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Book Reviews

Markos Karavias

Corporate Obligations under International Law. Oxford: Oxford University Press, 2013. Pp. 250. £63.00. ISBN: 978-0-19-967438-1.

In 2014, at the initiative of a number of Latin American countries, Ecuador in particular, the UN Human Rights Council established an open-ended intergovernmental working group whose mandate was 'to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of Transnational Corporations and Other Business Enterprises.'[1] This working group would be well-advised to consult Markos Karavias's *Corporate Obligations under International Law* before turning to the drawing board. This short but crisp study not only tackles the question of whether under positive law (Chapters II–IV) corporations have obligations under international law, but also how such obligations, insofar as they do not yet exist, should be structured if a decision were to be taken to make corporations direct addressees of international human rights obligations (Chapter V).

That corporations, regardless of the havoc they may wreak as a result of sometimes unscrupulous activities, are not (yet) bound by obligations under international human rights or international criminal law, whether of a conventional or customary nature, does not surprise. The UN Secretary-General's Special Representative for Transnational Corporations and Human Rights assumed as much, and proceeded to base corporate human rights duties on social expectations.[2] As far as the criminal law is concerned, international

1 UNHRC, 'Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with Respect to Human Rights' (2014) UN Doc A/HRC/26/L.22/Rev.1.

2 Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, annexed to the UN Special Representative's final report to the Human Rights Council (UN Doc A/HRC/17/31), endorsed by the Human Rights Council (UNHRC Resolution 17/4 (2011) UN Doc A/HRC/RES/17/4).

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criminal tribunals' jurisdiction *ratione personae* only extends to natural persons.[3] Admittedly, the Nuremberg Tribunal could declare organizations, including corporations, criminal, but on the basis of its Charter only members of those organizations could be (and were) brought to trial.[4] The *status quo* is that international human rights obligations only accrue to *States* (and perhaps to intergovernmental organizations) and international criminal law obligations only apply to natural legal persons, but not to corporations.

While the identification of this state of the law does not go against the mainstream position, Karavias should nevertheless be credited for his rigorous analysis of the positive law in this field, where the waters have been sometimes muddied by activist lawyers. Examination of *actual* State practice indeed demonstrates that States have so far proved very reluctant to impose direct obligations on corporations. There are exceptions under 'internationalized functional contracts', in particular exploration agreements concluded between corporations and the International Seabed Authority, and private loan agreements concluded between corporations and the World Bank (addressed at Chapter IV). The discussion of the latter type of – ultimately peculiar – contract is lengthy and overly detailed, particularly compared to the rather succinct discussion of the much more conceptual question of whether corporations are, or should be, direct addressees of obligations under international human rights or criminal law. That being said, it is surely of interest that States have found it functionally necessary to impose direct international law obligations on corporations entering into contracts with international institutions and have even allowed these corporations to initiate, before international tribunals, direct legal action against these institutions. Of interest but, again, nothing out of the ordinary. However, as Karavias himself observes, the functions which these corporations assume at the international level mirror those performed at the municipal level (p. 162). Corporations entering into contracts with the State are subject to municipal law and so, by analogy, a contract concluded by a corporation with an international institution may be subject to international law, all the more so if such a contract redeploys, by reference, standard clauses enacted by the institution (pp. 120–124; pp 132–134). This increased legal protection offered to the corporation accommodates the latter's concerns over legal certainty (unlike municipal law, international law cannot be modified by just one State),

[3] See notably Art 25 of the Statute of the International Criminal Court.

[4] Article 10 of the Charter of the International Military Tribunal (Nuremberg Charter) ('In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individual to trial for membership therein before national, military or occupation courts').

and thus encourages the sort of economic development from which States also stand to benefit.

The discussion of internationalized functional contracts shows that a status elevation of the corporation to a bearer of obligations, not only under municipal but also under international law, need not be threatening to States. After all, corporate obligations *restrict* corporations' discretion and may thus *widen* the protection of the broader interests of society. *A la rigueur*, they may even reduce the obligations of the State itself – a concern which, for that matter, has been cited in the Guiding Principles.[5] In the dominant positivist paradigm, moreover, States should not fear a heightened legal status of corporations: States, and only States act as exclusive gatekeepers of the international legal system, deciding on the conferral of a measure of international legal personality on non-state actors. If anything, this may be the only weak point of Karavias' study: his ready espousal of the State-centered positivist international law paradigm leads to a more general failure to engage with progressive scholarship. Arguments of that type call for a more inclusive international legal system,[6] as well as highlight the agency of sub-State individuals, groups, and organizations, also in terms of contributing to the scope of rights and obligations under international law.[7] In all fairness, however, Karavias has clearly indicated in his introduction that his study only concerns positive international law (p. 4). Adopting a detached attitude to the subject-matter, he consciously refrains from passing judgment on the *desirability* of corporate obligations under international law. Where he addresses the *lex ferenda* – direct obligations under international human rights law (Chapter V) – he does so from a *legal-structural* rather than a fully *normative* perspective. He follows through 'the implications of the recognition of corporate obligations on the scope and structure of performance of international human rights obligations' (p. 164), without engaging with the ontological question of whether such

5 UN Guiding Principles (n 2) Commentary to Principle 11 ('The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and *does not diminish those obligations*.') (emphasis added).

6 See Robert McCorquodale, 'An Inclusive International Legal System' (2004) 17 Leiden JIL 477 (challenging international legal theories that are based on an understanding of international law in terms of a solely state-based system).

7 See Ruti Teitel, *Humanity's Law* (OUP 2011) 171 (drawing attention to shifts in subjectivity and sources of law-making, which give non-state actors added agency, subjectivity and responsibility, and offer opportunities for persons and peoples – and not just States – to shape the law to which they are subject, and to shape the relevant values that are at issue).

obligations should exist (a question he may consider to fall outside his expertise, or even the legal domain altogether).

The structural critique of the transposition of human rights obligations from the State to the corporation – the grand finale in the last chapter – is in my view the strongest part of the study. This is not so much because Karavias relies on the well-known respect/protect/fulfill typology of State human rights obligations to draw the contour of corporate human rights obligations – an exercise which he surely performs well. Rather, he should be praised for injecting an insight into the debate which has so far received fairly little attention: the *problématique* of the corporation as both a human rights *obligor* (addressee of human rights obligations) and a human rights *holder* (beneficiary of human rights). True, a proposition that not only individuals, but also corporations may enjoy human rights is not new: the European Court of Human Rights has held as much,[8] and Marius Emberland devoted an entire monograph to the issue.[9] But what the status of a rights-holder means for its status as a rights-obligor has, to my knowledge, never been tackled as lucidly as it is by Karavias. According to Karavias, this dual status fundamentally alters the structure of performance of human rights law: the scope of a corporation's human rights obligations and the correlative human rights of the individual affected by corporate activity, have to be balanced with the corporation's own human rights, in particular its right to property. Now, a balancing exercise is certainly not alien to the existing human rights framework: after all, the enjoyment of a considerable number of human rights can be restricted on the basis of limitation clauses, where such restrictions are necessary and proportional to the public interest being pursued. Such limitation clauses, however, do not, or at least do not directly, balance *rights*. As the State – the primary human rights obligor – does not itself enjoy human rights, in the balancing exercise individual human rights and *collective interests* represented or mediated by the State are weighed against one another. How such a balancing exercise plays out in a horizontal setting – between a corporation and an individual – remains elusive, as such balancing will impinge not just on the corporation's *interests* but on its very *rights*. Karavias posits that this problem of two human rights beneficiaries, one of which (the corporation) is also a human rights obligor, could be solved by introducing elements of reciprocity in the relationship between the corporation and the individual. For the individual, this could mean that she may have

8 See for the seminal case: *The Sunday Times v United Kingdom* App No 6538/74 (ECtHR, 26 April 1979).

9 Marius Emberland, *The Human Rights of Companies* (OUP 2006).

to negotiate the scope of her human rights protection in a contract with a corporation (e.g. in an employment contract).

I wonder, however, whether this 'negotiability' or 'commodification' of human rights is a specific consequence of rendering the corporation a human rights obligor. To me it appears rather as a consequence of the corporation and the individual both being *beneficiaries* of *clashing* human rights. I am not entirely sure whether the future 'status upgrade' of the corporation to a human rights obligor truly changes the existing structure of performance. In fact, Karavias grounds his reciprocity argument in a rather old decision by the (then) European Commission of Human Rights in *X v the United Kingdom* (1981),[10] by virtue of which a Muslim employee had to take into account his contractual position when exercising his freedom of religion (Karavias, p. 190). Thus, weighing an individual's and a corporation's rights can already take place within the existing human rights structure, without the need to resort to corporate human rights obligations arising. The international obligations at issue in the cited case were, after all, not those of the corporation but of the *State,* whose municipal laws tolerated the impugned employer's practices.

What transpires from Karavias' study is that, by and large, the State remains the ultimate arbiter of societal conflicts. This means that, as far as corporate abuses are concerned, the State has a *positive obligation* to protect individuals suffering at the hands of corporations. This obligation is an international one, but it is discharged via municipal legal regulation. In this scheme, the corporation is the addressee of *municipal obligations* but not of direct international obligations. Sure, the municipal law avenue may give rise to under-regulation and under-enforcement of corporate conduct, but then international monitoring bodies and even international courts can call States to account for failing to discharge their obligations to protect. Furthermore, municipal corporate obligations need not be limited to corporate activity within the territory but could also apply *extraterritorially* (notably via the mechanism of home State regulation),[11] thus potentially raising the protective ceiling. Finally, corporate obligations – although not of the classic hard law variety – feature prominently in private regulatory initiatives;[12] compliance with these obligations could be enforced by market participants (such as consumers).[13] Against this backdrop, in a rare policy statement, Karavias opines that 'the imposition of human

10 *X v United Kingdom*, App No 8160/78, Commission Decision (5 November 1981).

11 See eg Liesbeth Enneking, *Foreign Direct Liability and Beyond* (Eleven Publishing 2011).

12 See eg Colin Scott, Fabrizio Cafaggi, Linda Senden (eds), *The Challenge of Transnational Private Regulation: Conceptual and Constitutional Debates* (Wiley Blackwell 2011).

13 See Anne van Aaken, 'Behavioral International Law and Economics' (2014) 55 HJIL 421.

rights obligations on corporations under international law is not the only viable alternative to securing the enjoyment of human rights' (p. 89). The quest for direct obligations under international law eventually appears as a vainglorious one. Such obligations may have some symbolic value, condemning corporate misbehavior at the global level, but could very well make little difference for the actual victims of such misbehavior; as is usual in international law, international obligations do not necessarily come with international enforcement mechanisms. Better, then, to rely on existing enforcement mechanisms such as those offered by the State, the market, or possibly even the corporations themselves.

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