UNIVERSIDADE CATÓLICA PORTUGUESA

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A Critical Examination of Their Role in Serving Transnational Corporate Power

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Resumo: As Corporações Transnacionais (CTNs) como portadoras de Direitos Humanos (DHs) em prol de interesses corporativos? Este trabalho contribui para a discussão relativamente nova sobre os Direitos Humanos Corporativos (DHs) a partir da perspectiva do (mau) uso dos DHs no contexto da contínua mudança de poder entre as TNCs e os estados-nação. Para isso, este trabalho amplia o exame da perspectiva jurídica-teórica restrita para as implicações econômicas e políticas. Ao investigar a disputa jurídica e filosófica sobre as CHRs e o desafio que os estados-nação enfrentam contra o poder crescente das TNCs, podemos analisar a interação entre essas duas esferas. No mais tardar, desde a posição vocal de X em favor do direito à liberdade de expressão, essa questão foi arrastada da discussão científica para o público. As implicações para as questões políticas reais levantam a questão de se as CHRs representam uma instituição que vale a pena perseguir no direito internacional. Este trabalho conclui que, em primeiro lugar, os direitos humanos internacionais não foram criados para incluir as empresas em seu escopo. Em segundo lugar, não há justificativa satisfatória para aceitar os CRHs, especialmente por causa da falta de necessidade devido ao enorme poder que as TNCs ganharam econômica e politicamente. Terceiro, o estabelecimento de CHRs aumenta o risco de as TNCs se tornarem mais prejudiciais ao público.

Palavras-chave: Direitos Humanos Corporativos, Direitos Humanos, Corporações Transnacionais, Lei Europeia de Direitos Humanos, Lei da ONU, Poder Econômico, Poder Político, Soberania, X, Elon Musk, Liberdade de Expressão, Liberdade de Expressão.

Abstract: Transnational Corporations (TNCs) as bearers of Human Rights (HRs) for the sake of corporate power? This work contributes to the relatively new discussion of Corporate Human Rights (CHRs) from the perspective of (mis)using HRs in the context of the ongoing power shift between TNCs and nation-states. To accomplish that, this work extends the examination from the narrow legal-theoretical perspective to economic and political implications. By investigating the legal and philosophical dispute over CHRs and the challenge nation-states face against the growing power of TNCs we can analyze the interplay between these two realms. At the latest, since X's vocal stance for the right to free speech, this issue has been dragged out of the scientific discussion into the public. The implications for real political issues raise the question of whether CHRs pose an institution worth pursuing in international law. This work

concludes, that first, international HRs aren't meant to include corporations in their scope. Second, there is no satisfying justification for accepting CHRs especially because of the lack of necessity due to the enormous power TNCs have gained economically and politically. Third, establishing CHRs raises the risk of TNCs becoming more harmful to the public.

Keywords: Corporate Human Rights, Human Rights, Transnational Corporations, European Human Rights Law, UN law, Economic Power, Political Power, Sovereignty, X, Elon Musk, Free Speech, Freedom of Expression.

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A. Introduction

When JD Vance, Vice President of the US, held his speech during the 61th Munich Security Conference on February 14 this year, the reaction of the European allies was fierce. The German minister of defense, Boris Pistorius, called Vance's allegation that free speech was "*in retreat*" in Europe "*not acceptable*"[1]. Vance had made false accusations of free speech being violated by the EU member states and the EU commissioners in the context of a broader threat to democracy from within[2]. Of course, the question arises: Why did Vance address an alleged retreat of free speech[3] in Europe (in a very misleading way)? While other reasons might surely play a role, one aspect seems neglected in the public discussion following the speech. Namely, the US cares about American corporations having as few obstacles as possible to operate in a foreign market. Since the US is at the forefront concerning tech companies, it is logical to assume that the Trump administration will pressure the EU to liberalize market regulations, which the EU has adopted to regulate liabilities of online platforms for instance[4]. If that's the case, one could assume that these big TNCs, like X, are using the claim to freedom of speech, respectively freedom of expression, to push their corporate interest (sometimes with the help of a government). In turn, this raises the question of whether corporations can and should be able to claim HRs. While corporate human rights obligations have become quite accepted and found their way into laws and regulations in the EU, particularly in the new EU Directive on corporate sustainability due diligence (CSDD)[5], the recognition of CHRs in international law has been disputed more. In international investment law, the protection of corporations as foreign investors has been established for a long time[6]. This is often realized through Bilateral Investment Treaties (BITs). Additionally, some scholars have advocated for the acceptance of

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[1] *Haase*, "JD Vance's criticism 'is not acceptable'".
[2] *Atkinson*, "JD Vance attacks Europe over free speech and migration"; *Steffen/Vera,* Fact check: JD Vance's free speech claims debunked.
[3] Free speech and freedom of expression are used synonymously in this work, as long as not referring to different provisions.
[4] See later Sec. D I.
[5] The CSDD entered into force on 25 July 2024 and aims to foster sustainable and responsible corporate behavior in companies' operations and across their global value chains by laying down obligations and liabilities, see Art. 1 of the Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, https://eur-lex.europa.eu/eli/dir/2024/1760/oj/eng.
[6] *Ku,* p. 731.

CHRs within international HRs law[7]. However, granting corporations HRs seems much more controversial within the juridical and public space[8]. That is why general work on CHR combining theoretical, economic, and political aspects is needed. Critics[9] argue that CHRs are not needed because of the current power increase of TNCs. Therefore, CHRs are in essence a reflection of a neo-liberal trend. To put it in other words, they suggest that CHRs are a tool for corporate interests in a global world, in which the power structures between TNCs and nation-states are increasingly shifting, making states less capable of enforcing public interests. Whether these assumptions are true or not and whether corporations should be granted the protection of HRs, we will examine in the following. For that purpose, this work is structured in three main aspects: Corporate Human Rights from the textual and legal perspective (Sec. B). There we will focus on the legal basis for CHRs and the differences between UN and European HRs law. Second, the question of how TNCs are challenging nation-states (Sec. C) will be elaborated. We will focus on the economic and political power increase of TNCs and its impact on HRs exercise and sovereignty. This will allow us to answer whether the assumption that TNCs are even able to abuse HRs is true. After that, we elaborate – on the example of X´s fight for free speech – how TNCs utilize CHRs in favor of their interests (Sec. D). We will focus on X´s adverse behavior against the EU and Brazil, how X pushes the American Supreme Court's understanding of free speech, and apply the theoretical approaches, examined before, on X. Lastly, we will summarize and conclude our findings (Sec. E).

B. Corporate Human Rights

I. The legal basis for Corporate Human Rights

1. European Human Rights Law

a. European Convention on Human Rights

While elaborating all provisions of the ECHR potentially granting legal persons the protection of human rights would push the envelope of this work, a review of a few selected provisions and rulings is expedient. For example, on the procedural level, the ECHR does extend the right

[7] Exemplary, *Kulick*; opposing *Ku*.
[8] *Kulick*, p. 1.
[9] Regarding the critique of CHRs see Sec. B II 1.

to initiate a case hearing to a legal person under Art. 34. According to Art. 34 ECHR the European Court of Human Rights (ECtHR) may receive any application from any person, non-governmental organization, or group of individuals claiming to be the victim of a violation. It could be argued that the term "*non-governmental organization*" refers to private entities that don't intend to make a profit. However, this isn't convincing because the ECHR does include legal persons in general in specific provisions (e.g. Art. 10). In conclusion, the procedural provisions must include profit-oriented entities (corporations or enterprises) in the scope as well. Regarding other provisions, although the ECHR doesn't mention legal persons explicitly, it doesn't exclude them either. Thus, the ECHR opens the door for an extensive interpretation. A similar hurdle arises when looking at Art. 1 ECHR since the provision only speaks of "*everyone*" as protected subjects. According to *Emberland*, the original authors of the ECHR didn't consider that there would be an issue with the application to corporations[10]. They took the inclusion of corporations into the Convention as granted[11]. Consequently, a historical interpretation of the provisions of the ECHR must necessarily lead to the applicability of its provisions to legal persons. Nevertheless, it should be made clear that the ECHR isn't wholly applicable to legal persons. The reason for that lies in the conceptual nature of specific provisions, which, by their textual understanding, can only protect human beings. For instance, Art. 2 ECHR obliges the member states to protect everyone's right to life by law. While the wording "*everyone*" can be ambiguous – and may address corporations as well – the scope of the provisions is narrowed by the protected object "*life*" since only living beings can have a life. Similarly, Art. 3, prohibiting torture, degrading treatment, and punishment, and Art. 12, granting the right to marry, only protect human beings[12]. Other provisions are clearer in terms of their applicability regarding corporations. Art. 1 of Protocol 1 of the ECHR explicitly includes legal persons next to natural persons in its scope. Therefore, corporations can claim the protection of their property ("*possessions*"), without any discussion. Other provisions seem to be more uncertain regarding their wording. Someone could draw the reserve conclusion (argumentum e contrario) that because of the explicit wording in some instances, the ambiguous provisions must be intended not to protect legal persons, hence corporations. However, that's

[10] *Emberland*, p. 10.
[11] *Ibid*, p. 35.
[12] *Ibid*, p. 33.

not a mandatory conclusion, as *Emberland* rightly points out[13], as can also be seen in the ECtHR case law[14].

This result isn't surprising since the ECHR seems heavily influenced by the relationship between democracy and capitalism[15] and European liberalism[16]. In the European context, it is not far stretched to say, that protecting corporations through strengthening corporate rights with the help of human rights lies in the public interest of securing economic integrative development and outcomes[17]. This might be achieved by improving the fundamental rights of corporations. As *Wiater* convincingly points out, the European integration project has been heavily shaped by the economic interests of the member states, which can be observed by looking at the history of the European integration project[18]. This started particularly with the founding of several industrial cooperative projects, such as the European Coal and Steel Community (ECSC) in 1951, which was controlled by the High Authority as the forerunner of the EU Commission[19]. This seems rational since companies have primarily driven the exchange of goods and capital. Though the ECHR must not be confused with the EU (law), the ideological foundation went parallel to the European Integration Project[20], which likely also goes back to the efforts to fight communism during the Cold War[21]. Naturally, securing corporate interests – with the end goal of improving public (economic) interests – led to the inclusion of corporations into the Human Rights regime of the ECHR[22].

b. ECtHR Case Law

With concern to the interpretation of the ECHR, the ECtHR has applied human rights protection to corporations in several cases. The ECtHR does not exclude legal persons generally from the protection regime. Other courts have taken a different approach, such as the Inter-American Court of Human Rights (IACtHR), which rejected the general idea of applying the provisions

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[13] *Ibid*, p. 34.
[14] See sec. B I 1 b.
[15] *Emberland*, p. 42.
[16] *Ibid*, p. 47.
[17] *Wiater*, p. 3.
[18] *Ibid, p. 7.*
[19] *Ibid, p. 7.*
[20] *Steininger/Von Bernstorff*, p. 5.
[21] *Ibid,* p. 5.
[22] *Ibid*, p. 7.

of the ACHR to legal persons, hence corporations, except when appropriate natural persons behind the legal person exercise an HRs claim[23]. The IACtHR is one of the overseeing bodies concerning the American Convention on Human Rights (ACHR), which is ratified by 25 members (mostly being South-American) of the Organization of American States (OAS). The IACtHR This coincides with one of the major theoretical approaches to CHRs, which we will discuss in section B II 2. Regarding the ECtHR, the Court often has justified the rights of collective actors not (only) based on the interests of the individuals who constitute them, but general public values and objectives, which the ECHR aims to support[24].

Since a full review of the ECtHR Case Law would not fit into this thesis, we'll take a look at a few exemplary rulings in which the ECtHR has granted corporations specific human rights. In the Niemietz v. Germany judgment, the Court ruled that Art. 8 ECHR, which obliges the state to respect everyone's homes (among other things), would apply to corporate offices as well[25]. In the case concerned, the police of Freiburg searched the applicant's law office, which was also located within the applicant's private residence. The court stated that: *„[…] it is not always possible to distinguish clearly which of an individual's activities form part of his professional or business life and which do not.*"[26]. Thus, the ECtHR held a convenient approach in admitting the real-life circumstances in which private and business life might be entangled, using the "*interpretative principle of effectiveness"*[27].

With regards to freedom of expression, the ECtHR ruled in the case of Autronic AG v. Switzerland in favor of the applicability of Art. 10 ECHR on Autronic, an electronics company. In this specific case, the Swiss Radio and Television Division rejected the company's application for a specific broadcasting license[28]. Notably, the company was pursuing only economic and technical interests. Thus, the ECtHR had not only to decide whether corporations can claim the protection of Art. 10 ECHR in general terms but also whether commercial speech falls under the provision's protection. The Court accepted the applicant's notion and stated:

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[23] Advisory Opinion, OC-22/16, IACtHR, Series A22 (2016), translated in *International Labor Rights Case Law*, Volume 3, Issue 3 (2017).
[24] *Isiksel*, "Corporate Human Rights Claims", p. 999.
[25] ECtHR, *Niemietz v. Germany*, App. No. 13710/88 (16 December 1992).
[26] *Ibid*, para 29.
[27] *Van den Muijsenbergh/Rezai*, p. 55.
[28] ECtHR, *Autronic AG v. Switzerland*, App. No. 12726/87 (22 May 1990), para 19.

"In the Court's view, neither Autronic AG's legal status as a limited company nor the fact that its activities were commercial nor the intrinsic nature of freedom of expression can deprive Autronic AG of the protection of Article 10 (art. 10). The Article (art. 10) applies to "everyone", whether natural or legal persons"[29].

An extensive interpretation of provisions wording was taken by the ECtHR, also referencing other judgments in favor of "*profit-making corporate bodies*"[30]. Interestingly, the court has been very sparing with its reasoning for the applicability of Art. 10 ECHR. Almost as if it wasn't seeing any conceptual or textual issues regarding the extension of the provision's protection.

Another ruling making clear that corporations can be victims of HRs violations is the Commingsol SA v. Portugal case. The Court was concerned with Art. 41 ECHR and its application on legal persons. Art. 41 ECHR obliges the Court, if necessary, to grant a form of compensation in the case of a violation of the ECHR or the Protocols thereto and if the internal law of the High Contracting Party concerned allows only partial reparation to be made. According to the ECtHR, corporations can be eligible to claim compensation for even non-pecuniary damages ("*the applicability of other forms of compensation to corporate applicants has never been questioned*"[31]). The Court explicitly didn't exclude commercial corporations from receiving non-pecuniary damage compensation[32] but emphasized that "*pecuniary compensation for non-pecuniary damage* must be provided "*to commercial companies, too"*[33]. This ruling stretches the concept of legal persons, hence corporations, to a wide margin.

To sum it up, the case law shows that the ECtHR has been very corporate-friendly regarding the interpretation of ECHR provisions and their applicability. Thus, it is not far stretched to conclude that, with concern to the history of the ECHR, the economic origins of the European integration project have stained the ruling tradition of the ECtHR. Therefore, corporations gladly took the opportunity to claim HRs regarding the ECHR[34]. Considering this, it is not

[29] *Ibid*, para 47.
[30] *Ibid*, para 47.
[31] *Emberland*, p. 123.
[32] ECtHR, *Commingersoll SA v. Portugal*, App. No. 35382/97 (06 April 2000), para 35.
[33] *Ibid*, para 35.
[34] Similarly, *Steininger/Von Bernstorff*, p. 8.

surprising that the Court approaches interpretative challenges concerning a provisions' application very practically, intending to broaden the scope of the ECHR as wide as possible.

2. International Human Rights Law

The broad scope of the ECHR and the above-stated corporate-friendly interpretation of its provisions by the ECtHR stand in opposition to the remainder of international HRs law. While HRs are part of international customary law[35] and several international treaties, a basis for the inclusion of legal persons into human rights protection is harder to find. Such an observation can be made, for example, by studying the International Covenant on Civil and Political Rights (ICCPR), which at least does not comprise any explicit wording to the applicability of the convention on legal persons, resp. corporate entities. While some articles contain phrases like "*no one*" (Art. 8), "*anyone*" (Art. 9 Sec. 2), or "*all persons*" (Art. 10), which could raise questions regarding the interpretation of these terms, most provisions clearly shall apply only to natural, not legal persons (see e.g. Art. 6 ICCPR, "*every human being*"). Furthermore, even though Art. 19 of the ICCPR – for example – grants freedom of opinion and expression to "*everyone*" it does not include any regulation regarding the licensing of enterprises – in contrast to Art. 10 ECHR. Neither does the ICCPR contain procedural rules that directly address legal persons. Additionally, the preamble merely addresses "*human beings*", "*human persons*", and "*individuals*", further weakening the argument for the inclusion of legal persons into the scope of the ICCPR. Similar conclusions can be drawn by looking at other international legal bodies, such as the Convention on the Elimination of All Forms of Racial Discrimination (CERD) or the Universal Declaration of Human Rights (UDHR)[36]. The latter, for example, also doesn't include the possibility of regulating the licensing of (media) corporations and grants the right to freedom of expression to "everyone", pursuant to Art. 19. In general, the term "everyone" can be found in almost any provision of the UDHR, but – like in the case of the ICCPR – it also lacks the same provision, which opens the door for CHRs in the ECHR.

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[35] *De Schutter*, p. 50.
[36] Similarly, *Steininger/Von Bernstorff*, p. 3; However, the UDHR does address "*every individual and every organ of society*" in its preamble. Because of that *Pegg* argues for human-rights related obligations of corporations, see *Pegg/Frynas*, p. 16.

These findings aren't surprising since international law originally addressed only states as subjects[37]. This view was also the basis for the *Danzig Railway Officials* ruling, in which the International Court of Justice (ICJ) spoke clearly against direct binding rights for individuals in international agreements[38]. Thus, historically, even the idea of addressing human beings in international law was relatively new. However, it should be noted that the concept of human rights – intended to protect individuals against authority and tyranny – dates back much further. Important milestones include the Magna Carta of 1215, the English Bill of Rights of 1689, the French Declaration of the Rights of Man and Citizen of 1789, and the American Declaration of Independence, all aimed to safeguard individuals against monarchical abuse of power[39]. The subsequent American Bill of Rights of 1791 recognized individuals' civil liberties as god-given rights[40], thus as birthrights. Nonetheless, these essential texts do not define fundamental (human) rights as part of an international legal framework. The shift began with the regulation of armed conflict, termed international humanitarian law, which aims to protect individuals against war crimes committed by others who could be held accountable under that law[41]. Additionally, the institutionalization of international law after the Second World War, exemplified by organizations such as the United Nations, which succeeded the League of Nations in 1945 led to the emergence of "*modern human rights*"[42]. In that regard, the *Danzig Railway Officials* ruling was dismissed with the ICJ decision in the *LaGrand Case*, which approved subjectifying individuals regarding claims under the Vienna Convention on Consular Relations[43]. During that time, the traditional view started to become one which classified HRs as public rights, meaning that an individual could enjoy HRs, and that the State must protect them and ensure an appropriate remedy[44]. The protection of corporations in international law, on the other hand, was heavily linked to the development of international trade agreements (BITs), leading to the slow incorporation of CHRs into the investment treaty arbitration[45]. Despite all of that, from a historical interpretative standpoint, it is very hard to argue for the

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[37] *Ku*, p. 733.
[38] *Jurisdiction of the Courts of Danzig*, Advisory Opinion No 15, 1928 PCIJ (Ser B) No. 15, 17 (03 March 1928).
[39] *Kundal*, p. 1325.
[40] *Ibid*, p. 1325 et seq.
[41] *Ku*, p. 734
[42] *Weissbrodt*/De la Vega, p. 20 et seq.
[43] *Ku*,p. 734; *LaGrand Case*, *Germany v. The United States of America*, ICJ (27 June 2001), p. 494.
[44] *Gronowska*, p. 451.
[45] See *Kulick,* "The Rights of Man", p. 297.

inclusion of corporations into the UN HRs law regime, since the purpose of HRs has been to protect individuals. To conclude, there is no textual – or legal historical – foundation for the acceptance of CHRs in international HRs law.

II. The theoretical dispute over Corporate Human Rights

1. Critiquing Corporate Human Rights

When looking at the history of international HR law, one can see that HRs weren't meant to protect corporations. Additionally, this is linked to another problem: due to the historical development of HRs, HRs have been traditionally conceptualized as rights connected to human dignity and equality[46]. Thus, a "*conceptual oxymoron*"[47] when accepting the idea that corporations can be bearers of human rights, given their lack of human value. Critics of the concept of CHRs argue – as the name suggests itself – that it is strictly dependent on the existence of a human being since it consists of an intrinsic value[48]. Modern human rights are mainly based on the idea that every human has inherent dignity and worth, which must be protected legally. This idea hasn't been the norm historically but has gotten a lot of support in the aftermath of the Second World War[49]. That is why supporters of this view argue that HRs can only be claimed by human individuals, not by corporations (so-called 'individualistic approach')[50]. In contrast to corporations, only human beings are capable of suffering[51]. This approach particularly emphasizes the power imbalance of humans and states, which has been the core basis for the conception of human rights. The vulnerability of human individuals causes the moral underlining of HRs, which can't be equated with corporate agents' "suffering"[52]. HRs provide legal protection against state interference in the sphere of individuals. Applying that justification for human rights leads necessarily to a denial of CHRs. Corporations or legal persons can't hold an intrinsic value or dignity. They exist because of an incorporative act and

[46] *Isiksel*, „The Rights of Man", p. 296; *Kulick*, p. 562.
[47] *Emberland*, p. 27.
[48] *Kulick*, p. 562.
[49] *Wiater*, p. 5.
[50] *Bottomly*, p. 62.
[51] *Kulick*, p. 544.
[52] *Isiksel*, „The Rights of Man"; p. 296, *Kulick*, p. 562.

dissolve because of a legal act, consequently leading to the assessment that corporations aren't 'natural' in a legal-philosophical sense, but artificial[53].

Institutionalizing human individuals by establishing HRs, the law acknowledges their universal moral interests[54]. Reversely, when accepting CHRs, corporations could be put on the same moral level. On one hand the 'classical liberal approach' can justify the concept of HRs, which sees HRs as a legal tool fulfilling individuals' need for protection against "*governmental excess*"[55]. However, this shows that corporate human rights can be conceptually critiqued as well as justified by liberal principles since Liberalism intends to grant economic freedom and, in that sense, legal protection, especially that of property. It advocates individual rights as protection against state-based oppression. While this naturally applies to human beings, it holds also true for legal entities. Some authors, on the other hand, perceive CHRs as a result of a general neo-liberal push in international law and therefore reject them[56]. CHRs are seen as a tool for corporate interests, reflecting a general trend after the 1970s[57], leading to a deepening of corporate (transnational) power. *Isiksel* argues the attempt to extend HRs on corporations would reflect an appropriation process protecting transnational corporations and bolstering their claims against states"[58]. In that context, critics emphasize the economic and political power imbalance between the developed and the developing world[59], accusing the attempt to grant corporate human rights of securing transnational Western corporations exploiting developing countries since these would have fewer tools to infringe corporate rights. *Steininger* sees the Marxist position confirmed that granting corporations individual rights as an instrument to protect corporate activity against collective redistribution reflects its securing impact on the power relations within capitalism[60].

Regardless of the ideological argument, the result of more protection would be less governmental capabilities to limit corporate power. This can be illustrated in the reasons for a past judgment by the Australian High Court. In the case of *Environmental Protection Authority*

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[53] *Wiater*, p. 17.
[54] *Besson*, p. 29.
[55] *Emberland*, p. 28.
[56] *Steininger/Von Bernstorff*, p. 2.
[57] *Wiate*r, p.5.
[58] *Isiksel*, „The Rights of Man", p. 297.
[59] *Wiater*, p. 4.
[60] *Steininger/Von Bernstorff*, p. 4.

V. Caltex Refining Co Pty Ltd, the defendant, an oil company, claimed the right against self-incrimination when asked to submit documents regarding accusations of committing pollution offenses. The court rejected that claim, seeing the risk of deepening the power superiority of corporations, arguing that due to the possession of much more resources, corporations would be usually in a stronger position than human beings[61]. While in this case, the Australian High Court didn't have to interpret UN law, the reasoning can be applied analogously to the issue around CHRs in international law, particularly regarding Art. 14 (3) (g) of the ICCPR [62]. Taking into consideration that holding corporations accountable for offenses has already been difficult, accepting CHRs could make that even more challenging. Thus, one could make the claim that CHRs would not benefit public interests but only the interests of managers and majority shareholders[63].

Besides legal-philosophical arguments, we should remember that there is little if any basis for deriving human rights from international legal treaties or customary law[64]. Additionally, practical and functional arguments against the establishment of CHRs are brought forward. Meaning, that the idea of CHRs would face practical obstacles, such as combining different legal corporate forms of domestic legal systems into one international law regime and the question of rights holders regarding the division between the shareholders and the corporation as a separate entity[65]. Thus, if corporations would be granted human rights, they could only be codified as law through a formal process, e.g. by international treaties[66].

2. The Need for Corporate Human Rights

However, the total rejection of CHRs is not shared by all scholars in international human rights law. Some argue that CHRs might even benefit human beings[67], particularly in the context of HRs exercise. Take the imaginary example of a daily journal – legally constructed as a legal person – getting banned by a state authority[68]. In this case, the company (the daily journal or

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[61] *Caltex Refining Co Pty Ltd v State Pollution Control Commission*, 25 NSWLR 118 (1991).
[62] Art. 14 (3) (g) ICCPR explicitly prohibits compelling an individual to testify against himself.
[63] *Bottomly*, p. 64.
[64] *Ku*, p. 732.
[65] *Ku*, p. 753.
[66] *Ibid*, p. 734, 753.
[67] *Bottomly*, p. 62.
[68] *Kulick*, p. 564.

publishing house) is getting hindered by the state from acting in a way that enables the individuals behind the legal person (executives, authors, etc.) to express their freedom of expression (as is, for example, written down in Art. 19 ICCPR) as a basic human right. From an individualistic point of view, someone might argue for the lack of necessity to protect the daily journal in such an example since the mentioned individuals could invoke their human rights by themselves. However, this misses the importance of corporately organized journals for giving individuals access to resources that enable them to make their opinions public to a broader audience, which otherwise wouldn´t be possible. Though nowadays authors have much easier access to publishing platforms through the internet, some traditional journals still own a lot of prestige, which automatically attracts public attention. In addition, internet platforms could also be seen as equivalent to traditional publishers. These mediums of articulation enhance HRs exercise. Thus, one could even imagine the creation of a corporation with the intent of enhancing HRs, as some Indigenous people did in Australia[69].

While *Wiater* concludes that there is no proper justification for corporate human rights based on an inherent moral value of corporations but rather a political justification[70], it mustn't result in a full lack of moral reasons to accept corporative human rights. Moral arguments can be made in favor of corporate human rights. If supporting corporate human rights is for example (partially) based on the idea of enhancing that of individuals, why shouldn't that constitute a moral justification as well? If the legal protection of corporations – under the view of 'corporate theory' – protects the rights of the employees indirectly (besides that of the shareholders), e.g., the right of journalists to freedom of expression, there is no reason not to assume a benefit for the individual in a moral sense.

Because of the described significant role legal persons, hence sometimes corporations (e.g. a publishing company) can have concerning the exercise of HRs, some argue that they deserve international legal personality, thus the ability to claim human rights[71]. That´s why the "derivative approach" since it recognizes the legitimate interests of corporations while giving a solution to the issues brought forward by the advocates of the individualistic approach[72]. The

[69] *Bottomly*, p. 61.
[70] *Wiater*, p. 17.
[71] *Ku*, p. 737.
[72] *Kulick*, p. 557.

derivative approach allows legal users to extract human rights protection from the individual and apply it to corporations[73], meaning that "*human beings are the ones who enable corporations to claim human rights because, eventually, they serve the interest of individuals.*"[74] Therefore this approach is more of a subcategory of the individualistic approach since it still doesn´t see legal persons as directly capable of bearing HRs[75]. When legal entities are still not enjoying human rights themselves but are entitled to claim the protection for the sake of ensuring the rights of individuals standing behind the corporation[76], CHRs are limited to the extent that only the human rights protection of individuals is fostered[77].

A case for CHRs can also be made from another perspective. Namely, that HRs are conceptually an internationalized variation of domestic constitutional rights[78]. Since corporations as legal persons are recognized and given fundamental rights in nation-states, at least in Western capitalist countries, mirroring this should also be applied on the level of international law[79], hence HRs law. This view is based on a particular understanding of international law, emphasizing the protective role of HRs against the exercise of public power by international institutions, analogous to the purpose of fundamental rights in domestic constitutions. However, according to *Isiksel*, this hasn't been the conceived main goal of HRs, but serving as a barrier against abusive exercise of power by nation-states and their agents[80]. HRs should hence be seen as a complementary, not adversary, regime to national regulations, "*elevating the standards of treatment that domestic institutions accord to citizens*"[81].

3. A Functional Perspective

The functional approach suggested by *Kulick* doesn't tie the application of human rights to the existence of human beings behind the corporation, but it does ask about the function (or purpose) of the company. Only as long as the purpose for which the corporation was established is directly linked to HRS protection claims, a corporation may receive that protection, and only

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[73] *Bottomly*, p. 62.
[74] *Kulick*, p. 544.
[75] *Ibid*, p. 539.
[76] *Ibid*, p. 544.
[77] *Wiater*, p. 2.
[78] *Isiksel*, „The Rights of Man", p. 298.
[79] *Ibid,* p. 314.
[80] *Ibid*, p. 344.
[81] *Isiksel*, „*The Rights of Man*", p. 345, 347.

to the extent that the corporation pursues the purpose through the specific activity[82]. Logically, this would mean, e.g. a company publishing political news articles could claim the right to freedom of expression, but not that to freedom of religion. The reserve would apply to a Church entity. In conclusion, applying human rights to corporations wouldn´t be based on the individuals behind the corporations – e.g., shareholders – but on their form as legal persons, and limited by their actions. Regarding infringements of the shareholders' freedom of religion would be irrelevant if the company hadn't been established for religious purposes. By that, – as *Kulick* does admit[83] – the jurisprudence of the ECtHR needs to be refuted partially since it sometimes takes into consideration the human beings behind the legal persons[84].

On the aspect of evaluating the purpose of a legal entity, the functional approach relies on domestic corporate law. Meaning, that a nation-state has the competence to regulate the establishment of corporations, with the result, that the domestic state decides to a considerable degree whether corporations can claim the protection of HRs[85] . This might be seen as riskless, but it definitely challenges the concept of HRs to the degree that they are universally (internationally) effective.

Kulick acknowledges that his approach faces the danger of CHRs being misused for corporate interest. He therefore suggests a three-tiered test for the evaluation of granting CHRs[86]. On the first level, the claimed HR must be conceptually applicable, excluding HRs which by their nature can only protect human beings (e.g. the prohibition of torture). After that, the purpose of the corporation must be evaluated. Lastly, the corporation must have made the pursuit of its purpose credible through its past behavior. However, it doesn't seem convincing, that the proposed test would be able to hinder, or even significantly limit, corporate abuse of a wide scope of HRs protection. Besides the hurdles of deciding what purpose a legal entity has, especially the third test question probably wouldn't be able enough, though it would make it harder for corporations to abuse the HRs protection. The necessity of behavioral credibility conflicts with *Kulick's* permission for a corporation to change its purpose. If the latter is the

[82] *Kulick*, p. 565.
[83] *Kulick*, p. 568.
[84] Exemplary, see ECtHR, *Sanoma Uitgevers B.V. v. The Netherlands*, Appl. No. 38224/03 (14 September 2010).
[85] *Ibid*, p. 565 et seq.
[86] *Ibid*, p. 567.

case, why shouldn't the corporation in question be able to claim HRs protection, by relying on the justification, that it recently changed its purpose. Therefore the lack of appropriate past behavior shouldn't be banning the application of CHRs. Additionally, even if a corporation is able to prove, that its past behavior reflects the exercise of the HR in question, that doesn't necessarily exclude corporate abuse of HRs protection. An analogous example would be Scientology's masking as a church entity and invoking freedom of religion in order to mask its primary financial interests.

As we can see, neither the functional or the derivative approach convincingly minimize their flaws. Does that mean, we should stick to the individualistic approach? If yes, what about the necessity for CHRs? To answer that question, there is no need for another approach, as long the individualistic approach is applied extensively. To be more specific, if we allow individuals to claim HRs in the case of an indirect infringement, we will be able to factor in the described socio-economic role of corporations. For example, a newspaper facing governmental actions should be permitted to invoke HRs protection as long as the individuals behind are significantly (indirectly) affected in the exercise of their HRs. In that case, there would be no need for the legal entity to take action. Whether these theoretical findings hold up, will be seen in the coming sections.

C. Transnational Corporations Challenging Nation-states

On the basis of the legal and theoretical findings we've just discussed a deeper look at the power dynamic between nation-states and TNCs and their implications for the (corporate) HRs is necessary. For that, we need to elaborate on how TNCs have gradually increased their power globally[87]. Further, we will see whether that affects nation-states ability to ensure their sovereignty and HRs realization. Only that way can answer the question, of whether the critics of CHRs are right about the risk of abusive use of corporate power concerning HRs. By "transnational corporations" we are referring to the synonymous wording "Multinational Corporations" (MNCs) and using – like *Gronowska*[88] – the definition of the UN legal

[87] Inspired by *Wallenius* we will divide this question into the economic and political power, see *Wallenius*, "The impact of the power balance between the state and the transnational corporation on human rights".
[88] *Gronowska,* P. 454.

framework which understands TNCs (or MNCs) as "*enterprises which own or control production or service facilities outside the country in which they are based*" the definition of the UN legal framework[89].

I. The Power of Transnational Corporations in the Global World

1. Economic Power

The globalization and internationalization of trade during the last few decades have disrupted societal structures. This "Global Capitalism" not only represents a collection of nation-states[90], but the internationalization of production and capital itself. National identities and borders are losing more and more importance since international trade and globalization have been forcing national countries to open to foreign investments. After World War II nation-states had much more power to influence their economy, leading to a more regulated world market by establishing economic mechanisms, such as capital controls, fixed exchange rates, or limited free trade agreements"[91]. The transformation in the communication and information sector and the end of Bretton Woods[92] 1971 created new international patterns of production, which in turn helped break up obstacles for the cross-border flow of capital[93]. In addition to the production patterns, national financial systems integrated, which created new forms of money capital, like hedge funds or secondary derivative markets, and made it easier for capital ownership to transnationalize[94]. This allowed for "*intensified inter-sectoral mobility of capital*" and influenced the loosening of the barriers between different kinds of capital (industrial, commercial, and money)[95]. Globalization created a framework, in which TNCs can operate, especially in the developing world, in their best interest[96]. Since national financial systems have been integrated into a global system and the network of stock exchanges, and computerization

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[89] "Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations, p. 25.
[90] *Robinson*, p. 180.
[91] *Babic*, p. 23.
[92] The Bretton Woods Agreement 1944 introduced a new era of global economy, especially by re-establishing the gold standard through the US dollar as international reserve currency, opening free trade by lowering tariffs, and establishing the World Bank and the Monetary Fund, see *Marrewijk*, p. 509.
[93] *Babic*, p. 23.
[94] *Ibid*, p. 178.
[95] *Robinson*, p. 178.
[96] *Augenstein/Kinley*, p. 3.

have decreased, money capital can move almost freely globally[97]. Because of that, the national origins of capital have lost significance. The transnationalization process led to about 80% of the global trade being linked (gross exports) to international production networks of TNCs in 2013[98]. As a result, the growth of gross domestic product (GDP) has been heavily outrun by the exponential increase in global trade[99].

The result was the development of transnational companies, from whom some have been able to gain wealth and economic power on a level exceeding some states. They ceased to represent nation-states but rather transnational capital. Besides cross-border activities, transnationalization is driven through decentralizing, fragmenting, and restructuring production processes"[100]. The ownership of materialities (especially means of production, distribution, land, and finance) can be seen as a gateway for uneven power relationships[101]. On the international level, global strategies of TNCs consist, among others, of cross-border mergers and acquisitions (M&A), interlocking directors globally, combining production factors globally, stock exchanges, subcontracting networks[102].This might lead to TNCs outplaying states in general terms, by choosing between different national laws through their settlement of subsidiaries[103].

In that context, FDIs are becoming a very important tool for TNCs' businesses. FDIs have gradually increased over the last few decades and become a major driver of profit-making for TNCs[104] as part of a strategy[105]. This is also true for mergers and acquisitions (M&As), which can be regarded as a subcategory of FDIs. M&As, as a crucial reflection of the globalization of capitalism, have grown in significance[106]. Their transaction volumes increased "*from around USD 500 billion per annum in the early 1990s to peaks of nearly USD 5,000 billion in 2007 and 2015*[107]. This development coincides with the growing share of cross-border deals

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[97] *Ibid*, p. 178.
[98] "Global Value Chains and Development", p. 24.
[99] *Roberts*, p. 162.
[100] *Robinson*, p. 180.
[101] *Birchall*, p. 51.
[102] *Ibid*, p. 176.
[103] *Weilert*, p. 454.
[104] *Kordos/Vojtovic*, p. 153.
[105] *Ibid, p. 153.*
[106] *Robinson*, p. 176.
[107] *Ibid*, p. 176; *Babic*, p. 25.

concerning M&As, reaching 50 percent from the 1980s until 2017[108]. Cross–border deals are often protected by Bilateral Investment Treaties (BITs). These generally consist of a so-called "stabilization clause"[109], which hinders the contracting governments from adopting new laws obstructing FDIs made by foreign corporations. If breached, the domestic state can be held liable in the form of a damage payment. Additionally, investment treaties are one-sided regarding the procedural right to file a complaint since this is generally only granted to the investing corporation. This could be used as leverage by TNCs to influence domestic governments in the lawmaking process, making the state less powerful[110].

According to *Wallenius*[111], this dependency manifests itself in laws favoring FDIs especially in the sectors of work and tax – since more FDIs could lead to more employment. However, TNCs are oftentimes not interested in securing employment safety and following relevant laws. Further, TNCs are aiming to decrease employment costs as much as possible. Similarly, the host state will probably provide the legal framework for cheap labor and low labor protection standards. This gets even more dubious in the case of child labor. Additionally, Lowering taxes can be necessary for attracting TNCs into the country, especially if the host state doesn't have many other capabilities to gain TNCs' attention. Governments regularly become hesitant to raise taxes, because they are worried about negative consequences, particularly TNCs pulling out resources. TNCs can also make it very hard for governments to enforce existing tax regulations by settling their parent company in a country with low corporate taxes[112], such as Ireland (using so-called 'tax havens').

As we can see, corporations were able to gain enormous economic size and power by becoming transnational and making use of 'global capitalism'.

2. Political Power

However, with economic power comes also corporate political power. That is power at the intersection of politics and business, describing "*the conglomeration of the influence that*

[108] *Babic*, p. 25.
[109] *Wallenius*, p. 28.
[110] *Ibid*, p. 28.
[111] For the following see *Wallenius,* p. 31 et seq.
[112] *Wallenius*, p. 32.

economic entities have to affect and/or transform the behavior of individual or collective entities or the predominant logic in other systems"[113]. One key characteristic of TNCs is that territorial boundaries ceased to be sufficient markers of power distribution between states and corporations[114].

On the first level, the tremendous material power, extending to, among other things, food, housing, and healthcare, leads to a power shift, which harbors the danger of dictating access to (socio-economic) rights[115]. If a big company owning thousands of housing facilities raises the rent to be paid by the tenants, this will automatically aggravate some individuals ability to access that facility. When the drinking water company *Nestlé*, for example, decides to buy land that harbors an enormous freshwater reserve, this will establish a barrier to the public's freshwater access. Since these materials are of high importance to realize rights [116], corporations owning them can hold the public hostage. As a result, there is a danger that TNCs (and corporations in general) are taking over public tasks, but with the primary goal of profit-making. A corporation's value system is based on profitmaking, making it immune to social consequences of its own actions"[117], leading to an asymmetry in the approach to economic activities.

We should also be aware of the legislative relationship between states and corporations. States have a huge amount of power, especially through the legitimized mandate to collect taxes and through their military capacities (though the latter can be challenged by the growing private military sector). Corporations are entitled – at least in Western democracies – to push back against the state on the legal level by invoking their fundamental (constitutional) rights. This dynamic seems to be getting challenged more and more during the last decades. The growing economic power of corporations gives TNCs more leverage over domestic governments. Thus, it may endanger the state's ability to regulate TNCs. The entanglement between the government and TNCs is an intended product. TNCs quite successfully influence governments through discussion platforms, organized by different (lobby) organizations and institutions, where the

[113] *Kroll/Edinger-Scholz*, p. 351.
[114] *McCorquodale*, p. 91.
[115] *Birchall*, p. 51.
[116] *Ibid*, p. 51.
[117] *Weilert*, p. 454.

corporate perspective can be extensively discussed. By lobbying and funding state actors (or political campaign contributions[118]) TNCs have successfully impacted the adoption of laws[119], aimed at reducing taxes or legal penalties, brought politicians on their side with monetary grants, and got exclusive jobs, this might be even more the case in developing countries. Of course, corruption remains a big problem in that matter. It is especially problematic since the line between legal lobbying and corruptive behavior has always been very blurry. According to *Robinson,* one important aspect of TNCs is their hegemonic position in the global market, forcing only nationally operating smaller corporations to rely on transnational capital, for example, through financing, supply chains, or outsourcing"[120]. Therefore, this hegemonic position results in an oligarchic-like structure, giving a small number of elite individuals enormous power through the ability of centralized planning[121]. The heads of these TNCs have built an elite circle, consisting of foundations, policy planning institutions, or corporate boards, which has enabled them to impact important institutions such as G8 or G20, the World Economic Forum, the World Bank, or the World Trade Organization[122].

As a result, nation-states are hesitant to regulate TNCs. However, nation-states inherit the jurisdiction to limit corporate activities within their territories[123]. This can manifest itself in e.g. limiting the import of specific materials or services, raising labor market standards, or simply raising corporate taxes. A lot of times, governments hold back strict regulative measures in order to attract TNCs[124]. These dynamics show an "*enormous structural power over states and political processes in pursuit of common global corporate interests, notwithstanding competition among transnational corporate clusters*"[125]. The direct and indirect pressure by corporations and their positive impact on a country's economy has already led to instances in which the host countries' governments did not enforce already existing laws – especially in the developing world. That means, in addition to the danger of not adopting laws regulating corporations, corporate political power can lead to an absurd situation in which a hosting

[118] *Ruggie*, p. 321.
[119] *Pegg/Frynas, p. 19.*
[120] *Robinson*, p. 177.
[121] *Ibid*, p. 177.
[122] *Robinson*, p. 177.
[123] *McCorquodale*, p. 97.
[124] *Maksimovic*, p. 6.
[125] *Robinson*, p. 177.

government willingly doesn't enforce existing laws[126]. This becomes more likely in the case of TNCs since they have more economic and political leverage than regional companies[127]. In the end, the described developments also touch on the issue of lacking democratic legitimization[128].

II. Obstructing Human Rights Exercise

As a result – or even subcategory – of corporate political power, the structural power of TNCs has reached a level, that specifically endangers HRs in practice[129]. They can impact the exercise of HR both on a factual and a legal level simultaneously[130]. This seem even more unfair when realizing how TNCs are benefitting from the transnationalization process and especially from operations in developing countries, often with weak state authorities and juridical systems[131]. Though TNCs are slowly forced consider the downsides of their global activities concerning environment, health, HRs, or generally corporate social responsibility (CSR)[132]. At the same time, local communities bear almost all drawbacks coming with corporate activities, often without being able to pursue legal remedies[133]. This is particularly interesting in the context of the research question since some supporters of CHRs are rejecting the argument that CHRs can endanger the HRs practice of individuals. It seems very likely that the described asymmetry in power will just strengthen if TNCs are being accepted as bearers of HRs on the level of international HRs law. This can manifest itself with Cutting an individual's access to freshwater impacts its human right to access safe drinking water and sanitation, derived from the right to an adequate standard of living under Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESC) and Art. 25 UDHR[134]. Hardening the tenant's ability to finance its home may infringe his human right to adequate housing, which is also derived from the right to an adequate standard of living[135]. On a broader level, avoiding tax payments could influence the state's ability to ensure fundamental/human rights, for example, through the lack

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[126] *Wallenius*, p. 23.
[127] *Ibid*, p. 24.
[128] *Kroll/Edinger-Scholz*, p. 352.
[129] *Babic*, p. 33.
[130] *Birchall*, p. 52.
[131] *Skinner*, p. 158.
[132] *Kordos/Vojtovic*, p. 154.
[133] *Ibid*, p. 158.
[134] See also: "The human right to water and sanitation", United Nations General Assembly Resolution.
[135] See also: General Comments by the United Nations Committee on Economic, Social and Cultural Rights, No. 4 on the right to adequate housing.

of material means necessary for human rights. There are many power strings through which corporate power over human rights could manifest itself.

Grasping corporate power over HR is crucial to understanding the need for regulations regarding corporate liability in the context of human rights abuses. Corporate power didn't just impact human rights exercise, but the regulative protections as well. This manifested itself in business interests motivating powerful corporations to oppose governmental aims to limit them. As a result, the discourse around the implementation of UN Norms or codes of conduct, addressing corporate HRs responsibilities/obligations has been heavily impacted by TNCs and their business associations[136]. Especially having access to "*decision-makers*", TNC's interests have gotten their way into the mainstream discourse, negatively impacting the push for binding regulations[137]. In addition, many countries who are dependent on TNC's business activities are developing countries. Already lacking legislation incorporating human rights, enforcement of human rights standards is weak, since TNCs are able to use economic leverage. Therefore, governments can be "unwilling or unable" to fulfill their HRs duties[138]. For instance, the ICESCR obliges the states in the case of corporate abuse to guarantee victims effective remedy. This obligation will lead to a dead end, if governments are unable – or unwilling – to apply the appropriate rules, especially in conflict zones or failed states due to the lack of a stable legal system[139].

III. Transnationalism and Sovereignty

As we elaborated above, TNCs were able to increase their economic size and their political power. Overlapping the connected ability to influence nation-states on the governmental level, this development raises issues with the self-proclaimed sovereignty of states. This counts for the legal and political realm. It is important to note that states at least voluntarily limit their power, or sovereignty, to a certain degree[140] when ratifying international treaties. National states restrain their own will and oblige themselves to the rule of international law willingly through

[136] *Martens*, p. 27.
[137] *Ibid*, p. 27.
[138] *McCorquodale*, p. 97.
[139] *Wallenius*, p. 25.
[140] *Voon*, p. 227.

the acceptance of international treaties[141]. This can be seen, for example, in HR law and international trade law as well, especially bilateral investment treaties (BITs)[142]. Legal self-limitation regarding BITs can be categorized into three examples of regulative clauses: the fair and equitable treatment clause regarding transparency and consistency of the state's actions towards corporations, the umbrella clause regarding the observation of the entered commitment, and the indirect expropriation clause limiting the state in its lawmaking[143]. Generally, BITs include clauses of arbitrability, limiting the state's area of jurisdiction of judicial organs concerning HRs law[144]. However, in HR law the willingness to self-limitation doesn't seem to be as pronounced as in international investment/trade law even though there is no other option when aiming for the best possible protection of HR globally. This can be seen especially when looking at TNCs. When TNCs increase their economic and, subsequently, political capacities, they become more capable of limiting a state's political, social, and economic policies[145]. As mentioned, this leads to a situation where states aren't properly able to confine corporate power since either a business branch office isn't situated in the country concerned or the management threatens the government to leave the country, possibly leading to the loss of workplaces[146].

Parallel to that development, getting hold of TNCs, especially in the case of human rights abuses, is becoming harder. Corporations becoming more and more transnational in their business activities challenges a key aspect of the traditional understanding of HR, it touches "*the substance of public authority that states wield over their territory*[147]". Meaning, a state's sovereignty in the context of HR is getting questioned in practical terms, since HR law addresses domestic states to ensure the protection of HR within their territory. The transnational character of corporations makes it more difficult to hold them responsible in practical terms as well. TNCs are often complex constructs, consisting of a parent company, subsidiaries, and suppliers which typically are situated in different countries. This makes it already challenging to answer the question of which legal entity must be brought to court and which state has the

[141] *Bures*, p. 100.
[142] *Ibid*, p. 101.
[143] *Ibid*, p. 101 f.
[144] *Ibid*, p. 103.
[145] *Augenstein/Kinley*, p. 3.
[146] *Kroll/Edinger-Scholz*, p. 350.
[147] *Augenstein/Kinley*, p. 3.

territorial obligation to enforce[148]. This can be counteracted through the direct imposition of HR obligations on corporations, making them extraterritorial[149]. However, this may be seen as a threat to state sovereignty, as it weakens a national state's regulative power and challenges the concept of state-centrism in international law[150]. The latter arises from the fear that giving HR direct binding effects could even appear as an alignment with public states[151].

However, from a state-centric view, the transnationalisation of production does not necessitate the end of the nation-state: there is substantial evidence that (some) states, as a specific form of political organization, can translate their power into the new era of global capitalism. Nation-states can achieve that, especially through state-owned enterprises (SOEs), which would lead to these states securing certain segments[152], like in the case of energy and defense companies.

IV. State-owned Enterprises

When discussing the power and legal dynamics between the state and TNCs, one aspect is often overlooked. While it is true that corporate rights frequently respond to state power and its infringements, TNCs can also serve as an extension of the state and, consequently, a tool used in the interest of a country. This can occur for example when a state invests in a company and becomes the majority shareholder.

First, we should notice the increase of transnational state-owned (SOEs) which are used as an advanced tool for the geopolitical or financial interests of states in the global system. According to *Babic*[153], from the 1970s to the 2000s the number of state-owned enterprises dropped, and SOEs had a market value of 11 percent of the market capitalization globally and their overseas investments made up about 11 percent of global foreign direct investment flows in 2012. China has been at the forefront of TSOEs by owning the vast majority (19.5 percent) of the 5,994 cases of TSOEs in 2017. It should also be mentioned that European countries play a strong role in TSOEs as well. Germany owned 7.7 percent and France owned 14.5 percent of global TSOEs, which reflects corporations' traditional role in these markets. These findings, among

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[148] *Voon*, p. 231; *Weilert*, p. 456.
[149] *Augenstein/Kinley*, p. 9.
[150] *Ibid*, p. 3.
[151] *Ibid*, p. 3.
[152] *Babic*/*Fichtner/Heemskerk*, p. 28.
[153] For the following see *Ibid*, p. 28 et seq.

others, allow the conclusion that first, transnationalism impacts state ownership, and second, states can use TSOEs to get a foot in the door of a foreign sovereign market and, therefore, potentially get a penetration tool for that economy. TNCs can use this increase in the significance of SOEs to advance their interests.

On the other hand, TNCs are also presenting a chance for better enforcement of HRs. If a state is aware of its duty to protect HR – territorial and maybe even extraterritorial – and sees that as part of national interests, it could utilize MNCs to pressure other states into protecting HR. This seems more promising than addressing HR abuses in a joint press conference, which often happens when there is domestic pressure on a government due to economic cooperation with autocracies. *Rajavuori* gives the example of the Norwegian Government Pension Fund Global (Norwegian Pension Fund), which manages a large portion of Norway's petroleum wealth and is famous for its activist divestment approach[154]. For example, they have dropped a subsidiary of the UK-based resource developer Vedanta Resources due to alleged human rights violations[155]. Though this means that state ownership can bring better outcomes for individuals around the world, it only applies to HR-respecting countries.

State ownership completely changes the usual power dynamic between states and corporations, basically melting them together. This has implications for the question of CHRs. It weakens the critique of CHRs, based on the assumption that corporate human rights are a product of the neoliberal agenda favoring corporations. More than that, one could argue that CHRs, in the case of state-owned TNCs, don't increase corporate power but rather state power in the international political sphere. This could, in turn, lead to several outcomes. First, corporate power could decrease (simultaneously) on the economic and political levels. Second, states could become even more powerful and undermine corporate rights. Third, governments could utilize corporate human rights to gain influence in foreign countries. This development challenges the traditional "*state-centric*" view that corporations are subordinate to state power[156].

On the other hand, the opposing view could be held, that the increase of SOEs is reflecting the trend of privatizing public sectors and, hence, public power. During the 1980s, a shift in

[154] *Rajavuori*, p. 728.
[155] *Ibid*, p. 728.
[156] *Maksimovic*, p. 5.

governmental interference in public sectors[157] started to occur, leading to sales of state enterprises worldwide worth over $185 billion by the end of the 1980s[158]. This development has helped the emergence of a new type of management, the "*New Public Management*", which aims to include typical business principles, such as efficiency, competition, or utilizing economic market models[159]. Behind that idea lies a key opinion of privatization supporters. Namely, private ownership provides incentives missing under state ownership, hence leading to private-run enterprises being the better models[160]. During the 1990s, the belief in privatization became a global economic phenomenon, with governments selling off $25 billion in SOEs in 1990 worldwide[161]. Arguments for the economic benefits of privatization can indeed be made. To name an example, *Nellis* concluded that private corporations producing tradables benefited the economy in Africa more than they ever did under public ownership[162]. On the broader level, privatization is seen as necessary because of the (alleged) inefficiency of state-run enterprises[163], the potential influence of politicians in the decision-making[164], or the lack of competition (or the existence of state monopolies)[165]. Supporters of privatization sometimes miss two key points: One is that corporations are profit-driven, leading to the danger of introducing mainly profitable services[166]. Although that might be good for the overall economy it is not necessarily for the services provided to the public. Second, independent of whether privatization is better for the economy, privatizing public services creates the danger of corporations getting too much leverage on governments. Additionally, in contrast to governmental services, private services remain profit-driven. However, the privatization of public power and the above-explained phenomenon of SOEs aren't necessarily exclusive. It seems we are witnessing the emergence of a trend toward the symbiosis of the private and the public realms. Corporations are trying to infiltrate the government sphere, while states are becoming aware of the possibilities SOEs offer to spread national influence globally. Calling

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[157] *Privatization* is used here broadly, including cases where private enterprises are allowed to participate in activities previously reserved exclusively for the public sector,
, p. 200.
[158] *Goodmann/Loveman*.
[159] *Savas*, p. 1736.
[160] *Stiglitz*, p. XI.
[161] *Goodmann/Loveman*.
[162] *Nellis*, p. 127.
[163] *Willner*, p. 62.
[164] *Ibid*, p. 62 et seq.
[165] *Ibid*, p. 64.
[166] *Jomo*, p. 203.

this a tense relationship seems more appropriate than concluding that one side has the upper hand. It will be seen how the power struggle between TNCs and nation-states in the context of SOEs will end. One can be said, though, that the concept of state-centrism has found its limits.

D. Transnational Corporations Utilizing Corporate Human Rights

To further explore whether CHRs are misused by TNCs for corporate interests we should take a look at one current real-life example suited to demonstrate the findings above. That example concerns the social media platform "X" claiming the right to free speech. We will discuss X´s behavior - particularly after Elon Musk´s takeover - in the context of the theoretical foundations and the power shift between TNCs and nation-states. Additionally, it would be interesting to take an exemplary look at the important case law of the US Supreme Court () concerning the First Amendment right to freedom of speech in comparison to ECtHR case law, since the EU faced a lot of criticism for its regulative regime from the American side. This enables us to draw analogies to the issue of freedom of expression in international HRs law (e.g. Art. 19 ICCPR).

I. X's Fight for Free Speech

Not just JD Vance alleged the EU for a lack of freedom of speech. Also Elon Musk, as the owner of X, criticized EU policies for content moderation combating illegal speech on social media, for example by calling Thierry Breton, former EU Commissioner for Internal Market, on X "*a tyrant of Europe*"[167]. One important EU law concerning content moderation is the Digital Services Act (DSA)[168] which has been subject to criticism by Online Social Media Platforms (SMPs). The DSA is an EU regulation adopted in 2022 and fully applicable since 2024, which updates the Electronic Commerce Directive 2000 in EU law. It applies to online platforms and intermediaries (Art. 2), such as social networks, and addresses illegal content, transparent advertising, and disinformation[169], while implementing intermediary liability[170]. X's moderation efforts under the DSA are less compared to other platforms[171]. X and other SMPs

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[167] "Elon Musk calls former EU digital chief Breton 'tyrant of Europe'", The Brussels Times.
[168] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC, https://eur-lex.europa.eu/eli/reg/2022/2065/oj/eng.
[169] Summary of the Regulation (EU) 2022/2065 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act), EU.
[170] *Kulesza*, p. 143 et seq.
[171] *Kaushal/Van de Kerkhof/Goanta/et al.*, sec. 5.1.

have been reducing their efforts to moderate content[172]. Because of its transparency and moderation behavior under the DSA, the EU Commission started an investigation against X[173]. Furthermore, a study found an increase in the usage of hate speech, including terminology associated with racism, sexism, and ableism, across the platform after X was taken over by Musk[174]. Targets were vulnerable communities, such as LGBTQ+, liberals, and ethnic minorities[175]. Musk aligns himself with right-wing political figures such as Trump, manifesting itself in X, which is not becoming a marketplace for free speech, as Musk is propagating, but a marketplace for right-wing content. In December 2024, Musk live-streamed a conversation with the co-leader of the German radical right-wing party, Alice Weidel[176], helping the party in their pre-election campaign for the new German Parliament composition in February 2025. On the other hand, Musk has been quite hesitant, hence hypocritical, when it comes to defending free speech in autocracies, such as China, or even regarding removing posts criticizing himself on X[177]. His actions point to him using X as a tool to influence the access, distribution, and presentation of information[178]. A bias in the approach to content moderation can also be observed with other SMPs, such as Google and Facebook, who are having trouble with EU regulation regarding content moderation and data protection (e.g. General Data Protection Regulation (GDPR)[179]) as well. For example, a work on Facebook's content moderation behavior during May 2021 identified instances in which Facebook removed documentation of aggressions against Palestinians committed by Israelis from Instagram[180]. According to that study, the censorship of documentation was biased in the sense that content supporting a pro-Israeli narrative was much less subject to censorship or removal than pro-Palestinian content[181]. These American-based SMPs are used to enjoy the right to freedom of expression, since in the

[172] *Arun/Chhatani/Kumaraguru*, p. 201.
[173] "Commission sends preliminary findings to X for breach of the Digital Services Act", EU Commission Press Release.
[174] *Arun/Chhatani/Kumaraguru,* p. 208.
[175] *Ibid,* p. 208.
[176] Later published by The Economic Times on their youtube channel, see "Elon Musk-Alice Weidel Full Conversation: Tesla CEO speaks to German far-right party AfD chief Economic Times".
[177] *Timm*, "Elon Musk has become the world's biggest hypocrite on free speech".
[178] *Uhlenbusch,* "Elon Musk, the Systemic Risk".
[179] In the past Meta got fined for breaches of the GDPR, see "1.2 billion euro fine for Facebook as a result of EDPB binding decision", European Data Protection Board News; in the case of Google, see "The CNIL's restricted committee imposes a financial penalty of 50 Million euros against GOOGLE LLC".
[180] *Almehdar*, p. 208.
[181] *Ibid*, p. 209.

US the Supreme Court (SCOTUS) already ruled in favor of SMPs bearing the First Amendment Right to free speech[182].

However, Europe isn't the only target of Musk's free speech agenda. Another incident concerning X occurred in Brazil during the last two years. In the aftermath of former president Jair Bolsonaro's loss during the presidential election in 2022, some of his supporters stormed and damaged buildings of the Federal Supreme Court, the Presidency, and the National Congress on the eighth of January 2023, leading to investigations of Bolsonaro[183]. As a result, the Brazilian Supreme Federal Court ordered X, among other SMPs, to block the accounts of individuals accused of inciting or supporting attacks on the democratic order. After ignoring several orders to remove the content and to select a local representative, as required by the law, X was fined $5.1m, and access to the platform was blocked. Only after a while did X comply with the orders and pay the fine, leading to the removal of the blockade[184]. Similarly to the example above, Elon Musk has aligned himself with right-wing figures in Brazil as well, namely Jair Bolsonaro. Depictive of that "coalition" is a meeting between the two, which took place in 2022 (before the takeover of X/Twitter by Musk) in Sao Paolo just five months before the presidential election (won by Lula)[185]. After that meeting Bolsonaro called Musk a "legend of freedom.", reminding of the behavior of Musk towards the EU[186]. Musk also made a public statement against an official of the host country by calling Alexandre de Moraes, one of the Supreme Federal Court's judges "Voldemort" and posting a meme of a dog dangling its private parts in the face of another animal[187]. Justice De Moraes has been acting against the spread of misinformation online during Bolsonaro's administration as the rapporteur of an investigation on digital militias harassing institutions since 2019 (so-called "fake news inquiry")[188]. Google lobbied successfully[189] against debating Bill 2630 in the Chamber of Deputies, which – broadly

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[182] See section D II.
[183] *Meyer/Bustamante*, "Accountability in Brazil".
[184] *Derico/Wells,* "Brazil lifts ban on Musk's X after it pays $5m fine".
[185] *Jeantet*, "Elon Musk visits Brazilian President Jair Bolsonaro to discuss Amazon rainforest plans"; Ironically, the topic of that meeting was the possible use of Starlink in the fight against deforestation, which surged under Bolsonaro's presidency.
[186] *Ibid*.
[187] *Phillips*, "Brazil lifts ban on X after Elon Musk complies with court demands".
[188] *Meyer/Bustamante,* "Accountability in Brazil"; *Reis*, "Brazilian Judicial Branch v. Telegram (and Bolsonaro)"; „Crise entre Musk e STF pode acelerar regulamentação das redes sociais': o que diz imprensa internacional", BBC.
[189] *Meyer/Bustamante,* "Accountability in Brazil".

speaking – was aimed at fighting disinformation on the internet[190]. It seems evident that X's corporate interests were prioritized over a supposedly heroic fight for free speech since many users in Brazil switched to other SMPs like Bluesky, and the demand for VPNs (Virtual Proxy Networks) in Brazil increased[191]. With a population of over 200 million people, surely Brazil was too big of a market for Musk not to comply with the orders. This case is reminiscent of how opportunistic the discourse around HRs and CHRs can be.

One, we can see that TNCs indeed utilize HRs to push their influence and hence their corporate interests. Rising economic and political power enables these corporations to shape public policies and influence lawmaking. Some scholars are calling that fusion of institutions concerning SMPs "techbrocracy"[192]. Economic power has led to political power since these tech companies have been invited into the inner circles of the government due to their significance. In combination with the techbrocracy, governance has become technocratic, which displaces the public sphere by the private and helps transform new build alliances between economic into international relations[193]. Regardless of the terms used to describe such oligarchic conglomerates, one thing seems evident. When these tech companies are advocating for the preservation of fundamental (human) rights, such as freedom of speech, they are building up a facade. The facade is there to hide the real goal, that of making a profit. To achieve that goal, TNCs, such as the technocracy, will search for "opportunistic political gain"[194].

Second, when TNCs claim CHRs, they are very likely not doing that to support the exercise of HRs by individuals. TNCs (mis)use the right to freedom of speech for their own corporate goals, which is also a manifestation of the above-elaborated shift of power between nation-states and TNCs. That is why *Koltay* agrees with *Bernal's* opinion that free speech will be championed by social media platforms whenever it suits them[195].

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[190] Projeto de Lei n° 2630, de 2020, Lei das Fake News, https://www25.senado.leg.br/web/atividade/materias/-/materia/141944.
[191] *Derico/Wells,* "Brazil lifts ban on Musk's X after it pays $5m fine".
[192] *Van de Kerkhof*, p. 4.
[193] *Gronowska*, p. 455.
[194] *Van de Kerkhof*, p. 4.
[195] *Koltay*, p. 572.

II. Pushing US Supreme Court Case Law?

When Vance, Trump, and Elon Musk are pushing for free speech in Europe, they are doing that from an American perspective. The American perspective inherits a different understanding of free speech than the European approach to freedom of expression. Thus, they are using the SCOTUS approach. We will examine its case law in comparison to cases of the ECtHR.

In that regard, a fairly new ruling by the SCOTUS must be mentioned, namely the case of *Moody v. NetChoice*. In October 2023, the SCOTUS sent back a ruling of an appellate court in Texas to the lower court for further proceedings. This case concerned statutes adopted in Texas and Florida in 2021, prohibiting social media platforms from censoring postings. The applicants were the Computer & Communications Industry Association (CCIA) and NetChoice, whose members consist of several social media platforms. The reasoning behind the laws consisted of allegations of removing postings of conservative voices[196]. This could also be interpreted as if these laws were created to ease the spreading of conservative ideas.

The SCOTUS emphasized SMP's First Amendment right. Freedom of expression applies "*when an entity engaged in compiling and curating others' speech into an expressive product of its own is directed to accommodate messages it would prefer to exclude*"[197]. Wanting the social media platform to change the published speech is a preference that cannot be imposed under the First Amendment[198]. The SCOTUS puts social media platforms into the same category as traditional publishers and editors, which do and legally can select expressions into their products[199]. The SCOTUS aligned with former rulings, granting corporations vast protection of constitutional rights by consistently taking a derivative approach[200]. In that regard, it could be said that the SCOTUS consistently applies the theoretical concept of the "marketplace of ideas". That wording was used by the SCOTUS first in the case of *United States v. Rumley* in 1953[201], where the court dealt with several issues around the right to free speech. In that case, the referent was the secretary of an organization engaged in the sale of political books. He refused to give

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[196] *Samuelson*, "Do Social Media Platforms Have Free Speech Rights to 'Censor' Conservatives?".
[197] Moody v. Netchoice LLC, 603 U. S. (2024), Syllabus, para (a) sec. (1).
[198] *Ibid*, para III. Sec. C.
[199] *Moody v. Netchoice* LLC, 603 U. S. (2024), Opinion of the Court delivered by Justice Kagan, before para I.
[200] *Kulick*, p. 552, 554.
[201] *Wampfler*, p. 108.

away the names of those who made bulk purchases of these books for further distribution to the House Select Committee on Lobbying Activities and was therefore convicted[202]. The SCOTUS ruled in favor of *Rumley*.

Though "marketplace of ideas" was used for the first time in this ruling, traces of it can be found in earlier rulings by the SCOTUS, namely in the judgment concerning *Abrams v. United States* in 1919. One of the judges expressed the concept of "free trade of ideas" and laid down the path to which the right to freedom of expression should be interpreted[203]. Independent from the terminology used, the concept fundamentally emphasizes the need for competing ideas in a free market[204], initially established by John Steward Mill[205] and John Milton[206]. Therefore, there is no room (or only a small room) for government interference, hence the right to free speech[207]. As a result, the best idea will automatically come out at the top[208]. However, some argue that this approach is outdated and not suited for the new challenges of the digital age, especially considering that not all participants of the marketplace are interested in fair competition by willingly spreading "fake news"[209]. Accordingly, the US government has been quite hesitant to regulate online speech. Often, the task to contain (hate) speech is taken by civil litigators raising claims because of defamation[210].

In contrast, the EU has a relatively narrow understanding of free speech. That's why the EU has been more determined to regulate SPMs by implementing several laws (see above). This can also be observed in ECtHR case law. In two important rulings concerning the liability of online media platforms, the ECtHR expressed a stricter approach. In *Delfi AS v. Estonia*[211] the ECtHR ruled in favor of *Estonia*[212]. The applicant, a news portal, published an article under which platform users commented with offensive words. Though the news porta removed the

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[202] *United States v. Rumley*, 345 U.S. 41 (1953), p. 42.
[203] *Wampfler, p. 108.*
[204] *Ibid*, p. 108.
[205] *Gordon*, p. 235.
[206] *Nunziato*, p. 1524.
[207] *Ibid*, p. 1520.
[208] *Ibid*.
[209] *Wampfler*, p. 109.
[210] *Nunziato*, p. 1523.
[211] ECtHR, *Delfi v. Estonia*, App. no. 64569/09, (10 October 2013).
[212] The ruling was later approved by the Grand Chamber, see ECtHR Grand Chamber*, Delfi v Estonia*, Appl. no. 64569/09, (16 June 2015).

comments after noticing, the ECtHR found no violation of Art. 10 ECHR in the ruling of the Estonian court, which held the applicant liable for the offensive comments made by its users. However, interestingly, the ECtHR, accepted the notion of the news media platform falling under the scope of Art. 10 ECHR again, without much explanation, and stating: "*The Court considers that the applicant company's grievance relates to freedom of expression and falls within the scope of Article 10 of the Convention*"[213]. This stands in line with the settled case law we discussed above.

Another important ruling of the ECtHR was made in the case of *Zöchling v. Austria*[214] which concerned a news portal's moderation behavior, particularly the absence of a notice-and-take-down system. In this case, the applicant, a popular Austrian journalist, had been the subject of an article published by a right-wing news portal. Registered users commented on that article, partially using death threats and massive insults. Even though the news portal deleted the comments and passed over the email addresses of the users in question, their identification failed due to the server providers refusing to give away the names of their users. Despite the news portal's efforts, the ECtHR emphasized that at least a minimum of automatic filtering is necessary and overruled the judgment of the Vienna Court of Appeal[215], which was satisfied with the efforts of the news portal. Again, the ECtHR did not elaborate on the applicability of Art. 10 ECHR stating that it has been established case law by now[216].

Whether these rulings implemented too strict requirements for news portals in terms of content filtering and observation of content, can be argued[217]. However, though these two judgments didn't deal with SMPs specifically, they are reminiscent of the ECtHR's approach regarding online platform regulation, approving of the traditional European view on freedom of expression compared to the American understanding. However, they also show that the question of whether corporations can claim the right to freedom of expression isn't disputed. Furthermore, connecting this section to the circumstances regarding X, it can also be concluded

[213] ECtHR, *Delfi AS v Estonia*, para 50.
[214] ECtHR, *Zöchling v. Austria*, App. no. 4222/18 (05 September 2023).
[215] *Tuchtfeld*, "Be Careful What You Wish For".
[216] ECtHR, *Zöchling v. Austria*, para 15.
[217] Critical *Voorhoof*, p. 128.

that TNCs can utilize a certain regional understanding of a human right to push their agenda in a foreign region.

III. Applying the Theoretical Approaches

On the regional level, we can see that the US and the EU approaches have been different in terms of content moderation policy, but the same regarding the juridical acceptance of a corporation´s right to freedom of speech/expression. However, the question of how the theoretical approaches towards CHRs in the context of international HRs law would handle the question of X on a broader level remains open. The individualistic approach doesn't grant human rights to corporations. Therefore, the outcome would be clear. Accordingly, X couldn't claim the right to freedom of expression, as for example laid down in Art. 19 Sect. 2 ICCPR. The wording of the provision ("everyone") could not be interpreted extensively, so that legal persons could not make use of HRs. This is the consequence of assuming that HRs are inherently connected to human dignity and value arising from the nature of human beings. Supporters of this view would argue that this is a good thing, considering the issues arising from the power Musk has reached. Looking at the current events, they probably feel confirmed.

Applying the derivative approach on the other hand would lead to a different outcome. To remember, the derivative approach aims at the individuals behind the legal entity. If they can claim a specific human right in the individual case, so can the legal person. When a person works as a journalist for a journal, his right to freedom of expression extends to the journal. Implementing these ideas on the case of X, someone would need to conclude that X is protected through its users. Since social media companies are widely used platforms for all kinds of expressions, particularly political speech, they are enabling the exercise of the users' human right to freedom of expression. By claiming that human right, the individuals standing behind the corporation would benefit. The derivative approach has, for example, been adopted by the SCOTUS in its past rulings, benefiting corporations and thereby granting SMPs the right to free speech[218].

Regarding the functional approach suggested by *Kulick*, the outcome wouldn't be as clear. As we remember, *Kulick* determines the applicability of a specific human right on corporations by

[218] See *Moody v. Netchoice LLC*, 603 U. S. (2024); *Kulick*, p. 552, 554.

considering the purpose of the corporation's activity. If its corporate activity is meant to realize people's freedom of expression, such as in the case of journals or newspapers, that right could be claimed. In X's case, the important question would be whether X's purpose is to support its user's expressions. However, the answer to that question doesn't seem to be evident. On the one hand, X is a profit-oriented company, making most of its revenue through advertising (despite the lack of actual profit-making[219]). On the other, X's business model depends on giving its users a platform to express their thoughts. Yet, *Kulick* does not view different purposes as being necessarily exclusive. He acknowledges that profit orientation and the aim for expression of thought can coexist, as he suggests that newspapers can fall under the protection of the right to freedom of expression (Art. 10 ECHR) and need the protection of their possessions (Art. 1 of Protocol 1 of the ECHR)[220]. This would also lead to X becoming a bearer of the right to freedom of expression.

However, here also lies a problem with Kulick´s approach. What if a corporation is misusing a human right by hiding its actual interest, whatever it might be (profit, power, etc.)? Since *Kulick* allows a legal entity to have several purposes simultaneously, that would be a blank check for Musk to further push his agenda through X. Furthermore, in contrast to the derivative approach, the functional approach doesn't aim to support an individual but the legal entity. The example of X shows that this approach has major flaws in that regard because it underestimates the new power structures of TNCs. The examples of Musk, resp. X v. the EU/Brazil show the increasing power of TNCs, particularly that of "big tech". Though X's economic relevance for the US and world economy might not be significant, there still is a connection to economic power through the owner of X, Elon Musk, who has become an influential person in the Trump administration and owns other very important companies, such as Tesla and SpaceX. Him being one of the wealthiest persons worldwide has given him the opportunity to become one of Trump's top official advisers[221]. He might not be an official cabinet member, but he happens to counsel the administration in economic affairs. He inspired the installment of DOGE, the Department of

[219] See net income until 2nd quarter 2022, https://www.statista.com/statistics/299119/twitter-net-income-quarterly/: Since Musk bought and delisted X the company doesn't have to make quarterly public disclosures, https://www.investing.com/academy/statistics/twitter-facts-statistics/.
[220] *Kulick*, p. 565.
[221] *Collins/Sneed,* "Elon Musk is serving as a 'special government employee,' White House says", BBC.

Government Efficiency, established through Executive Order 14158 of January 20, 2025[222], is currently consulting other agencies in reviewing all existing covered contracts and grants and, where appropriate and consistent with applicable law, terminating or modifying such covered contracts and grants to reduce overall Federal spending (Sec. 3 (ii) (b) Executive Order 14222 of February 26, 2025)[223]. DOGE reflects several problems. One is the lack of democratic legitimization of an agency, which was not established by Congress and is led by a corporate Elite, having much access to governmental resources and power. Second, it shows again how corporate economic power finds its way into the public/political sphere. *Mose/Hampel* see Musk's behavior as a threat to democracy and a "*Wake-up Call for Europe"* due to the international legal order changing and foreign (hostile) interference[224]. Applying these findings, we can see our position confirmed, that the derivative approach and the functional approach are majorly flawed since they naively overlook the global emergence of a new elite hiding their interests when claiming HRs.

E. Conclusion

Though this work couldn't possibly touch all relevant subjects concerning CHRs in depth, we were able to show a few aspects and implications. First, we showed that the legal textual basis for CHRs in international law is weak. International treaties, particularly the provisions of the UDHR, ICCPR, and CERD lack explicit and implicit textual evidence for the inclusion of corporations in their scope of protection. In contrast, the case for CHRs is textually stronger with regards to the ECHR (though not obvious), leading to the ECtHR traditionally accepting the idea of CHRs in cases where specific provisions intrinsically allow so. Second, we have explained the power modern TNCs have reached in today's world, economically and politically. They can structure their company through several subsidiaries in different countries, expanding their business activities around the globe. Through the globalization of capital and production means, TNCs have gained economic flexibility, which makes it easier for them to choose their

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[222] Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deragulative Initiative (19 February 2025), https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency-regulatory-initiative/.

[223] Implementing the President's "of Government Efficiency" Cost Efficiency Initiative (26 February 2025), https://www.whitehouse.gov/presidential-actions/2025/02/implementing-the-presidents-department-of-government-efficiency-cost-efficiency-initiative/.

[224] *Moser/Hampel*, "Elon Musk's Wake-up Call for Europe".

place of business. Thus, TNCs are gaining more and more leverage on nation-states and political power on the governmental level, weakening public interests. Combining the dispute over CHRs and the new emerging power structures between states and TNCs, TNCs are increasingly challenging the territorial sovereignty of nation-states, particularly their ability to enforce and protect HRs against their abuse by TNCs. This lies in the fact that TNCs are increasingly getting hold of means of production which impact fundamental socio-economic rights and become more transnational. This comes with the evolution of SOEs, which, on the one hand, can elevate nation-states' power on the global level but, on the other hand, increase the current trend of privatization of public power. Some governments saw an opportunity and are working increasingly with TNCs together. These findings give us the answer that TNCs are in no need for CHRs. Additionally, we showed in the example of X's fight for free speech that TNCs are aware of their growing power and utilizing CHRs claims in the public sphere to push their corporate agenda. While doing that, X/Musk tries to import the broad American (SCOTUS) understanding of freedom of speech as a part of 'the marketplace of ideas'. In the end, we also showed, by applying the major three theoretical approaches to the application of CHRs in international HRs law, that the derivative and the functional approaches cannot handle the power shift between TNCs and nation-states sufficiently. These developments evidentially show that a 'dehumanization' of HRs has started. Now, it could provokingly be said: So, what? If corporations can claim HRs internationally, that doesn't eradicate human individual's ability to claim HRs. That might be true, but it is also naive. The danger lies in opening a gate, which potentially could weaken the effect HRs have legally and symbolically. Accepting CHRs as a recognized institution would undermine the claim of victims of HRs abuses by corporations. Furthermore, it would blur the meaning of HRs in public discourse. The current state of corporate power could be secured through the HRs discourse[225]. By repeatedly claiming HRs, corporations could elevate themselves to the moral level of humans. While it is true and accurate that domestic constitutions happen to have fundamental rights for corporations, there is no automatic derivation of such rights in international law. Some parts of the law should be off-limits for subjects inheriting immense power. As *Isiksel* convincingly points out in the example of CHRs claims under the ECHR:

[225] *Griffin*, p. 49.

"*As discursive constructs, human rights norms are as strong or as weak as the practices that instantiate them. (...) the more (...) ascribe human rights to corporations that lack human vulnerabilities, the more they clothe the latter's material losses in anthropomorphic metaphors, the more they allow companies to usurp the humanity of the professionals who are only contractually obligated to them, the more they risk depreciating the moral currency of human rights in the long run*"[226].

Given these dangers, sufficient justification must be provided. This is even more important as HRs in UN law are, by default, meant to protect only human beings. However, no such justification can be found. TNCs already wield an immense amount of power and lack vulnerability. The only justification for CHRs lies in enhancing the protection of individuals' HRs (the derivative approach). However, as explained, if we establish a broad scope for HRs protection and include indirect interference, there is no need for this. Further, when granting CHRs, the ability of nation-states to limit TNCs will just decrease. There might be a solution: strengthen the power of states or enhance the competencies of the UN (or another new global entity). Otherwise, TNCs will continue to grow, while nation-states remain constrained by their territorial and judicial limitations. If this cannot be achieved, HRs on the international level should only apply to human beings, and therefore the derivative and the functional approach rejected.

[226] *Isiksel*, "Corporate Human Rights Claims", p. 1005.

Bibliography

Books:

- *De Schutter, O.* – "International Human Rights Law – Cases, Materials, Commentary", Cambridge University Press, Cambridge, UK (2010).
- *Emberland*, *Marius* – "The Human Rights of Companies: Exploring the Structure of ECHR Protection", Oxford University Press, Oxford, UK (2006).
- *Pegg, Scott/Frynas, Jedrzjei G.* – "Transnational Corporations and Human Rights", Palgrave Macmillan, Hampshire and New York, UK and USA (2003).
- *Roberts, Simon.* – "Enterprises and Industrial Policy: Firm-based perspectives", The Oxford Handbook of Industrial Policy, Oxford University Press, Oxford (2020).
- *Van Marrewijk, Charles* – "International Economics: Theory, Application, and Policy", Second edition, Oxford University Press, Oxford, UK (2007).
- *Weissbrodt, D./De la Vega, C.* – „International Human Rights Law – An Introduction", University of Pennsylvania Press, Philadelphia, USA (2007).

Book Chapter:

- *Besson*, *S.* – "Justifications", in: International Human Rights Law, Fourth Edition, Part I, Chapter 2, Oxford University Press, Oxford, UK (2022), 23-42.
- *Bottomley, Stephen* – "Corporations and Human Rights", in: Commercial Law and Human Rights, Dartmouth Publishing Company, Hampshire, England and Ashgate Publishing Company, Burlington, USA (2002), 47-68.
- *Jomo*, *K.S.* – "A Critical Review of the Evolving Privatization Debate", in: Privatization: Successes and Failures, Chapter 7, Columbia University Press New York, USA (2008), 199-212.
- *Kulesza, Joanna* – "Human Rights and Social Media: Challenges and Opportunities for Human Rights Education", in: Polarization, Shifting Borders and Liquid Governance Studies on Transformation and Development in the OSCE Region, Part I Main Section: Between Stability and Transformation in the OSCE Region, Chapter 8, Springer, Cham, Switzerland (2024), 139-154.
- *Robinson, Colin.* – "Privatization: analysing the benefits", in: International Handbook of Privatization, Edward Elgar Publishing Limited, Cheltenham, UK (2003), 41-60.
- *Voorhoof, D.* – "Freedom of expression in the digital environment : how the European Court of Human Rights has contributed to the protection of the right to freedom of expression and information on the internet," in: Digital media governance and supranational courts – selected issues and insights from the European judiciary, E. Psychogiopoulou and S. de la Sierra, Edward Elgar, Cheltenham, UK (2022), 112–137.
- *Weilert*, *Katarina.*, "Taming the Untamable? Transnational Corporations in United Nations Law and Practice", in: Max Planck Yearbook of United Nations Law, Volume 14, Martinus Nijhoff Publishers, *s.l.* (2010), 445-506.
- *Willner*, *Johan*, "Privatization: a sceptical analysis", in: International Handbook of Privatization, Edward Elgar Publishing Limited, Cheltenham, UK (2003), 60-86.
- *Wampfler*, *Philipp* – „Netz-Gespräche und „marketplace of ideas" – was digitale Plattformen für politische Kommunikation bedeuten", in: Was Ist Digitalität?", in: Philosophische und Pädagogische Perspektiven, J.B. Metzler Berlin, Heidelberg, Germany (2021).

Article in a scientific review:

- *Almehdar, A.* – "Freedom of Expression on Social Media Platforms: Facebook's moderation behavior on Palestine's May 2021 Movement", in: International Law and Politics, Volume 54 (2021), 207-219.
- *Augenstein, D./Kinley, D.* – "Beyond the 100 Acre Wood: In which International Human Rights Law finds new ways to tame Global Corporate Power", in: International Journal of Human Rights, Volume 19, Issue 6 (2015), 828-848.
- *Babic, M./Fichtner, J./Heemskerk, E.* – "States versus Corporations: Rethinking the Power of Business in International Politics", in: The International Spectator, Volume 52, Number 4 (2017), 20–43.
- *Birchall*, *D.* – "Corporate Power over Human Rights: An Analytical Framework", in: Business and Human Rights Journal, Volume 6, Issue 1 (2021), 42–66.
- *Bures*, *P.* – "Sovereignty and Transnational Corporations", in: W – Gdańskie Studia Prawnicze, R. 27, Nr. 2 (2023), 99-108.
- *Gordon, J.* – "John Stuart Mill and the "Marketplace of Ideas"", in: Social Theory and Practice, Volume 23, Number 2 (1997), 235-249.
- *Griffin, R.* – "Rethinking Rights in Social Media Governance: Human Rights, Ideology and Inequality", in: European law open, Volume 2 (2023), 30-56.
- *Isiksel*, *T.*, Corporate Human Rights Claims under the ECHR, in: The Georgetown Journal of Law & Public Policy, Volume 17, Issue S (2019) 979-1005.
- *Isiksel*, *T.* – "The Rights of Man and the Rights of the Man-Made: Corporations and Human Rights", in: Human Rights Quarterly, published by: The John Hopkins University Press, Volume 38, Number 2 (2016), 294-349.
- *Koltay, A.* – "The Protection of Freedom of Expression from Social Media Platforms", in: Mercer Law Review, Volume 73, Number 2, Article 6 (2022), 523-589.
- Kordos, M./Vojtovic, S. – "Transnational corporations in the global world economic Environment", in: Procedia - Social and Behavioral Sciences, Volume 230 (2016), 150 – 158.
- *Kroll, C. / Edinger-Scholz, L.* – "Corporate power and democracy: A business ethical reflection and research agenda", in: Business Ethics, the Environment & Responsibility, published by Wiley, Volume 33 (2024), 340-362.
- *Ku, J.* – "The Limits of Corporate Rights Under International Law*"*, in: Chicago Journal of International Law, Volume 12, Number 2, Article 13 (2012), 729-749.
- *Kulick, A.* – "Corporate Human Rights?", in: The European Journal of International Law, Volume 32, Number 2 (2021), 537–569.
- *Kundal*, *N.* – "The Evolution and Impact of Human Rights: From Ancient Origins to Modern Challenges", in: International Journal of Science and Research, Volume 12 Issue 11 (2023), 1324-1328.
- *Nunziato, D.* – "The Marketplace of Ideas Online", in: Notre Dame Law Review, Volume 94, Issue 4 , Article 2 (2019).
- *Rajavouri*, M. – "How should States own … Heinisch v. Germany and the Emergence of Human Rights-Sensitive State Ownership Function", in: The European Journal of International Law, Volume 26, Number 3 (2015), 727-746.
- *Ruggie*, *J.*, "Multinationals as global institution: Power, authority and relative autonomy", in: Regulation & Governance, Volume 12, Issue 3 (2018), 317–333.
- *Steininger, S./Von Bernstorff, J.* – "Who Turned Multinational Corporations into Bearers of Human Rights? On the Creation of Corporate 'Human' Rights in International Law", in:

Max Planck Institute for Comparative Public Law & International Law, Research Paper Series, Number 2018-25 (2018).
- *Van den Muijsenbergh, W./Rezai*, *S.* – "Corporations and the European Convention on Human Rights", in: Global Business & Development Law Journal, Volume 25, Issue 1, Article 5 (2012).
- *Voon*, T., "Multinational Enterprises and State Sovereignty under International Law", in: Adelaide Law Review, Volume 21 (1999), 219-252.
- *Wiater, Patricia* – "Fundamental Rights of Corporations as International Human Rights: The Perspective of Regional Economic Courts", in: Human Rights Law Review, Volume 23, Issue 4 (2023), 1-23.

Materials in electric form:

- *Atkinson*, *E.* – "JD Vance attacks Europe over free speech and migration", BBC (15 February 2025), https://www.bbc.com/news/articles/ceve3wl21x1o, consult. 07 April 2025.
- *Arun, A./Chhatani, S./An, J./Kumaraguru, P.* – "X-posing Free Speech: Examining the Impact of Moderation Relaxation on Online Social Networks", Proceedings of the 8th Workshop on Online Abuse and Harms, Association for Computational Linguistics, Mexico City, Mexico, (20 June 2024), 201–211, 10.18653/v1/2024.woah-1.15, consult. 05 April 2025.
- *Collins, K/Sneed, T* – "Elon Musk is serving as a 'special government employee,' White House says", BBC (03 February 2025), https://edition.cnn.com/2025/02/03/politics/musk-government-employee/index.html, consult. 08 April 2025.
- "Commission sends preliminary findings to X for breach of the Digital Services Act", EU Commission Press Release (12 July 2024), https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3761, consult. 07 April 2025.
- „Crise entre Musk e STF pode acelerar regulamentação das redes sociais': o que diz imprensa internacional", BBC, https://www.bbc.com/portuguese/articles/cml72xx7zkvo, consult. 06 April 2025.
- *Derico, B./Wells, I.* – "Brazil lifts ban on Musk's X after it pays $5m fine", BBC (09 October 2024), https://www.bbc.com/news/articles/c5y06vzk3yjo, consult. 06 April 2025.
- "Elon Musk calls former EU digital chief Breton 'tyrant of Europe'", The Brussels Times (11 January 2025), https://www.brusselstimes.com/eu-affairs/1388595/elon-musk-calls-former-eu-digital-chief-breton-tyrant-of-europe-tbtb, consult. 07 April 2025.
- "General comments and recommendations, United Nations Committee on Economic, Social and Cultural Rights", General Comment No. 4 on the right to adequate housing (09 December 1991), https://www.ohchr.org/en/documents/general-comments-and-recommendations/committee-economic-social-and-cultural-rights, consult. 07 April 2025.
- *Goodmann*, *J./Loveman, G.* – "Does Privatization Serve the Public Interest?", Harvard Business Review, November – December 1991, https://hbr.org/1991/11/does-privatization-serve-the-public-interest, consult. 28 March 2025.
- *Jeantet*, *D.* – "Elon Musk visits Brazilian President Jair Bolsonaro to discuss Amazon rainforest plans", Los Angeles Times (20 May 2022), https://www.latimes.com/world-nation/story/2022-05-20/elon-musk-visits-brazil-for-amazon-plans, consult. 06 April 2025.
- *Kaushal, R/Van de Kerkhof, J./Goanta C./ Spanakis, G./Iamnitchi, A.* – "Automated Transparency: A Legal and Empirical Analysis of the Digital Services Act Transparency Database", The 2024 ACM Conference on Fairness, Accountability, and Transparency, Rio

de Janeiro, Brazil, ACM, New York, NY, USA (03–06 June 2024), https://doi.org/10.1145/3630106.3658960, consult. 05 April 2025.
- *Martens, J.* – "Corporate Influence on the Business and Human Rights Agenda of the United Nations", Brot für die Welt/Global Policy Forum/MISEREOR, Aachen/ Berlin/ Bonn/ New York (2014), https://www.globalpolicy.org/sites/default/files/Corporate_Influence_on_the_Business_and_Human_Rights_Agenda.pdf, consult. 04 April 2025.
- *Meyer, E.P.N./Bustamante, T.* – "Accountability in Brazil: Legal Developments After 8 January 2023 Legal Developments After 8 January 2023", VerfBlog (08 May 2023), https://verfassungsblog.de/accountability-in-brazil/, consult. 09 April 2025.
- *Moser, C./Hampel*, *L.* – "Elon Musk's Wake-up Call for Europe", VerfBlog (27 January 2025), https://verfassungsblog.de/elon-musks-wake-up-call-for-europe/, consult. 09 April 2025.
- *Phillips, T.* – "Brazil lifts ban on X after Elon Musk complies with court demands: Social platform was blocked after tech billionaire failed to name local representatives and pay fines", The Guardian (09 October 2024), https://www.theguardian.com/technology/2024/oct/08/musks-x-reinstated-in-brazil-after-complying-with-supreme-court-demands, consult. 06 April 2025.
- "Report of the Group of Eminent Persons to Study the Impact of Multinational Corporations on Development and on International Relations", UN Doc. E/5500/Rev.1, ST/ESA/6, New York, USA (1974), p. 25, https://digitallibrary.un.org/record/819904?v=pdf, consult. 08 April 2025.
- *Reis*, *U.L.S.* – "Brazilian Judicial Branch v. Telegram (and Bolsonaro): How National Judicial Bodies Get on Top of the Rebel Social Media Platform, VerfBlog (25 March 2022), https://verfassungsblog.de/brazilian-judicial-branch-versus-telegram-and-bolsonaro/, consult. 09 April 2025.
- *Samuelson*, *P.* – "Do Social Media Platforms Have Free Speech Rights to 'Censor' Conservatives? Can states force social media platforms to stop removing lawful-but-awful postings?", Communications of the ACM, https://cacm.acm.org/opinion/do-social-media-platforms-have-free-speech-rights-to-censor-conservatives/, consult. 06 April 2025.
- *Steffen, S./Vera, A.* – "Fact check: JD Vance's free speech claims debunked", DW (17 February 2025), https://www.dw.com/en/jd-vance-free-speech-claims-debunked/a-71642886, consult. 07 April 2025.
- Summary of the Regulation (EU) 2022/2065 on a single market for digital services and amending Directive 2000/31/EC (Digital Services Act), EU, Summaries of EU legislation (15 February 2023), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:4625430, consult. 07 April 2025.
- "The CNIL's restricted committee imposes a financial penalty of 50 Million euros against GOOGLE LLC", European Data Protection Board News (21 January 2019), https://www.edpb.europa.eu/news/national-news/2019/cnils-restricted-committee-imposes-financial-penalty-50-million-euros_en, consult. 31 March 2025.
- *Timm, T.* – "Elon Musk has become the world's biggest hypocrite on free speech", The Guardian (15 Jan 2024), https://www.theguardian.com/commentisfree/2024/jan/15/elon-musk-hypocrite-free-speech, consult. 07 April 2025.
- "Global Value Chains and Development – Investment and Value added Trade in the Global Economy", United Nations Publication, UNCTAD/DIAE/2013/1, https://unctad.org/system/files/official-document/tdr2013_en.pdf, consult. 09 April 2025.

- *Tuchtfeld, E.* – "Be Careful What You Wish For: The Problematic Desires of the European Court of Human Rights for Upload Filters in Content Moderation", VerfBlog (23 September 2023), https://verfassungsblog.de/be-careful-what-you-wish-for/, consult. 06 April 2025.
- "The human right to water and sanitation", United Nations General Assembly Resolution 64/292 (28 July 2010), https://digitallibrary.un.org/record/687002?v=pdf, consult. 07 April 2025.
- *Uhlenbusch* – "Elon Musk, the Systemic Risk", VerfBlog (07 February 2025), https://verfassungsblog.de/elon-musk-the-systemic-risk/, consult. 09 April 2025.
- *Van de Kerkhof*, *J.* – "Musk, Techbrocracy, and Free Speech", VerfBlog (17 January 2015), https://verfassungsblog.de/musk-techbrocracy-and-free-speech/, consult. 05 April 2025.
- "1.2 billion euro fine for Facebook as a result of EDPB binding decision", European Data Protection Board News (22 May 2023), https://www.edpb.europa.eu/news/news/2023/12-billion-euro-fine-facebook-result-edpb-binding-decision_en, consult. 06 April 2025.

Videos:

- *Haase, N.* – "Pistorius: JD Vance's criticism 'is not acceptable'", DW (14 February 2025), https://www.dw.com/en/pistorius-jd-vances-criticism-is-not-acceptable/video-71617746, consult. 07 April 2025.
- "Elon Musk-Alice Weidel Full Conversation: Tesla CEO speaks to German far-right party AfD chief Economic Times", Youtube Channel, https://www.youtube.com/watch?v=cpjKbWKZn00, consult. 08 April 2025

Theses:

- *Wallenius*, *D.* – "The impact of the power balance between the state and the transnational corporation on human rights", Master's Thesis in Human Rights, Uppsala Universitet, Department of Theology, Spring Term (2020).