigilance in preventing violations of international humanitarian law and human rights law.

and Part Two (Good practices relating to private military and security companies) lit. A(I.):

> 2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoners of war camps or places of internment of civilians in accordance with the Geneva Conventions.

[76] See Samantha Besson, 'International Human Rights and Political Equality—Some Implications for Global Democracy' in Eva Erman and Sofia Näsström (eds), *Equality in Transnational and Global Democracy* (Palgrave, 2014) 89–123; Samantha Besson, 'International Human Rights Law and Mirrors' (2018) 7(2) *ESIL Reflections*, https://esil-sedi.eu/wp-content/uploads/2018/04/ESIL-Reflection-Besson.pdf; Samantha Besson, 'L'égalité des Etats membres de l'Union européenne: un nouveau départ en droit international de l'organisation des Etats?' in Édouard Dubout (ed), *L'égalité des Etats membres de l'Union européenne* (Bruylant, 2022) 263–98.

Importantly, the same may be argued about IOs by virtue of their continuity to States *qua* primary public institutions. This is, however, provided those IOs have actually been instituted by their internal law as public institutions reinstituting their Member States' peoples. As argued earlier, however, this has not been the case so far but for a few exceptions. This explains why, but for those exceptions such as the EU especially and its fundamental rights regime, most IOs are not yet regarded as incurring obligations under international human rights law. In turn, they are not yet considered as limited by international human rights law in the delegation to private persons of the exercise of the 'functions' they draw from the conferred sovereign powers of their Member States.[77]

In light of the central place of international human rights obligations of States among the limits on privatisation, two questions need to be addressed in turn: the nature of States' human rights obligations in the event of privatisation, and their content.

First, the *nature of the relevant human rights obligations*. It is important to distinguish between two complementary, rather than alternative, tiers of State obligations and responsibility in case of breach of these obligations: first, the State's obligations and its responsibility through the attribution of the conduct of private persons; and second, its obligations of diligent control over these private persons and its responsibility for the negligence of its organs in exercising that control.[78]

Under international human rights law, first of all, States incur the same obligations to respect, protect and fulfil whether they act through their organs or, and this is important, through private persons whose conduct may subsequently be attributed to them. Indeed, in international responsibility law, as mentioned before, the conduct of such private persons can be attributed to States, for instance because States have authorised them to exercise elements of public authority or, otherwise, exercise effective control over them.[79] These obligations therefore cover the actions of State organs as well as those of private persons acting as agents on behalf of the State. The point

[77] See Besson (n 11); Besson and Martí, 'No Democratic Representation without Institution' (n 14).
[78] On the difference, see Samantha Besson, *Due Diligence in International Law* (Brill/Nijhoff, 2023) 144–6.
[79] See eg, Arts. 5 and 8 of the Articles on Responsibility of States for Internationally Wrongful Acts (n 45):

> Article 5. The conduct of a *person or entity which is not an organ of the State* under article 4 but which is *empowered by the law of that State to exercise elements of the governmental authority* shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance; Article 8. The conduct of a person or group of persons shall be considered an act of a State under international law if *the person or group of persons* is in fact acting on the *instructions of, or under the direction or control of, that State* in carrying out the conduct.

See also ILC, Commentaries of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (n 53) Art. 5(1), (5).

here is to prevent the State from invoking a delegation or conferral of authority to private persons to evade its human rights obligations.

What this means, in other words, is that the State is not only responsible for the breach of its positive obligations of prevention and diligent protection to protect human rights against their restrictions by a private person and for its negligence in monitoring them, as will become clear next. Indeed, in the event of delegation of the exercise or conferral of any element of public authority, the State also incurs the same obligations and, in case of breach of those obligations, the same responsibility as if it were acting through its own organs.[80]

Importantly, however, and secondly, besides its human rights obligations and responsibility by attribution in the event of privatisation, the State is also, of course, under additional positive obligations to prevent, protect and diligently remedy any human rights violations that this delegation or conferral to private parties may entail.[81] It must therefore act accordingly upstream of the delegation or conferral by establishing a legal framework, including through the enactment of private or criminal law obligations for these private parties, and then downstream by actively monitoring the private parties concerned and reacting to any shortcomings on their part, for instance by providing procedural and material remedies.

It is important to emphasise that international human rights law does not ground actual human rights obligations for the private persons exercising public authority by conferral or mere delegation. Indeed, the bearers of those obligations remain public institutions only. This is justified, as explained earlier, by the international human rights law-based status of the State as guarantor and protector of equal human rights.[82]

[80] This is underestimated by the Committee on Economic, Social and Cultural Rights (CESCR) in its *General comment No. 24 (2017) on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities,* Sixty-first session (10 August 2017), UN Doc. E/C.12/GC/24, which only focuses on the former kind of obligations and responsibility. See eg, para 21:

> The increased role and impact of private actors in traditionally public sectors, such as the health or education sector, pose new challenges for States parties in complying with their obligations under the Covenant. Privatization is not per se prohibited by the Covenant, even in areas such as the provision of water or electricity, education or health care where the role of the public sector has traditionally been strong. Private providers should, however, be subject to strict regulations that impose on them so-called "public service obligations": in the provision of water or electricity, this may include requirements concerning universality of coverage and continuity of service, pricing policies, quality requirements, and user participation. Similarly, private health-care providers should be prohibited from denying access to affordable and adequate services, treatments or information. For instance, where health practitioners are allowed to invoke conscientious objection to refuse to provide certain sexual and reproductive health services, including abortion, they should refer the women or girls seeking such services to another practitioner within reasonable geographical reach who is willing to provide such services.

[81] This applies whether the conditions of attribution of conduct by virtue of authorisation or effective control over those private persons mentioned before are fulfilled or not, provided the looser conditions of control required for the due diligence standard to apply are met. See Besson (n 78) 198–203.

[82] See Samantha Besson, 'The Bearers of Human Rights' Duties and Responsibilities for Human Rights—A Quiet (R)Evolution' (2015) 32(1) *Social Philosophy & Policy* 244.

True, some domestic legal orders do go further and actually vest private persons with direct human rights obligations in such cases.[83] This amounts to a confusion between the 'human rights obligations' of the State (to whom those private persons' conduct is attributed) and the 'responsibilities for human rights'[84] of private persons under international law. It is also problematic from the point of view of the respect for human rights.[85] It puts into question the very role of human rights in the international public law status of States. Indeed, it undermines the egalitarian guarantee of human rights referred to earlier and in particular what amounts to their necessary public institutional mediation.[86] To that extent, the blurring of public and private human rights obligations and the conflation between their public and private duty-bearers[87] actually contributes to the further erosion of the public/private distinction.

This leads to the second question introduced earlier: the *content of the State's human rights obligations applicable to privatisation*. Today, international human rights law grounds both a general positive obligation to protect human rights, and obligations specific to each right.

First and foremost, the general positive obligation to protect human rights is the obligation of every State to organise itself so to be able to respect the human rights of every person within its jurisdiction.[88] This obligation therefore places important limitations on the privatisation of a State's rights. This would be the case, for example, if a delegation of exercise or a conferral of

[83] See eg, Art. 35(2) of the Federal Constitution of the Swiss Confederation (18 April 1999), SR 101 (Upholding of fundamental rights): 'Whoever acts on behalf of the State is bound by fundamental rights and is under a duty to contribute to their implementation'.

[84] On the notion of complementary and non-directed 'responsibilities for human rights', see Besson (n 82).

[85] Importantly, the most recent version of the Draft Legally Binding Instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises actually draws that distinction. See UN Human Rights Council, *Draft Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises, Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights (OEIGWG)*. Text of the third revised draft legally binding instrument with textual proposals submitted by States during the seventh and the eighth sessions of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Fifty-fifth session (13 February 2024), UN Doc. A/HRC/55/59/Add.1 (updated, clean version), Art. 2:

> The purpose of this (Legally Binding Instrument) is: (a) To clarify and facilitate effective implementation of the *obligation* of States to respect, protect, fulfill and promote human rights in the context of business activities, particularly those of transnational character; (b) To clarify and ensure respect and fulfillment of the human rights *responsibilities* of business enterprises […]

[86] See Besson (n 82).

[87] See also Johns (n 61).

[88] See Samantha Besson, 'Extraterritoriality in International Human Rights Law: Back to the Jurisdictional Drawing Board' in Austin Parrish and Cedric Ryngaert (eds), *Research Handbook on Extraterritoriality in International Law* (Elgar, 2023) 269–91; Samantha Besson, 'The Extraterritoriality of the European Convention on Human Rights. Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' (2012) 25(4) *Leiden Journal of International Law* 857.

those rights to private persons were to deprive the State of its capacity to exercise its jurisdiction or to ensure the equality of its citizens.

From this general positive obligation of jurisdiction, one may derive a general positive obligation of 'publicness' on the part of the State.[89] It comes close to grounding a total limit or ban on the privatisation of the State's authority, were such a delegation or conferral to jeopardise the State's ability to adopt, implement and enforce the law. In short, then, effective equal human rights protection requires an effective sovereign State[90] and, by extension, effective sovereign public institutions under international law.

Regarding the additional specific obligations to respect, protect and fulfil specific human rights likely to be able to set limits on privatisation, second, they can have a very diverse content depending on the circumstances. One should mention both the obligations specific to particular rights, which can be restricted under certain conditions, and the intangible core of every human right, which, as its name suggests, must never be restricted and under any conditions. The former ground flexible limits on privatisation, while the latter grounds a total limit or ban on privatisation.

One should start, on the one hand, by exploring the potential of different obligations correlative to those specific rights.[91] In addition to the negative obligations to respect and thus refrain from violating these rights, the articulation between different complementary positive obligations, and especially between the obligations to protect and fulfil these rights, is key in this context.[92] Indeed, the consequences of privatisation are diffuse and the

[89] For a similar argument, see Benvenisti (n 15).

[90] See also Cristina Lafont, 'Sovereignty and the International Protection of Human Rights' (2015) 24 *Journal of Political Philosophy* 427.

[91] See David Birchall, 'Reconstructing State Obligations to Protect and Fulfil Socio-economic Rights in an Era of Marketisation' (2022) 71(1) *International and Comparative Law Quartely* 227; Aoife Nolan, 'Privatization and Economic and Social Rights' (2018) 40(4) *Human Rights Quarterly* 815. On education more specifically, see Jacqueline Mowbray, 'Is There a Human Right to Public Education? An Analysis of States' Obligations in Light of the Increasing Involvement of Private Actors in Education' (2020) 33 *Harvard Human Rights Journal* 121.

[92] This distinction and complementarity between obligations to protect and obligations to fulfill is actually underestimated by the CESCR in GC 24 (n 80) para 22:

> The Committee is particularly concerned that goods and services that are necessary for the enjoyment of basic economic, social and cultural rights may become less affordable as a result of such goods and services being provided by the private sector, or that quality may be sacrificed for the sake of increasing profits. The provision by private actors of goods and services essential for the enjoyment of Covenant rights should not lead the enjoyment of Covenant rights to be made conditional on the ability to pay, which would create new forms of socioeconomic segregation. The privatization of education illustrates such a risk, where private educational institutions lead to high-quality education being made a privilege affordable only to the wealthiest segments of society, or where such institutions are insufficiently regulated, providing a form of education that does not meet minimum educational standards while giving a convenient excuse for States parties not to discharge their own duties towards the fulfilment of the right to education. Nor should privatization result in excluding certain groups that historically have been marginalized, such as persons with disabilities. States thus retain at all times the obligation to regulate private actors to ensure

means of restraining them diverse as a result. An example of a positive obligation 'to protect' is the obligation to impose a ban on energy cuts on private service providers in case of failures to pay. As for positive obligations 'to fulfil', one might think of the introduction of a tariff shield on energy prices.

There is, on the other hand, an intangible core to every human right that cannot be restricted under any circumstances. To infringe this core would indeed undermine the fundamental equal status of the persons protected by each right.[93] Given the established discriminatory effects of certain privatisation policies in practice,[94] the intangible core makes it possible to impose a total ban on conferral or delegation whenever equality can no longer be guaranteed. By extension, and as a preventive measure, it also makes it possible to consider that a minimum public service must be guaranteed in all circumstances for the protection of each right and of all its right-holders equally.[95]

While the practice of post-war international human rights law was initially characterised by strong reservations, if not total agnosticism, towards requirements relating to the internal organisation of the State, and in particular regarding the definition of limits on privatisation, things have started to change. This may be observed in the fields of the right to water, the right to education, the right to food and the right to health. It is best exemplified by the positions held in by various Special Rapporteurs regarding those rights.[96]

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that the services they provide are accessible to all, are adequate, are regularly assessed in order to meet the changing needs of the public and are adapted to those needs. Since privatization of the delivery of goods or services essential to the enjoyment of Covenant rights may result in a lack of accountability, measures should be adopted to ensure the right of individuals to participate in assessing the adequacy of the provision of such goods and services.

[93] See Besson (n 67).

[94] See Mégret (n 1) 486, by reference to Alston (n 33) paras 35 and 82; and Kishore Singh, Special Rapporteur on the right to education, *Protecting the right to education against commercialization*, Twenty-ninth session (10 June 2015), UN Doc. A/HRC/29/30, para 63.

[95] See CESCR, GC 24 (n 80) para 21.

[96] See eg, Alston (n 33) para 67 ff.:

> 67. Procedural fixes have not worked precisely because privatization is a philosophy of governance rather than just a financing mechanism. A new strategy therefore needs to be focused first and foremost on basic values. Indeed, privatization's original proponents saw it as a question of values, albeit very different ones. Margaret Thatcher famously remarked that 'there is no such thing as society … There is no such thing as an entitlement, unless someone has first met an obligation'. 68. In response, the human rights community needs to reassert the centrality of concepts such as equality, society, the public interest and shared responsibilities. Although international law addresses primarily the rights of individuals, human rights are also clearly embedded within and inseparable from society and community. It is not accidental that the Universal Declaration of Human Rights: proclaims its relevance for 'every organ of society'; calls for 'society and the State' to protect the family; recognizes that everyone, as a member of society, has the right to social security; emphasizes everyone's 'duties to the community'; and contemplates limitations on rights only insofar as they meet "the just requirements of morality, public order and the general welfare in a democratic society".

A word of caution is in order, however. Indeed, international human rights law has itself been affected by the erosion of the public/private distinction. This has led to various critiques of the 'passivity' or even 'complicity' of human rights in the face of the market.[97] It is important to understand, therefore, that international human rights law will only be able to limit privatisation if it, as well, is thoroughly reinforced in such a way as to be able to protect the instituting dimension of human rights, and in particular the equality of human rights-holders.[98] This requires a clearer egalitarian interpretation of those rights. The largely untapped resources of comparative public law, including comparative human rights law,[99] should be explored in this respect. This is especially true of comparisons with non-Western legal traditions of the public.[100]

Conclusion

The end of the current cycle of the public/private distinction is an increasing concern for lawyers. International law that has gradually become a guarantor, but also a disruptor of that distinction is no exception in that regard.

As this article has argued, one may identify residual legal and institutional resources of international public law to mobilise against privatisation. It is the first time, indeed, in the history of the successive eclipses of the public/private distinction that the distinction has found itself dependent on two legal orders at the same time: the national and the international.

See also Léo Heller, Special Rapporteur on the human rights to safe drinking water and sanitation, *Human Rights and the Privatization of Water and Sanitation Services,* Seventy-fifth session (21 July 2020), UN Doc. A/75/208; Singh (n 94).

[97] See Samuel Moyn, 'A Powerless Companion: Human Rights in the Age of Neoliberalism' (2015) 77(4) *Law and Contemporary Problems* 147; Susan Marks, 'Four Human Rights Myths' in David Kinley, Wojciech Sadurski and Kevin Walton (eds), *Human Rights: Old Problems, New Possibilities* (Edward Elgar, 2013) 217–35; Samantha Besson and Milène Hauri, 'Les droits de l'Homme au service du marché? Critique et réforme du droit international et européen des droits de l'homme en vue d'un renouveau démocratique' (2020) *Annuaire suisse de droit européen* 427.

[98] See also Alston (n 33) para 69 ff.:

> 69. Whereas human rights law is premised upon the existence of a competent and benign State, privatization advocates assume the State to be incompetent and/or malign, while casting the private sector as efficient and socially responsible. 70. The human rights community needs to highlight the many reasons why government should be best placed to carry out community responsibilities. They include government's commitment to promoting substantive equality, its capacity to adopt rules that are rendered fair and equitable through processes of consultation and feedback, its embrace of systems of checks and balances designed to avoid capture by any particular group, its eschewal of personal financial profit for administrators, and its answerability for alleged human rights abuses. Under a privatization regime, these considerations are, for the most part, replaced by the single measure of economic efficiency, a concept that cannot possibly capture the range of objectives that those entrusted with promoting the public good should seek to achieve.

[99] See on the comparative law of statehood, see Besson (n 44); Samantha Besson, 'Comparative Law and Human Rights' in Mathias Reimann and Reinhard Zimmermann (eds), *Oxford Handbook of Comparative Law* (Oxford University Press, 2nd edn 2019) 1222–49.

[100] For one study of this kind in English, albeit limited to Western jurisdictions, see Catherine Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (Oxford University Press, 2007).

This two-tier guarantee is both a source of great danger and unprecedented protection. On the one hand, and as mentioned in the second and third sections of this article, the universal scope of international law has facilitated the erosion of the distinction even more rapidly than would otherwise have been the case. By turning it into international public law, indeed, it has exported and then magnified the in-built public-private hybridity of the domestic public law of European States and their IOs. On the other hand, however, international law could also, for that very same reason, halt that erosion through the reinterpretation of the international legal rights and obligations of public institutions identified in the last two sections of the article. This could in particular occur through the reinstitution of the same peoples as different publics by many public institutions of international public law at the same time, including States but also (universal and regional) IOs. In turn, articulating the corresponding continuity between the multiple public institutions of international law could provide an unprecedented opportunity to consolidate a truly inter-public legal status and protect the international (public) rule of law.

In case the proposed reinterpretations of the rights and obligations of States and other public institutions existing in minimal international public law were not to succeed in the curbing of privatisation, the proposed argument will not have been developed in vain. It could indeed help prepare the rediscovery of the public/private distinction and, arguably, its renewed legal reception one day in a few centuries ahead, thereby hopefully contributing to launching a new legal and institutional cycle for the distinction. This is, after all, what the glossators of Roman law did, undaunted, after rediscovering the public/private distinction in the twelfth century following its first long eclipse between the fifth and eleventh centuries. Their unfailing efforts at cultivating and reviving the distinction enabled its reintroduction in the sixteenth century and contributed, in their wake, to the emergence of what would become contemporary 'public' international law.

Disclosure statement

No potential conflict of interest was reported by the author(s).

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