Human rights elephants in an era of globalisation : commodification, crimmigration, and human rights in confinement

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5 Widening the net
Towards private human rights obligations?

5.1 INTRODUCTION

In the present and next chapters, attention will be shifted towards a second development of globalisation that may endanger the human rights elephant: that of commodification. Chapter 2 already outlined how commodification challenges accountability under, and the effectiveness and legitimacy of, international human rights law. Here, analysis will focus upon the extent to which, and the way in which, international human rights law has been able to remain both veracious and resilient in the face of such commodification challenges.

This analysis will be two-pronged as it focuses on two distinct yet interrelated aspects: that of private human rights responsibility on the one hand and that of international state responsibility on the other. In theory, both of these vehicles could provide ample ground to accommodate contemporary developments of commodification and to accordingly make international human rights law, at least in the books, 'commodification-proof'. As will become apparent, however, in practice the fundamental tenet of territorial states as primary duty bearers has limited the way in which international human rights law can be, and has been, adapted to commodification realities. Private human rights obligations are addressed in the present chapter, whereas states' human rights obligations will be addressed in chapters 6 and 7. Like the previous chapters, each of these chapters denotes macro-level trends before applying the applicable framework to the case study contexts.[1] In turn, a brief concluding intermezzo reflects on the main findings of these chapters by taking a closer look at their further implications for RPC Nauru and PI Norgerhaven.

5.2 PRIVATE OBLIGATIONS: BETWEEN RESILIENCE AND VERACITY

Chapter 2 has outlined how private parties have progressively become involved in the governance of specific confinement contexts. Such progressive importance of non-state actors in the global economy, in combination with the pervas-

1 In the present chapter, analysis at the case study level will limit itself to RPC Nauru as no private actors are involved in the core governance framework of PI Norgerhaven.

ive privatisation of core functions traditionally regarded as belonging to the state and the significant impact of non-state actors on a range of individual freedoms and liberties, has featured as one of the main arguments amongst commentators to extend international human rights obligations horizontally to private actors.[2] Whilst such calls have been around since the inception of international human rights law, they have prominently come to the fore over the past decades now that the impact of non-state actors has become particularly undeniable.[3] In contemporary global economy, some multinationals for instance have a far larger economic power than small sovereign states: various multinational corporations, also those operating on the confinement markets, employ more people and have larger revenues than some countries have inhabitants and gross domestic products.

Many authors have claimed that rethinking the current system and entrenching private human rights obligations is therefore a promising strategy – or even a dire necessity – in order to guarantee the protection of human rights norms in the face of ongoing neoliberalism.[4] According to these authors, the time has come for the development and imposition of mandatory human rights obligations for private actors, in particular for transnational corporations, as a resilient effort in the face of commodification developments.[5] As Alston for example maintained in 2005,

> "[t]oday […] at least a subset of non-state actors has suddenly become a force to be reckoned with and one which demands to be factored into the overall equation in a far more explicit and direct way than has been the case to date. As a result, the international human rights regime's aspiration to ensure the accountability of all major actors will be severely compromised in the years ahead if it does not succeed in devising a considerably more effective framework than currently exists in order to take adequate account of the roles played by some non-state actors".[6]

Such arguments are frequently of a normative nature: they are based on the perspective that human rights entitlements should be universal in order to protect human dignity against infringements originating from any actor, be it a public or private one. Consider, for example, the focus on the *aspiration* of the human rights regime in the quote by Alston above. Vandenhole, Türkelli and Hammonds likewise consider that "human rights (law) is about correcting power, first and foremost for the protection of the most vulnerable and

2 Alston, 2005; A. Buchanan, 2013, pp. 283–284; Grear & Weston, 2015; Karavias, 2013, p. 20; Kinley & Tadaki, 2004; Kobrin, 2009; Tomuschat, 2014; Vandenhole, 2015; Vandenhole & Van Genugten, 2015.

3 Karavias, 2013, p. 21; Knox, 2008, p. 1; Vandenhole & Van Genugten, 2015, p. 1.

4 Černič, 2015; Clapham, 2006; Grear & Weston, 2015; Jägers, 2002; Kinley & Tadaki, 2004; Kobrin, 2009; S. R. Ratner, 2001; Stinnett, 2005; Vandenhole, Türkelli, & Hammonds, 2014; Vandenhole & Van Genugten, 2015.

5 Grear & Weston, 2015, p. 24; Kobrin, 2009.

6 Alston, 2005, pp. 5–6.

marginalised […]. [T]he decisive criterion for singling out actors as human rights duty-bearers is [thus] whether they exercise power or are in a position to do so".[7] Kinley and Tadaki argue that there is an urgent need to rethink human rights law's concepts and structures in order to focus on the effectiveness of protection rather than the entities bound by positive law.[8] In her book with the telling title 'Corporate Human Rights Obligations: In Search of Accountability', Jägers concludes that

> "[h]uman rights aim to protect the dignity of each human being. *In order to effectively satisfy this objective* it is imperative that human rights provisions are interpreted in conformity with the present-day circumstances. […] It is necessary to apply a broad interpretation of human rights provisions encompassing private action, *if human rights law is to be effective* in the present-day circumstances where human rights protection is frequently dependant on private action".[9]

Such scholarship applies what can be called a functional approach to human rights; it is not simply pinpointing accountability but *in search* of it. It is often focussing on the *lex ferenda:* extending human rights to private actors is outlined to be promising as it would more effectively protect the objectives of, and normative claims embedded in, international human rights law.[10] As such, these authors favour a resilient approach of human rights law vis-à-vis commodification developments in order to stay veracious to its fundamental tenet of protection for all.

This is of course not to say that such scholars disregard the legal dimension of international human rights law: to the contrary, they argue that at its core there are no fundamental legal problems with conceptualising direct obligations for non-state actors, either because the human rights law system would already allow for them or because the system allows for amendments to that effect.[11] McBeth for example asserts that "[t]he need for private human rights obligations can be deduced both from the practical necessity [...] and by logical

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7 Vandenhole et al., 2014, p. 1036.

8 Kinley & Tadaki, 2004, p. 1021.

9 Jägers, 2002, p. 256 (emphasis added).

10 Vandenhole and Van Genugten maintain, for example, that "[u]nderstanding the relative strength of human rights obligations incumbent on States may help consider how the emerging regime of human rights obligations for other actors *should* be further developed": Vandenhole & Van Genugten, 2015, p. 3 (emphasis added). Human rights obligations for private parties would in this sense represent "the beginning of a more global and coherent response to new challenges to human dignity": S. R. Ratner, 2001, p. 545.

11 See e.g. A. Buchanan, 2013, pp. 283–284; Černič, 2015; Clapham, 2006, pp. 266–270; Jägers, 2002; Kinley & Tadaki, 2004; S. R. Ratner, 2001). For an alternative perspective, see Karavias, who argues that if corporations are both obligors and right holders under international human rights law, "the structure of performance of human rights law could be fundamentally altered" and would at times require balancing acts between the rights of individuals (vis-à-vis the corporation) and the rights of corporations (vis-à-vis the State): Karavias, 2013, pp. 196–197. See also Ronen, 2013.

implication from the expression of rights as an entitlement to be respected by all".[12] Hence, for this particular strand of scholarship, the authoritativeness of the human rights law framework appears not to be at stake – although the system is in need of refinement or reinterpretation. In making such arguments, authors frequently don't shy away from assuming the moral high ground: Černič, for instance, argues that "*[i]t is uncontentious* that international law *should* regulate corporations given their powerful position in the global economy and countless allegations that they violate human rights".[13]

Nevertheless, such arguments *de lege ferenda* have been largely unsuccessful in effectively challenging the dominant state-centric paradigm of international human rights law *de lege lata*.[14] Indeed, on the plane of positive law "little, if anything has materialised".[15] The call for human rights obligations for private actors has, as Alston reports, been unable to change the majority of international lawyers' reluctance to fundamentally reconsider the central role of the state in international law.[16] Of particular interest in this regard is the work of Karavias, who in a detailed account explains why international human rights law currently does not give rise to corporate obligations.[17] Applying both a textual and a dynamic approach to international human rights treaties, he indeed concludes that, although the somewhat abstract formulation of international human rights law has led some scholars to argue otherwise, international human rights treaties do not directly regulate corporate conduct.[18] As such, international human rights law has largely stayed veracious to its fundamental tenet that human rights obligations are in principle obligations of the (territorial) state.

The foregoing is however not to say that no development towards corporate human rights obligations, inspired by calls for resilience, can be discerned at all. To the contrary, norms have progressively been developed by international and regional organisations, civil society, and the corporate world itself in order

12 McBeth, 2004, p. 144. In his article, McBeth however appears to straddle the boundary between what is and what ought to be, therewith conflating normative considerations with aspects of positive law. On the one hand, he outlines a *need* for private human rights obligations and details how such obligations would not be incompatible with the international human rights law system per se. On the other hand, he implies that private human rights obligations already exist: he dedicates an entire section to discussing "the question of the content of the human rights obligations of private entities, particularly the private providers of social services" and he contends *inter alia* that "the conclusion that private entities have a negative obligation of non-violation of the human rights of others in the course of their ordinary activities is self-evident": McBeth, 2004, p. 146.

13 Černič, 2015, p. 75 (emphasis added).

14 Hallo de Wolf, 2011, p. 121; Karavias, 2013; Ronen, 2013.

15 Tomuschat, 2014, p. 320.

16 Alston, 2005, p. 21.

17 Karavias, 2013.

18 Karavias, 2013, p. 67. Moreover, in relation to customary international human rights law, he concludes that the notion that corporations are bound by human rights law is not supported by either state practice or *opinio juris*: Karavias, 2013, pp. 73–83.

to enhance corporate social responsibility ('CSR').[19] Since the 1970s, the UN has for example attempted to regulate corporate activities in soft law instruments, although initial attempts failed due to a lack of consensus.[20] Finally, in 2011, the UN Human Rights Council adopted the Guiding Principles on Business and Human Rights ('UNGP') on the basis of a 2008 Report by Special Representative John Ruggie.[21] In his report, Ruggie proposed a three-pillar framework of human rights in a business context, consisting of responsibilities to protect, respect, and remedy.[22] According to the report, human rights in business contexts should thus comprise (i) the state's responsibility to protect individuals against third-party human rights abuses, (ii) the corporate responsibility to respect human rights, and (iii) effective access to remedies for victims of human rights violations.[23]

As Ruggie admits, however, the second pillar is based on soft law instruments and corporate practice instead of on 'hard law'.[24] The UNGP are henceforth not legally binding.[25] Whereas corporate responsibility has indeed not yet been regulated in instruments providing legally binding obligations, various soft law human rights instruments have elaborated upon corporate human rights norms. As a prime example, the UDHR stipulates in its Preamble that

> "the General Assembly proclaimed the Declaration as a common standard of achievement for all peoples and all nations, to the end that *every individual and every organ of society* […] shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance" (emphasis added).

Article 29 of the UDHR furthermore specifies that everyone has duties to the community, whereas Article 30 of the UDHR provides that "[n]othing in this Declaration may be interpreted as implying *for any State, group or person* any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein" (emphasis added). Accord-

19 Hallo de Wolf, 2011, p. 113 ff.; Nolan, 2016b; Van den Herik & Černič, 2010, p. 734 ff.; Weissbrodt & Kruger, 2003.

20 In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights approved the '*Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights*', yet these Norms were eventually not adopted by the then UN Commission on Human Rights: Černič, 2015, p. 71; Van den Herik & Černič, 2010; Weissbrodt, 2014, p. 136.

21 Ruggie, 2008.

22 Ruggie, 2008. See also Weissbrodt, 2014.

23 Ruggie, 2008, p. 4.

24 Ruggie, 2008, p. 8.

25 A. Buchanan, 2013, p. 284; Hallo de Wolf, 2011, pp. 118–121; Weissbrodt, 2014.

ing to some, the UDHR hence also applies to corporations.[26] Van den Herik and Černič rightfully point out, however, that the legal significance of the UDHR in this regard is limited because, first, the private duties that might be argued to be encapsulated in the UDHR are not included in the ICCPR or ICESCR as the UDHR's binding equivalent, and, secondly, only the Preamble of the UDHR makes reference to individual duties vis-à-vis other individuals.[27] Consequently, "[a]t best, these provisions and references may serve as a spring board towards a new conception of human rights in which commitments of corporations are more clearly articulated".[28] Likewise, Kinley and Tadaki argue that "[i]n the absence of binding effects, […] the duties that the UDHR imposes on TNCs may amount to ethical duties at best".[29] Therefore, at least in a legal sense, the UDHR arguably provides only a very fragile basis for developing an individual duties approach to human rights.[30]

Other forms of soft law likewise have limited impact in terms of accountability. The voluntary guidelines, declarations, and codes aimed at regulating corporate activities as developed by amongst others the Organization of Economic Cooperation and Development (OECD) and the International Labor Organization (ILO) are not addressed to corporations directly and are not in any case binding on signatory states.[31] As a result, the implementation mechanisms of the OECD's Guidelines for Multinational Enterprises ('OECD Guidelines') and the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy ('ILO Declaration') – which are in fact the only two soft law instruments containing implementation mechanisms that enable scrutiny of corporate conduct – do not function in a judicial or quasi-judicial way and cannot be considered to intrusively deal with either state or corporate behaviour.[32] Even more so, soft law instruments with no independent monitoring and enforcement mechanisms – such as the UN Global Compact launched in 2000 ('the UN Global Compact'), which encourages corporations to adhere to nine core principles relating to respect for human rights – at the end of the day are "little more than [instruments] of rhetoric".[33] Again, such

26 As Henkin for example claims, the Preamble of the UDHR arguably makes clear that it "excludes no one, no company, no market, no cyberspace. The Universal Declaration applies to them all": Henkin, 1999, p. 25. See also Kinley & Tadaki, 2004, pp. 948–949; Van den Herik & Černič, 2010, p. 734.

27 Van den Herik & Černič, 2010, p. 734.

28 Van den Herik & Černič, 2010, p. 734.

29 Kinley & Tadaki, 2004, p. 949.

30 See similarly Rodley, 1993, p. 307.

31 Kinley & Tadaki, 2004, p. 949.

32 See similarly Kinley & Tadaki, 2004, pp. 949–950. In relation to the OECD Guidelines, a complaint procedure was introduced in 2000 that enables NGOs to bring a complaint against a multinational enterprise in relation to alleged breaches of the OECD Guidelines to a National Contact Point (NCP) as set up in OECD member and adhering states: Castelo Branco & Delgado, 2012, p. 359; Nolan, 2016b, p. 39.

33 Kinley & Tadaki, 2004, p. 951.

instruments are stepping stones towards awareness about corporate responsibility – and thus pursue resilience – yet arguably do not constitute more than that – as a result of a strong veracity to the fundamental tenet that human rights obligations are presumed to be state responsibilities.[34] Attempting to adhere to both the legal and the moral side of the Janus-face, soft law instruments thus to a certain extent seem to be situated between a rock and a hard place in trying to simultaneously showcase veracity and resilience.

In addition to soft law norms, the corporate world itself has developed and adopted a number of voluntary human rights initiatives to strengthen CSR. This includes both private initiatives urging corporations operating in certain geographical areas or specific branches to comply with international human rights standards and the development and adaptation of internal codes of conduct by corporations themselves.[35] Examples of the former include the Sullivan Principles (relating to corporations operating in apartheid South Africa), the MacBride Principles (relating to Northern Ireland), the Slepak Principles (relating to the former Soviet Union), the Miller Principles (relating to China and Tibet), the Macquiladora Standards of Conduct (relating to the US-Mexico border), the Valdez Principles (relating to the environment), and the US Apparel Industry Partnership's Workplace Code of Conduct (relating to the garment industry).[36] In relation to corporations' internal codes of conduct, many corporations nowadays have established human rights policy statements and codes of conduct.[37] Already in 2004, Kinley and Tadaki pointed out that that it would be difficult to find a major corporation that does not at least make *some* claim about abiding by a human rights-inspired code of conduct.[38] Such volitional endeavours have been explained in terms of the commercial interests of corporations and the increasing exposure of their social impact.[39] The instrumental value of the 'court of public opinion' that Ruggie prominently discussed in his report should hence not be underestimated in the development of internal corporate norms.[40] These developments should however again be seen as stepping stones rather than bases for

34 Kinley & Tadaki, 2004, p. 951. In his report, Ruggie recognises this weak legal standing of soft law instruments that form the basis of the corporate responsibility to respect whilst simultaneously maintaining that these instruments may nevertheless have effects in other ways: as he nuances, "[f]ailure to meet this responsibility can subject companies to the courts of public opinion – comprising employees, communities, consumers, civil society, as well as investors – and *occasionally* to charges in actual courts": Ruggie, 2008, p. 16 (emphasis added). On the role and value of these 'courts of public opinion', see in particular also Wheeler, 2015. On the role of shareholders in influencing company performance on human rights, see Coles, 2003; R. Sullivan & Seppala, 2003, pp. 110–112.

35 Hallo de Wolf, 2011, pp. 113–114; Kinley & Tadaki, 2004, p. 954; Weissbrodt, 2014, p. 136.

36 Kinley & Tadaki, 2004, p. 954; McCrudden, 1999, p. 168; Nicolet, 2016, pp. 556–557.

37 Černič, 2013, pp. 24–25; Van den Herik & Černič, 2010, p. 737.

38 Kinley & Tadaki, 2004, p. 953.

39 Coles, 2003; Kinley & Tadaki, 2004, p. 953; R. Sullivan & Seppala, 2003, pp. 110–112.

40 Ruggie, 2008, p. 16; Wheeler, 2015.

actual legal responsibility: private initiatives referencing human rights responsibility are generally not specific enough to induce legal responsibility.[41] They are, moreover, voluntary and self-regulatory in nature and as a result generally have a limited capacity to genuinely pressure corporations.[42] As such, whilst resilient efforts may attempt to rely on them in order to mitigate the impact of commodification, ultimately they do not necessarily provide the most effective pathways towards protection.

Whilst a variety of tactics of resilience to enhance corporate obligations have hence been developed over the past decades, "[t]he actual legal cover these initiatives provide is meager or non-existent. The […] rudiments of an international legal framework may be discernable, but the legal content of the law is almost wholly absent".[43] Whilst it is true that the first contours provided by soft law standards and voluntary codes of conduct may over time evolve into a solid framework of positive law through a bottom-up approach to international human rights law,[44] provided that such framework can overcome issues related to the need for veracity vis-à-vis the fundamental tenet of territorial states as primary duty-bearers, such development is still in its infancy.[45] Arguably, the UN intergovernmental working group's *'Legally Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises'*, of which the 'zero draft' was released in July 2018, comes closest to a binding regulation of private human rights obligations yet is far from completion.[46] Moreover, fundamental debates on whether international human rights instruments *should* create legal obligations for corporations in the first place, and if so, whether initiatives should address such issue through the vehicle of existing instruments, new regimes, or mere consensus and cooperation with the corporate world itself are in full swing.[47] As previously outlined, some scholars are sceptical about current approaches and advocate for stronger regulation of corporations' human rights impact, for "[i]n practice, if not in theory, too many of them currently escape the net cast by international human rights norms and institutional arrangements".[48] Others, on the other hand, fundamentally disagree, arguing that incorporating private human rights obligations in many cases would not be effective and might even cause serious damage to the

41 Černič, 2013, pp. 24–25; Van den Herik & Černič, 2010, p. 737.
42 Černič, 2013, p. 25; Kamatali, 2012, pp. 149–150; Kinley & Tadaki, 2004, pp. 955–956.
43 Kinley & Tadaki, 2004, p. 948.
44 Kinley & Tadaki, 2004, pp. 958–960; Muchlinski, 2003, p. 50.
45 The initiatives so far "do not have more than moral value": Hallo de Wolf, 2011, p. 121.
46 This zero draft was adopted four years after the UN Human Rights Council adopted Resolution A/HRC/RES/26/9 that called for the start of negotiations on a binding international treaty on businesses and human rights. The zero draft is available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf (last accessed 30 May 2019). See also Correa, 2016.
47 Kamatali, 2012; Weissbrodt, 2014, p. 136; Weissbrodt & Kruger, 2003, p. 914.
48 Alston, 2005, p. 6.

system of human rights law as a whole.[49] This debate reflects the larger paradox of showing resilience and veracity at the same time, for accommodation of commodification in the international human rights law system would require that the tenet of territorial state obligations is bent far enough without breaking it, which at times may seem like an infeasible undertaking.

It is important to mention that so far, this section has focussed primarily on *corporate* human rights obligations. This niche has been the predominant focal point of scholarship on private human rights obligations, yet one should not forget that other private actors may likewise have a significant impact on the enjoyment of human rights, including in the field of confinement. As has been outlined in chapter 2, this includes actors that are not typically associated with human rights abuse in the first place, such as NGOs, charities, and churches.[50] These actors are often framed as champions and defenders of human rights and as catalysators of change.[51] They have occasionally even been described as "sources of justice and democracy".[52] As likewise previously elaborated upon, however, non-profits are not necessarily motivated by altruism, do not support rehabilitative ethics per se, and cannot be unconditionally trusted to do the right thing, whilst their charitable image legitimises their existence and involvement in governance networks including in realms of confinement.[53] Their self-standing responsibility should, hence, not be neglected in the debate on private human rights obligations, particularly where they exercise power with a significant bearing on the enjoyment of human rights. There indeed seems no reason to *a priori* distinguish for-profit organisations from not-for-profit ones when discussing the existence, scope, and desirability of private human rights obligations either *de lege lata* or *de lege ferenda*.

5.3 'POSITIVE OBLIGATIONS' AND 'HORIZONTAL APPLICATION' AS EFFECTIVE RESILIENT EFFORTS?

Instead of relying on direct private human rights obligations, various scholars have turned to the doctrine of 'positive obligations' as a more effective form of resilience – at least in the short-run – to effectuate human rights protection in commodified settings involving private actors. According to some, positive obligations indeed constitute a panacea in that they would provide for an alternative and more effective pathway to achieve human rights compliance. This idea is based on the horizontal application (or *Drittwirkung*) of human

49 Knox, 2008. See also Hannum, 2016, p. 431.
50 Armstrong, 2002, p. 345.
51 See for example Guay, Doh, & Sinclair, 2004; Kobrin, 2009; Van Tuijl, 1999.
52 Van Tuijl, 1999.
53 Armstrong, 2002; Galaskiewicz, 1985, p. 297.

rights obligations: such obligations do not only protect individuals against the exercise of state power, but also require the state to provide protection against horizontal interferences.[54] In this sense, it is no longer sufficient that a state does not violate human rights norms *itself*: it should also act as a guarantor of such norms by regulating private conduct as a potential source of horizontal interference.[55] This dual role is reflected by the dichotomous notions of 'negative' and 'positive' human rights obligations that are linked to all substantive human rights norms, as the introductory chapter has already explained.

According to some, horizontal effect "constitutes a departure from the traditional approach that human rights are held by the individual exclusively against the State".[56] In this regard it has been argued that "support for the hypothesis of the *Drittwirkung* of international human rights law can be inferred from the nature of human rights and from the general provisions of the human rights treaties".[57] Thus, in light of the object and purpose of international human rights law, codified human rights norms could arguably be applied to private actors such as corporations.[58] If this happens to be true, a distinct set of private human rights obligations is no longer strictly necessary: private actors could be held responsible for their conduct under the existing norms. At the same time, however, such an interpretation is – except for a single exception that will be discussed below – *de lege ferenda* at best: the horizontal effect of human rights is generally understood as being indirect (or '*mittelbare Drittwirkung'*), meaning that human rights norms can regulate the acts of private parties but that states ultimately remain responsible for the violation.[59] In other words, the emerging doctrine of positive human rights obligations obliges states to regulate corporate conduct domestically in order to guarantee and foster the enjoyment of human rights by those within its jurisdiction, yet such positive obligations do not, as Karavias emphasises, change the nature of the system of responsibility under international human rights law given that the horizontal application of human rights through the notion of positive obligations is "not direct, in the sense that corporations do not emerge as human rights addressees".[60] Hallo de Wolf clarifies that such

54 Karavias, 2013, pp. 57–58.
55 Karavias, 2013, p. 58; Van Berlo, 2017b, p. 9.
56 Jägers, 2002, p. 36.
57 Jägers, 2002, p. 44.
58 Jägers, 2002, p. 247.
59 Hallo de Wolf, 2011, p. 192; Jägers, 2002, p. 247; Knox, 2008, p. 47.
60 Karavias, 2013, p. 67. This finding is corroborated by General Comment 31 of the HRCee, which outlines that the obligations enshrined in the ICCPR "are binding on States [Parties] and do not, as such, have direct horizontal effect as a matter of international law. The Covenant cannot be viewed as a substitute for domestic criminal or civil law. However the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would

lack of direct *Drittwirkung* means that private parties are not recognised as direct bearers of human rights obligations either substantially or procedurally.[61] It is thus true that horizontal application through positive obligations may prove to be a promising strategy in the face of commodification developments – yet *not* because it would turn corporations or other private actors into addressees of international human rights norms, but because it has the potential of indirectly affecting corporate conduct through the scope of state obligations.[62] The system currently in place is hence not necessarily ill-placed to affect private behaviour, yet does not turn corporations into direct adressees of international human rights law. Consequently, *mittelbare Drittwirkung* of human rights via the notion of positive obligations may be regarded as a somewhat resilient effort to accommodate commodification whilst staying true to the fundamental tenet of territorial state responsibility.

An important exception to this rule is the Charter of Fundamental Rights of the European Union ('CFREU'). The CFREU became legally binding on the 1st of December 2009 when the Treaty of Lisbon entered into force and enshrines political, social, and economic rights for citizens and residents of the European Union (EU). It obliges EU institutions and member states to act and legislate in consistency with such rights. The Court of Justice of the European Union ('CJEU') has specifically dealt with the question of direct horizontal application of the CFREU. In *Association de médiation sociale v Union locale des syndicats CGT and Others* (the '*AMS*' case), the CJEU explicitly questioned whether the Charter can be applicable to disputes between private individuals.[63] This question was not completely novel: in *Mangold* and *Kücükdeveci*, the Court had previously affirmed that the principle of non-discrimination based on age as enshrined in Article 21(1) CFREU is a general principle of Union law that applies to disputes between private individuals.[64] Nevertheless, various authors argued that the CFREU had no direct horizontal application given that Article 51(1) of the Charter states that the provisions of the Charter "are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are

impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities." See HRCee, *General Comment no. 31,* UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), 26 May 2004, para. 8.

61 Hallo de Wolf, 2011, pp. 185–195.

62 See also Van den Herik & Černič, 2010, pp. 729–733.

63 CJEU, *Association de médiation sociale v Union locale des syndicats CGT and Others*, 15 January 2014, Case C-176/12.

64 CJEU, *Mangold v. Helm*, 22 November 2005,Case C-144/04; CJEU, *Kücükdeveci v. Swedex*, 19 January 2010, Case C-555/07.

implementing Union law".[65] Since private individuals are not mentioned in this provision, various authors concluded that no direct horizontal application is envisaged by the Charter.[66]

The CJEU considered in *AMS*, however, that "the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law".[67] Thus, the CFREU may apply directly in a horizontal dispute where such dispute is governed by EU law. In *AMS*, this was the case since the dispute concerned national legislation that was adopted to implement an EU Directive.[68] As Van der Hulle aptly analyses, the applicability of the Charter is henceforth not determined by the *nature of the legal relationship* between parties but rather by the determination whether the case falls within the *ambit of EU law*.[69] Nevertheless, the Court in *AMS* also reiterates that individuals cannot rely on all provisions of the Charter in a horizontal dispute: instead, they can only rely on those provisions that "suffice to confer on individuals a right which they may invoke as such".[70] This has consequently become the appropriate test for horizontal effect under the CFREU.[71] Ultimately, whether a provision has direct horizontal effect depends on the wording of the specific provision involved and the meaning provided to it.[72] This seems to correlate with the distinction between *rights* and *principles* expressed in Article 51(1) of the Charter.[73] It indeed seems to be the case that *rights* may have direct horizontal effect whereas *principles* – that allow courts to only test the legislative and implementation acts by which such principles are applied –[74] do not.[75] To complicate the determination of direct horizontal effect, however, the charter itself does not detail which provision constitute rights and which constitute principles.[76] Frantziou therefore rightfully criticizes the lack of clear standards and criteria: the approach taken may ultimate-

65 Article 51(1) CFREU.

66 See in this regard Heerma van Voss, 2014, p. 119; Van der Hulle, 2014, pp. 563–564. See also Emaus, 2015, pp. 71–72.

67 CJEU, *AMS*, para. 42.

68 CJEU, *AMS*, para. 43.

69 Van der Hulle, 2014, p. 564.

70 CJEU, *AMS*, paras. 47-49.

71 Emaus, 2015, p. 73.

72 Van der Hulle, 2014, p. 565.

73 This provision provides *inter alia* that rights should be *respected* whereas principles should be *observed*.

74 As Article 52(5) CFREU provides, "[t]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

75 See Emaus, 2015; Van der Hulle, 2014. In *AMS*, the Court consequently held that Article 27 CFREU – which was central to the case – does not provide a subjective right to individuals: CJEU, *AMS*, para. 49.

76 See similarly Heerma van Voss, 2014, pp. 121–122.

ly lead to "an informal and unpredictable horizontality model, which is an important legal hurdle for private parties on whom obligations are imposed, while in turn [it] offers little more than an uncertain prospect for parties seeking to have those obligations imposed on others".[77]

Leaving this debate aside for the moment, it should hence be noted that the Court in *AMS* made clear that direct horizontal effect of provisions enshrined in the CFREU is not excluded *a priori*.[78] The Charter therewith seems to be the exception to the norm insofar as private obligations are concerned: it appears to have been particularly – and exceptionally – resilient by allowing for the direct horizontal effect of a number of provisions.

5.4 THE CASE STUDY CONTEXT: RPC NAURU

What does the foregoing mean in the context of RPC Nauru?[79] In essence, the various private actors involved in the governance network of RPC Nauru have no self-standing binding human rights obligations as a matter of hard international law, which will not change until a binding instrument is adopted at the supranational level. No matter how far commodification has *in casu* progressed, no matter how much the private actors involved have nested themselves at the core of the nodal governance setting, no matter the fact that private actors continue to fulfil core tasks in the RPC that have a direct effect on human rights enjoyment: the private contractors are not legally bound by hard international human rights law obligations.

That is not to say that the private actors involved in RPC Nauru – the most important ones being, as analysed in chapter 2, Transfield/Broadspectrum, Canstruct, Wilson Security, IHMS, the Salvation Army, and Save the Children Australia – are not subjected to human rights norms at all. They fall, first, within the scope of the UNGP which applies to *all* business enterprises, both transnational and others.[80] This hence includes the Salvation Army and Save the Children: although they are non-profits, they engage in typical business activity in the context of RPC Nauru and there is therefore no compelling reason to exclude them from the UNGP's ambit.[81] Consequently, the private stakeholders involved should respect human rights by refraining from "infringing on the human rights of others" and by addressing "adverse human rights impacts with which they are involved".[82] The subsequent question is, however, which precise human rights should be respected. As the UNGP in turn

77 Frantziou, 2015, p. 668.
78 Heerma van Voss, 2014, p. 122.
79 As mentioned above, since PI Norgerhaven does not involve private actors, the focus here is exclusively on RPC Nauru.
80 Principle 14 of the UNGP.
81 Wynn & Navarro Blakemore, 2017, p. 14.
82 Principle 11 of the UNGP.

outline, this includes at a minimum the rights enshrined in the UDHR, the ICCPR, the ICESCR, and the ILO's Declaration on Fundamental Principles and Rights at Work.[83] What is precisely expected from the private stakeholders in RPC Nauru remains however somewhat ambiguous: as the Commentary to the UNGP outlines, "*[d]epending on circumstances,* business enterprises may need to consider additional standards".[84] In any event, the UNGP urge business enterprises to have policies and processes in place, including (i) a commitment to meet human rights responsibilities, (ii) a due diligence process that identifies, prevents, mitigates, and accounts for human rights impacts, and (iii) processes that allow for any adverse impact on human rights to be remedied.[85]

In addition, the conduct of private stakeholders involved in RPC Nauru potentially falls within the scope of the OECD Guidelines. These Guidelines are not legally binding as such but concern "recommendations addressed by governments to multinational enterprises" operating in or from adhering countries: multinational enterprises are thus merely invited to adopt the guidelines voluntarily.[86] Since Nauru is not a member state of the OECD nor an adhering country, the private actors involved should furthermore operate from one of the adhering countries in order to be invited to do so in the first place. This happens to be the case: Transfield/Broadspectrum, Canstruct, Wilson Security, IHMS, the Salvation Army Australia, and Save the Children Australia are based in Australia which is an OECD member state. Similar to the UNGP, it is likely that the Salvation Army and Save the Children are also covered, since the OECD Guidelines provide that "[a] precise definition of multinational enterprises is not required […] [t]hese usually comprise companies *or other entities* established in more than one country and so linked that they may co-ordinate their operations in various ways".[87] At the same time, what is exactly required from the private contractors remains opaque: in relation to the topic of human rights, the OECD Guidelines merely state that enterprises should "[r]espect the human rights of those affected by their activities *consistent with the host government's international obligations and commitments*".[88] Indeed, the UDHR "and other human rights obligations of the government concerned are of particular relevance in this regard".[89] Thus, it transpires that the private actors involved in RPC Nauru should, insofar as they have adopted the guidelines voluntarily, respect those human rights that *Nauru* – not Australia – is bound by, either on the basis of treaty or custom.

83 Principle 12 of the UNGP.
84 OHCHR, 2011, p. 14 (emphasis added).
85 Principles 15-24 of the UNGP.
86 OECD Guidelines, page 9, para 1 and page 29. See also Castelo Branco & Delgado, 2012, p. 359; Nolan, 2016b, p. 39.
87 OECD Guidelines, page 12, para 3 (emphasis added).
88 OECD Guidelines, page 14, para 2 (emphasis added).
89 OECD Guidelines, page 39-40, para 4.

The ILO Declaration also has the potential of covering the private contractors involved in RPC Nauru. Indeed, in a similar fashion as the OECD Guidelines, the Declaration arguably seeks to guide both corporate actors and non-profit organisations.[90] At the same time, Nauru is – together with six other UN member states – not a member of the ILO.[91] This calls into question whether the private actors operating on its territory can be held responsible under the Declaration in the first place, since it specifically invites "governments of States Members of the ILO, the employers' and workers' organizations concerned *and the multinational enterprises operating in their territories* to observe the principles embodied therein".[92] However, it seems plausible that the ILO Declaration – in a similar vein as the OECD Guidelines – intends to at least include enterprises *domiciled* in a member state. Given that all private actors in RPC Nauru are based in Australia, and given that Australia is a member state, the private contractors thus seem to be addressed by the ILO Declaration. Nevertheless, similar to the OECD Guidelines, the ILO Declaration *guides* corporations but does not bind them: multinationals are "recommended to observe on a voluntary basis".[93] Moreover, since this Declaration contains primarily guidelines related to workers – i.e. in the field of employment, training, conditions of work and life, and industrial relations – they are only partially of relevance here.[94] Although workers' rights are inevitably also of crucial importance in the context of offshore processing, the ILO Declaration does not provide further ground for holding private actors responsible for potential violations of human rights of those confined in RPC Nauru.

The UN Global Compact is likewise voluntary in nature and thus depends on companies' own initiatives to submit to the principles contained therein. Transfield/Broadspectrum, Canstruct, Wilson Security, IHMS, the Salvation Army, and Save the Children Australia do not participate in the framework, and the principles can thus not be applied to them.[95] Interestingly, Ferrovial S.A. – which acquired Broadspectrum in 2016 – joined the UN Global Compact in 2002.[96] Since it subsequently terminated Broadspectrum's operations on Nauru,[97] the UN Global Compact will not further be elaborated upon here.

90 ILO Declaration, page 3, para 6.
91 The other non-members being Andorra, Bhutan, Liechtenstein, Micronesia, Monaco, and North Korea.
92 ILO Declaration, page 1 (emphasis added).
93 ILO Declaration, page 3, para 7.
94 ILO Declaration, page 3, para 7.
95 See for all current participants, https://www.unglobalcompact.org/what-is-gc/participants/ (last accessed 23 November 2018).
96 See https://www.unglobalcompact.org/what-is-gc/participants/4596-Ferrovial-S-A- (last accessed 23 November 2018).
97 H. Davidson, 2017.

Most of the private actors involved in RPC Nauru have developed their own codes of conduct or statements on CSR.[98] Only Broadspectrum's code of conduct details human rights compliance in a separate part: a separate Human Rights Statement was published "to outline Broadspectrum's respect for human rights and how it aspires to uphold human rights in the course of operating its business".[99] The source documents are the UDHR, the UN Global Compact, the UNGP, and the ILO Declaration on Fundamental Principles and Rights at Work.[100] According to the code,

> "even though none of the International Human Rights Standards are binding on or enforceable against it […], Broadspectrum uses the International Human Rights Standards as a framework to guide its decision-making and constructive engagement within its sphere of influence, while respecting the responsibility of government to ensure the protection of human rights. In that sense, Broadspectrum recognises its own limitations and ability to influence change when it comes to government policy and other matters outside its control".[101]

Thus, whilst Broadspectrum recognizes the importance of human rights compliance, it also notes that "this commitment is limited to what is within its reasonable capability and requirements of law and government policy".[102] Whilst potential human rights violations can be reported internally,[103] they cannot be enforced in any way.

Instruments regulating the human rights obligations of private stakeholders involved in RPC Nauru thus to a certain extent may cover their operations, although these instruments are generally not binding. This will be further addressed in chapter 9 of this book, when the 'law in action' in RPC Nauru is reflected upon. The context of RPC Nauru thus confirms and illustrates that international human rights law has attempted to show resilience in the face of progressive responsibilisation of private actors, and their consequent increase in authority and power, yet that it ultimately remains highly veracious to the

98 See the codes of conduct of Broadspectrum (http://www.broadspectrum.com/about/code-of-business-conduct, Wilson Security (https://www.wilsonsecurity.com.au/aboutus/Pages/ourcommitment.aspx), IHMS (http://www.ihms.com.au/csr.php), the Salvation Army (https://salvos.org.au/scribe/sites/safesalvos/files/Code_of_Conduct_V1_Feb_2017.pdf), and Save the Children (https://www.savethechildren.org.au/getmedia/259a95e1-65f3-41d4-83b4-665a8271acc9/SCA-Child-Safeguarding-Policy-and-Code-of-Conduct.pdf.aspx) (all last accessed 23 November 2018). Only Canstruct's code of conduct cannot be traced online.

99 See page 1 of Broadspectrum's Human Rights Statement, available at http://www.broadspectrum.com/pdf/TMC-0000-LE-0020-Human-Rights-Statement.pdf (last accessed 20 September 2018). The codes of conduct and CSR statements of other contractors do not mention human rights, although some discuss values that may be identified in human rights terms.

100 Broadspectrum's Human Rights Statement, p. 2.

101 Broadspectrum's Human Rights Statement, p. 2.

102 Broadspectrum's Human Rights Statement, p. 2.

103 Broadspectrum's Human Rights Statement, p. 5.

fundamental tenet that (territorial) states are the primary bearers of binding international human rights obligations. Insofar as the private actors operating in RPC Nauru have human rights obligations, these remain of a soft-law or voluntary nature and do not provide significant prospect for holding such actors legally accountable.

5.5 CONCLUSION

Whilst commodification has to certain extents in a resilient effort adapted to the commodification development of privatisation, this has – in staying veracious to its fundamental tenet of territorial state obligations – not resulted in binding international human rights obligations for private actors as duty bearers. In this sense, the voluntary frameworks in place are often characterised by a relative lack of effectiveness. Specifically, most frameworks lack avenues to hold private actors accountable under the norms that they have subscribed to, as binding opportunities for answerability and enforcement are often not provided for. Only a limited set of frameworks such as the OECD Guidelines and the ILO Declaration contain implementation mechanisms that enable scrutiny of sorts, yet these often do not function in a judicial or quasi-judicial way.

In this sense, the expansion of instruments regulating private human rights obligations seems to be inspired first and foremost by the moral side of international human rights law's Janus-face: it is the promise of equal and universal protection for all that informs ongoing calls to expand the catalogue of duty-bearers. Legally, however, the effectiveness of such instruments has been duly circumscribed.

Ultimately, this begs the question what the precise added value of soft-law and voluntary private human rights obligations is. On the one hand, as the case study of Nauru has also shown, due to global efforts, various private actors at the local level feel the need to prescribe to human rights standards and to develop their own respective codes of conduct. They also, increasingly, are captured within the ambit of soft-law instruments of human rights. As such, at the 'glocal' level, global developments and local operations are sewn together, with the development of global regimes being translated into local promises, and with local promises *vice versa* being used to evaluate, refine, and promote the acceleration of, standards of responsibility at the global level. On the other hand, whilst it is true that in case-specific instances at the local level such norms *do* work, and whilst it may be true that they constitute stepping stones towards potential future instruments of responsibility at the global level,[104] the potential danger of such norms is that power-bearers may

104 Černič, 2013, p. 25; Kamatali, 2012, pp. 149–150; Kinley & Tadaki, 2004, pp. 955–956.

subscribe to them without significant accountability consequences. This, in turn, seems to allow private actors to keep up appearances and to operate behind what may turn out to be a human rights façade. Such façade *also* plays out on the 'glocal' level, as it entails that private actors rely on their formal subscription to global regimes in order to justify their operations on the local level. The use of international human rights law instruments governing private obligations in such adverse way will further be reflected upon in Part III of this book, where both legal and non-legal avenues of protection are included in the scope of theorising and analysis.