



3d lecture (Thursday 9th March 2017): The private actors' public functions and public international law constraints

Outline

1. Private business actors as international law-makers
2. Recent recalibrations of public/private actors, procedures, values
 - a) Internet governance
 - b) Foreign investment law
3. Human rights limits to privatisation
 - a) Intensifying the states' protective obligation to regulate and monitor
 - b) "Direct" international human rights obligations of private contractors, providers, and partners only in exceptional constellations
4. Private actors' human rights obligations *de lege ferenda*?
5. The law's mutually constitutive doubling of public sovereignty and private property
6. Blurring the spheres: The commercialised state and philanthrocapitalism.
Global constitutionalism both in public law and private law forms and analogies.

Main message of lecture 3

Global private and public/private standard-setting is becoming the *ersatz law-making* due to the stagnation of purely public (inter-governmental) treaty making. The lacking "shadow" of a public international law-maker (which would be capable of taking over regulation) leads to problems of effectiveness and legitimacy of the private and private/public standards.

In two important issue areas, the public/private recalibration of law-making and law-enforcement is currently discussed. For internet governance, the two models are (public/private) multistakeholderism versus (purely public, inter-state) multilateralism. Due to the historical dominance of US-based firms, the privatised multistakeholder model is more likely to uphold the public value of free speech as in principle acknowledged by universal human rights law.

The international regime of foreign investment protection is increasingly considered to give undue priority to private investors' interests over host states' public regulatory goals and outsiders' human rights. The private (commercial) law-inspired scheme of investor – state arbitration is also viewed as imbalanced towards the private side. The publicisation of the investment regime in terms of substance (*ordre public* clause in BITs), institutions (investment courts), and procedure (admission of human rights counter-claims) is ongoing.

A key question is under what conditions the private actors engaged in law-making and in the provision of public services are themselves directly bound by public international law obligations notably by international human rights. This question cannot be answered

without revisiting the state's obligations in this context. Privatisation shifts the centre of gravity from state obligations to respect and fulfill human rights to state obligations to protect, and notably to *obligations to ensure* equal access to affordable services for all. This includes the obligation to regulate on anti-discrimination measures and on universal service obligations.

In addition, only in narrow constellations, private actors fulfilling public functions are saddled with direct international human rights obligations and incur a quasi-state responsibility for breaches occurring in direct connection with their public service.

The continuous rise of private corporate power has been co-constituted and fuelled by public international law. Reigning it in order to safeguard and realize values which are tagged "public" but which could also be simply called "human" is an ongoing challenge which is best met – I submit – by upholding public/private distinctions, stereotypical as they might be.

Key documents for lecture 3

Directive 2014/95/EU of the European Parliament and of the Council of 22 Oct. 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups (of 15 Nov. 2014, OJ 2014, L 330/1) (**CSR-Directive**).

French *loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre* of 21 Feb. 2017.

Case law for lecture 3

ICSID, *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic*, Case No. ARB/07/26, Award of 8 Dec. 2016.

Key literature for lecture 3

Anne Peters/Lucy Köchlin/Till Förster/Gretta Fenner Zinkernagel (eds) *Non-state Actors as Standard Setters* (Cambridge: CUP 2009).

Tim Büthe/Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton, NJ: Princeton University Press 2011).

Axel Marx/Miet Maertens/Johann Swinnen/Jan Wouters (eds), *Private Standards and Global Governance* (Cheltenham: Elgar 2012).

Markos Karavias, *Corporate Obligations under International Law* (Oxford: OUP 2013).

Daniel J.H. Greenwood, "The Semi-Sovereign Corporation", in: James Charles Smith (ed.), *Property and Sovereignty: Legal and Cultural Perspectives* (Farnham: Ashgate 2013), 267-294.

Richard M. Locke, *The Promise and Limits of Private Power: Promoting Labor Standards in a Global Economy* (Cambridge: Cambridge University Press 2013).