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

*Melissa J. Durkee**

Imagine a future in which the U.S. government has closed the postal service, shuttered its administrative apparatus, and stopped funding education. Confirmation battles have dismantled the federal judiciary, with most adjudication now performed by private arbitrators. After years of erosion of public standards, corporate environmental and labor practices are now left to voluntary self-regulation and market pressures. Private military and security companies command and regulate a vast military infrastructure, executing contracts to meet U.S. intelligence and defense requirements. Prisons have been fully privatized. After losing faith in elections, the U.S. populace no longer insists on them. The country is administered by a small cadre of officials whose job mainly involves negotiating and monitoring contracts with the many private companies that run the shop.

The vision may be dystopian. Is it also illegal under international law?

This is the essential question Frédéric Mégret takes up in "Are There 'Inherently Sovereign Functions' in International Law?," an article recently published in the *American Journal of International Law*, and the subject of this symposium.[1] Mégret is concerned that the neoliberal trend toward creeping privatization seems to "hollow out the state,"[2] threatening human rights protections and perhaps international law itself. He asks whether international law requires that a core set of functions be performed by a public authority—the state—and whether it sets limits on what may be outsourced to private actors. In doing so, he embraces the idea that international law is engaged with sovereign states in the project of co-constitution—that international law has constructed "the very concept of sovereignty 'from without'"[3]—and may have something to say about what a sovereign state is, or must be.

As the contributions to this symposium illustrate, such a project could have a variety of starting points. Mégret's choice is to look at the norms enshrined in positive law and to reason inductively, building an account and taxonomy of inherently sovereign functions based on the international legal obligations states hold to each other and to their populations. The account acknowledges an array of important challenges: that, on its face, international law has been rather ambiguous or agnostic about the internal constitution of the state, especially the line between public and private. That, moreover, this line has historically been fluid: "there is almost no function that . . . has not historically been[] exercised by actors other than states."[4] Indeed, Mégret's first line of inquiry, which focuses on the horizontal obligations of the interstate system, does not offer a very thick account of what might be inherently sovereign. Perhaps states are required to maintain the "ability to delegate" governmental tasks,

* *Allen Post Professor of Law, Associate Dean for International Programs, and Director of the Dean Rusk International Law Center, University of Georgia School of Law, Athens, Georgia, United States.*

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

[2] *Id.* at 453.

[3] *Id.* at 460.

[4] *Id.* at 458.

since the Montevideo criteria require the capacity to govern. Perhaps there is something in the monopoly on the use of force, requiring, at least, that states hold on to the decision to wage war?[5] The analysis is striking for how little the interstate system seems to require of states.

Where Mégret's analysis gains real purchase is in the second line of inquiry, where he asks what might be derived from states' vertical obligations to their populations, specifically as enshrined in international human rights law. Here, despite the law's professed neutrality to governmental form, Mégret elicits the requirement that the state serve as the ultimate guarantor of human rights, providing implementation, supervisory, and remedial functions that enable it to serve that role. Although he acknowledges that other actors, specifically corporations, can be bound to respect human rights, it is states that must ensure their implementation. To do that, a state must have some minimum core and competence to act. Thus, in Mégret's account, it is human rights law that demands something recognizable as "statehood," as that law requires "a broad range of supervisory functions that implicate the very democratic apparatus of the state."[6]

This symposium includes five contributions by leading authorities in law, political science, and political theory. The responses challenge, affirm, supplement, and reframe the project of defining what may lie in the mandatory core of sovereign statehood, offering intriguing reflections on, for example, what it means for a state to "govern," what is the essence of a "public" realm, whether international law demands publicness of other institutions than the state, and what is at the normative core of these inquiries.

Eyal Benvenisti of Cambridge University and the Hebrew University of Jerusalem suggests that Mégret's argument could be read to articulate a "human right to the state."[7] Benvenisti would situate this right within a tradition that conceives of state sovereignty as afforded for the purpose of facilitating responsibility to individuals. The territorial rootedness of sovereignty encourages this. States cannot outsource the task of governing to territorially unmoored "private corporations that can effortlessly relocate once they are done plundering the natural resources of areas they exploit, having immiserated the local population." Benvenisti would elaborate this human right to the state by invoking the normative grounds of human agency and dignity, which suggest a state's obligation to protect individual and collective self-determination and to maintain the "publicness" of governance. Finally, the "publicness" of international organizations also requires shoring up in the face of insulating immunities and corrosive pressures by private interests.

Samantha Besson of the Collège de France and the University of Fribourg also affirms the importance of publicness at the international level. She would shift the analysis beyond a concern with states and their functions altogether, in favor of a focus on "the institutional dimension of international public law."[8] She explains that "[c]aring for the publicness of international law" requires more than understanding the legality of privatization under that law. Instead, it requires a more "foundational" understanding of how the international public represents itself through law and legal institutions, which include both states and international organizations, among others. In fact, focusing on *functions* entrenches the kind of problem Mégret's analysis is meant to address: it encourages thinking about functions as interchangeable, "outsourceable," and of equal value. It encourages thinking of private functions as "publicizable," and the international public as dispensable. Addressing the privatization concern motivating the article requires dropping both functionalism and the identification of the public with the state in favor of an approach that seeks to understand the full "continuum" of institutions by which the international public orders itself and is ordered.

[5] *Id.* at 477.

[6] *Id.* at 491.

[7] Eyal Benvenisti, *Are There Any Inherently Public Functions for International Law?*, 115 AJIL UNBOUND 302 (2021).

[8] Samantha Besson, *The International Public: A Farewell to Functions in International Law*, 115 AJIL UNBOUND 307 (2021).

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Jean Cohen of Columbia University also dispenses with functionalism, outlining the "normative basis of the ideas of sovereignty and publicness" that undergird Mégret's analysis.[9] Cohen observes that democracy itself cannot be derived through Mégret's method, from human rights protections, but she argues that "democracy and human rights do mutually co-constitute each other in the long run." This is because democratic deliberation "makes those who are subject to the law its authors" and defines the nature and scope of rights protections. Cohen's normatively grounded approach affirms the "intrinsic value of publicness of public power in connection with democratically legitimate sovereignty." In doing so it emphasizes accountability and representativeness and, fundamentally, the need for democratic societies to maintain the capacity to self-govern—including the capacity to regulate private corporate self-regulators—in order to foster the common good.

Nigel White of the University of Nottingham considers corporate self-regulation of fundamental concern in the context of regulation of the use of force.[10] White argues that the monopoly on use of force requires states to do more than hold on to the decision to wage war; they must also "regulate its exercise through public laws adopted within national and international constitutional frameworks." White's premise is that sovereignty requires "supreme authority" domestically and a capacity to act internationally. Outsourcing too much authority to private military and security companies (PMSCs) undermines both of these aspects. To illustrate the stakes, White reviews the United Kingdom's decision to allow PMSCs to self-regulate, which "effectively freed PMSCs from the constraints of public law and public international law," with detrimental consequences for the United Kingdom's capacity to meet its international legal obligations. In the end, White supports Mégret's conclusion that even if certain functions related to use of force can legitimately be outsourced, "the specific supervisory and remedial features of such a regime . . . must [themselves] be public."[11]

Sooner or later, everything old is new again. Daniel Lee of the University of California, Berkeley, vividly illustrates that Mégret's concerns about the transfer of public functions to unaccountable, profit-seeking entities were foreshadowed in the pre-Westphalian era.[12] He focuses on the sixteenth century theorist Jean Bodin, who built a theory of sovereign exclusivity by identifying "which *marques* [of sovereignty] are not shared in common," with non-sovereigns like princes or feudal lords, finding eight such "marques," or rights, which have at their core the fundamental right of legislative authority. In Bodin's analysis, sovereign rights "cannot be divided or alienated away" without the loss of sovereignty itself, though the sovereign can delegate. As Lee points out, Bodin's motivation for developing this analysis was not so remote from the concerns of our time: "[t]he cash-strapped, debt-burdened Valois monarchy devised sketchy tactics to raise revenue, one of which was the lucrative practice of the . . . sale of public offices to private individuals." Sovereignty is not, Bodin wanted to affirm, "a vendible asset." The analysis still resonates in light of Mégret's current concerns.

Something more is required of our governing institutions than the dystopian contractual minimum. This affirmation emerges as a common ground for the contributions to this symposium, as well as the article that precipitated it. All suggest a more robust vision, whether characterized as the authority to facilitate and implement rights, individual and collective self-determination, representation of a global public, democratic deliberation and accountability, regulatory authority, or legislative activity. Taken as a whole, the symposium invites further reflection on how to elicit the core requirements of governance, how to characterize them, and why they matter.

[9] Jean L. Cohen, *The Democratic Construction of Inherently Sovereign Functions*, 115 AJIL UNBOUND 312 (2021).

[10] Nigel D. White, *Outsourcing Military and Security Functions*, 115 AJIL UNBOUND 317 (2021).

[11] Mégret, *supra* note 1, at 488.

[12] Daniel Lee, *Defining the Rights of Sovereignty*, 115 AJIL UNBOUND 322 (2021).

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