Introduction

This book is based on a research project funded by the Leverhulme Trust on Intellectual Property and the human rights of corporations in Europe.[1] The aim of the project was to investigate the history and rationale for the paradoxical extension of human rights to companies in the European Convention on Human Rights (ECHR)[2] and to analyse the Court's jurisprudence on protection of companies' intellectual property in this light.

Whilst there is a substantial body of scholarship on the human rights obligations of companies,[3] there is extraordinarily little scholarship on the human rights of companies as victims of human rights violations in the ECHR.[4] The first systematic study defending the 'human' rights of companies in the European Convention system was published by Emberland in 2006.[5] According to Emberland, the ECHR is founded on a distinctive, sui generis

[1] Leverhulme Major Research Fellowship (MRF 2019 – 112).

[2] 'Convention for the Protection of Human Rights and Fundamental Freedoms' opened for signature 4 November 1950, European Treaty Series no. 5.

[3] See John G. Ruggie, *Just Business: Multinational Corporations and Human Rights* (London: WW Norton & Company, 2013); John G. Ruggie, 'Business and Human Rights: The Evolving International Agenda' (2007) 101(4) *American Journal of International Law* 819–840; John G. Ruggie et al., 'Ten Years After: From UN Guiding Principles to Multi-fiduciary Obligations' (2021) 6(2) *Business and Human Rights Journal* 179–197; Lise Smit et al., *Study on due Diligence Requirements through the Supply Chain* (Luxembourg: Publications Office of the European Union, 2020); Robert McCorquodale, *Business and Human Rights* (Oxford: Oxford University Press, 2024); Stefanie Khoury and David Whyte, *Corporate Human Rights Violations: Global Prospects for Legal Action* (London: Routledge, 2016).

[4] The leading study is by Silvia Steininger and Jochen Von Bernstorff, '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 (MPIL) Research Paper No. 2018-25* (2018).

[5] Marius Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection* (Oxford: Oxford University Press, 2006).

European conception of human rights which includes private property and free enterprise as central characteristics and integral components of the European liberal state. Ten years on, Dean Spielmann, former president of the European Court of Human Rights (ECtHR), concurs that not only do companies enjoy human or fundamental rights in the European Convention system, but argues that it is also fair and just that companies should be given the same rights as individuals.[6] Similarly, Peter Oliver states that 'it would be wrong to treat companies less favourably than natural persons'.[7] Emberland and Oliver allude to utilitarian and functionalist justifications (derived from J. S. Mill) without adverting to the conceptual tensions between utilitarianism and human rights extensively discussed by legal theorists and philosophers.[8] In particular, beyond the laconic reasoning of the ECtHR in the decided cases, little is offered by way of historical evidence or systematic, conceptual or theoretical insight into the rationale for the grant of property rights to 'legal persons' in Article 1 of the First Protocol (A1P1) ECHR.[9] In contrast, political scientists and international and intellectual property lawyers have voiced concern about the appropriation of human rights by private economic actors, accelerated by the World Trade Organization's (WTO) adoption of the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement.[10] Critics point out that 'TRIPS was never enough'[11] for transnational pharmaceutical and tobacco corporations which have shifted legal regimes to secure heightened legal protection for their intellectual property in bilateral Free Trade Agreements and aggressively sued states around the world.[12] From this

[6] Dean Spielmann, 'Companies in the Strasbourg Courtroom' (2016) 5(3) *Cambridge International Law Journal* 405.

[7] Peter Oliver, 'Companies and Their Fundamental Rights: A Comparative Perspective' (2015) 64(3) *International and Comparative Law Quarterly* 662.

[8] For instance, John Rawls, A *Theory of Justice*, rev. ed. (Oxford: Oxford University Press, 1999) and Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) and, more generally, Peter Drahos, *A Philosophy of Intellectual Property* (London: Routledge, 2016).

[9] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 9), 213 U.N.T.S. 262, entered into force 18 May 1954.

[10] Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).

[11] Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).

[12] Laurence R. Helfer, 'Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking' (2004) 29(1) *Yale Journal of International Law*; Eyal Benvenisti and George W. Downs, *Between Fragmentation and Democracy: The Role of National and International Courts* (Cambridge: Cambridge University Press, 2017); Stephanie Hartmann, 'When Two International Regimes Collide: An Analysis of the Tobacco Plain Packaging Disputes and Why Overlapping Jurisdiction of the WTO and Investment Tribunals

perspective, the exceptionalist conceptualization of companies as legitimate victims of violations of human rights in the European Convention system, far from justified, appears to confirm that a capture and appropriation of public international law by powerful private actors is underway, facilitated by economic institutions and new forms of global constitutionalism.[13] Which of these approaches is right? Specifically, what was the history and rationale for the extension of human rights to legal persons' enjoyment of their possessions in A1P1 and how has A1P1 been applied by the Court to intellectual property rights (IPRs)? To answer these questions, the methodology adopted in this study involves a combination of historical, theoretical, and comparative legal analysis.

The book begins with an examination of the conceptual and normative foundations of international human rights to elucidate whether there is a distinctive European human rights ethos which, by contrast to international human rights, necessitates extension of property rights to companies. Contrary to the ECHR exceptionalist thesis, the first chapter argues that the normative foundations of the ECHR mirror the moral foundations of international human rights in the Universal Declaration of Human Rights (UDHR).[14] The chapter recalls the historical context which prompted calls for the entrenchment of human rights in international law and examines the theoretical foundations of international human rights, highlighting the centrality of the individual human person as the subject of human rights. The analysis is based on Lauterpacht's *International Bill of Rights* (1945),[15] the first and only text setting out a complete scheme for the international protection of human rights at the time and the main intellectual influence on the drafting for the UDHR on which the European Convention was

Does Not Result in Convergence of Norms' (2017) 21(2) *UCLA Journal of International Law and Foreign Affairs* 204–245; Peter K. Yu, 'The Investment-Related Aspects of Intellectual Property Rights' (2016) 66 *American University Law Review* 829; Graeme B. Dinwoodie, *A Neofederalist Vision of TRIPS: The Resilience of the International Intellectual Property Regime* (Oxford: Oxford University Press, 2012); Christophe Geiger (ed.), *Research Handbook on Intellectual Property and Investment Law* (Cheltenham: Edward Elgar, 2020).

[13] Stephen Gill and A. Claire Cutler (eds.), *New Constitutionalism and World Order* (Cambridge: Cambridge University Press, 2014); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA: Harvard University Press, 2018); Jonathan Griffiths and Tuomas Mylly (eds.), *Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive Rights*, 1st ed. (Oxford: Oxford University Press, 2021).

[14] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR) Article 5.

[15] Hersch Lauterpacht and Philippe Sands, *An International Bill of the Rights of Man* (Oxford: Oxford University Press, 2013).

expressly based.[16] The chapter explains how the list of civil, political, social and economic fundamental human rights is derived from the idea of respect for individual human freedom as distinct from economic market freedoms. The final part of the chapter examines how a human right to private property may be grounded on protection of home and personal possessions to facilitate development of the human personality and enable the individual human person to live a life with dignity. Not unexpectedly, the theories discussed in this chapter did not form part of the discourse of representatives and lawyers at the Council of Europe involved in the drafting of the ECHR. However, as shown in the next chapter, advocates of the inclusion of the right to property in the ECHR repeatedly mentioned the importance of protecting home and personal possessions as a natural or even sacred right. The theoretical justifications thus offer a deeper understanding of the subject and object of human rights in the ECHR.

The inclusion of property rights in the ECHR proved highly controversial and was delayed until the adoption of the First Protocol. Chapter 2 retraces the drafting history of the text of A1P1 declaring that 'every natural and legal person is entitled to the peaceful enjoyment of his possessions'. The meaning of the text is anything but straightforward. There is no mention of companies, but in common and civil law jurisdictions there is no doubt that companies are 'legal persons' or 'personnes morales' in French. Neither is the term 'property' used; instead, the French version uses the term 'biens' whilst the English version uses the word 'possessions'. Yet, it is well established in the jurisprudence of the ECtHR that A1P1 protects property rights and that companies have standing to launch claims as victims of violations of their right to property. Why was this not made unambiguously clear by the drafters? And why would a human rights treaty include companies as victims of violations of human rights? The chapter uncovers an important connection hitherto unnoticed by scholars in the evolution of the ECHR text on A1P1. The provisions on individual rights of petition to the Court in the original template produced by the European Movement (EM) envisaged that 'corporate bodies' would enjoy rights of petition to the Court. Corporate bodies were removed from the text by the Council of Ministers, but corporations made their reappearance as 'legal persons' in the final iteration of the Article on property rights (A1P1). The elusive terminology was introduced by the lawyers who had drafted the original template for the EM, whose aim was a federalist

[16] As detailed by Brian Simpson in his seminal study of the genesis of the ECHR: A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford: Oxford University Press, 2004).

Europe based on market freedoms and economic integration. The drafting history shows that the Assembly representatives were unclear about the precise meaning and implications of the formula, but their assent was secured on the understanding that the wording would entrench the natural or 'sacred' right of each human person to protection of their home and personal possessions. Those who had originally opposed the inclusion of property rights in the Convention relented carried along by a shared sense of urgency across the political spectrum that the moment had to be seized or the opportunity to adopt a European Convention on Human Rights would be lost. The ambiguous text of A1P1 was a triumph for the lawyers who had seized the political momentum to convince delegates to vote with their hearts (recalling the mass confiscations of millions of people's homes and belongings by the Nazis) when the cold legal reality was that they were voting for a text which secured supranational protection of companies' assets and capital, tangible and intangible property, including debts, securities and intellectual property. The ECHR was revolutionary not only because it included individual rights of petition to an international court, but also because these rights were implicitly extended to companies (as subjects of human rights) whose 'possessions' would be protected in the forthcoming Protocol on pretence that a home and minimum of personal belongings were required for each individual human person to live a life with dignity.

Chapter 3 investigates the connection between the original template for the ECHR (which envisaged that corporations would enjoy a right of petition) and the final text of A1P1. The deletion of corporate bodies by the Committee of Ministers in the Article on individual rights of petition was criticized in the Assembly as a regressive step on the grounds that the trend in international law had been to emphasize the rights and duties of individuals. The analysis shows that this claim was misleading. The concept of legal personality in international law was indeed undergoing significant changes in the aftermath of WWII. There was a nascent debate on whether international organizations such as the United Nations (UN) could acquire legal personality and file complaints on behalf of victims of injury at the International Court of Justice (ICJ), but there was no question of the individual having standing to enforce these rights in an international court. In contrast corporate bodies had historically enjoyed legal personality in civil and common law systems in Europe. The 'legal person' was not a person as ordinarily understood but a legal fiction originating in Roman law and created to facilitate ownership and transfer of property by groups of individuals. In European national laws, legal personality was extended, inter alia, to companies, in the wake of the industrial revolution, to enable ownership sale and transfer of tangible and intangible property.

At the same time, deep theoretical and political divisions emerged on the nature of the corporation and the aims of corporatism and free markets. The chapter documents how these divisions were still alive at the end of WWII and formed the background to the political compromise which resulted in the addition of legal persons to the Article on property rights in the ECHR. In short, the term 'legal person' literally meant different things to different politicians on opposite ends of the political spectrum in Europe. Only in the fictional language of national laws did 'legal persons' have rights, notably the right to own, use and dispose of property. There were no such persons as subjects of law in international human rights, only real individual human persons. Thus, the inclusion of companies as subjects of human rights in the ECHR in the form of 'legal persons' was not necessitated by a distinctive European conception of human rights based on market freedoms. It was a semantic compromise to accommodate competing political ideals on the nature and function of corporations in a united Europe. The next chapter shows how the term 'possessions' had an equally fictional character in domestic European laws.

Chapter 4 argues that by contrast to the meaning of the term in natural language, 'possessions' in law has a much wider technical meaning. Much like fictitious 'legal persons', 'intangible possessions' were created as legal fictions in civil and common law jurisdictions in Europe to accommodate shares, debts, securities and intellectual property as novel types of fictitious commodities. The analysis retraces the roots of such legal fictions in European property law in Roman law's dual categories of rights in rem, over tangible, corporeal 'things', and rights in personam or over intangible, incorporeal 'things', and shows how these concepts were stretched to accommodate the economic and technological changes unleashed by the industrial revolution. The chapter details how 'intellectual' property was added to the legal category of intangible fictitious possessions in civil and common law jurisdictions in Europe in the nineteenth century. By the time the Convention was adopted, the term 'possessions' had been firmly established in European national laws to include all types of intangible property, well beyond the types of personal possessions that advocates of property rights at the Council of Europe had argued were morally required to facilitate development of the human personality. Overall, the analysis reveals a profound disconnect between the wide legal meaning and reach of the term 'possessions' ('biens') in A1P1 and the moral discourse on property rights at the Council of Europe. The obfuscation between the ordinary meaning of 'possessions' and the technical legal meaning, combined with the assignment of fundamental rights to legal persons in

A1P1, completed a virtuous fictitious legal circle. This facilitated judicial protection of the intangible assets, profits and intellectual property of transnational companies in Western capitalist market economies under the purview of a supranational Court ostensibly created to secure protection of the fundamental *human* rights of each individual human person. The text of A1P1 thus conceals an underlying tension between the moral discourse of property rights advocates at the Council of Europe and the subject and legal reach of the interests protected. The potential tensions and contradictions inevitably surface when looking for a coherent ethos and principled basis for the text. It was left to the now-defunct Commission and the Court to navigate through the ambiguities and tensions embodied in the text to distil the essence of the right to property. Chapter 5 provides a systematic review of the case law of the Commission and Court's application of A1P1 to companies IPRs and Chapter 6 examines the Court's external balancing of IPRs with other Convention rights.

The first wave of companies' claims relating to IPRs was not tested until the early 1980s. Chapter 5 shows that, by then, the Commission and Court had developed a set of rules and principles grounding the extension and expansion of A1P1 to IPRs. In the early cases filed by companies in the 1960s and 1970s, the Commission and Court had deferred to national laws legal fictions in the construction of 'legal persons' and 'possessions'. Initial doubts expressed by some judges on the scope of application of the term 'possessions' to intangibles were resolved in the Court's landmark majority decision in *Sporrong* v. *Sweden* (1982) entrenching protection of private companies' profits under A1P1 based on the Court's 'autonomous' reading of the term 'possessions'. Thus, when the first claims relating to companies' IPRs reached the Commission in the early 1980s, it had no difficulty in hearing complaints from a multinational pharmaceutical corporation which alleged to be a victim of a State's violations of its right to enjoyment of possessions. The turning point came with the Grand Chamber's (GC) landmark judgment of *Anheuser-Busch* v. *Portugal* (2007). The detailed analysis of the judgment suggests a tacit alignment of the scope of protection of IPRs under the Convention with the European Union's (EU) regulatory framework on IPRs, grounding a further extension of A1P1. In the last decade, in a series of cases relating to patents, copyright and trademarks, the Court has adopted a 'rule of law' approach to the construction of A1P1, eschewing a substantive application of the internal balancing test of private and public interests. The review of the case law concludes that the future points to an inevitable tilt of the Court's construction of companies IPRs towards the EU legal order, consolidating and

deepening supranational legal protection of companies' IPRs in Europe with little trace left of the original moral intent of securing protection of the fundamental right of each individual human person to protection of a minimum of home and personal possessions to live a life with dignity.

Chapter 6 completes the analysis of the Court's jurisprudence on IPRs with a review of the Court's approach to the external balancing of IPRs with other Convention rights, notably freedom of expression in Article 10 ECHR. The review takes as its starting point the optimistic expectations, of European IP scholars at the turn of the century who had welcomed the turn to human rights as counterweights to the seemingly unstoppable expansion of IPRs. The analysis of the Court's case law details why the expectations were not met. The Court's case law on Article 10 ECHR, it is suggested, is underpinned by incongruent rationales: a moral rationale, whereby autonomy is deemed necessary for each individual person's development and participation in democratic society, and an economic rationale grounded on the commercial interests of corporations in free markets. A number of key decisions from the Court in the 1990s are shown to blur the two rationales, conflating freedom of expression with unfair competition and granting Member States a wide margin of appreciation and discretion to adopt a light-touch approach to the regulation of commercial speech deemed by the Court to lack a public interest or political dimension. The discussion further shows how the Court's approach to protection of commercial speech, combined with the elevation of IPRs to fundamental rights in A1P1, has resulted in the strengthening of IP owners' rights in the external balancing exercise between Article 10 ECHR and protection of IPRs in A1P1. For Emberland, the Court's liberal free market interpretive lens, whilst at odds with the moral rationale for Convention rights, is nevertheless justified on the grounds that the Court has adopted a teleological approach centred on protection of the core values of a functional liberal market economy, democracy, equality and the rule of law. However, the Court's entrenchment of corporate commercial interests in pursuit of a liberal, free-market, economic conception of democracy risks encroachment of the human rights and freedoms of individual human beings. Supranational, legal protection of commercial expression and corporate ownership of IP can allow monopolistic behaviour to thrive unchecked at the expense of individual human persons whose human rights the Convention was originally intended to protect. Unlike ordinary citizens, global corporations have the financial and legal capability to leverage a wealth of resources to secure protection of their intellectual property in national courts, international Courts, investment tribunals and at WTO. The liberal economic

interpretation of Convention rights grounded in market freedoms can ultimately result in an emasculation of the personal freedoms that the Convention founders were seeking to entrench as necessary to enable the full development of the human personality. For these reasons, protection of companies IPRs in the ECHR has become the ground on which the inherent tensions and contradictions in A1P1 are playing out. The concluding chapter explores three scenarios on the future direction of protection of IPRs at the ECHR.

1

The Foundations of Human Rights and Property Rights

INTRODUCTION

The European Convention on Human Rights (ECHR) was opened for signature in Rome on 4 November 1950.[1] On 8 March 1951, the UK was the first State to ratify the ECHR. Ratifications by Norway, Sweden and Germany followed in 1952, but it took another year for the required ten ratifications for the Convention to enter into force on 3 October 1953.[2] Property rights were left out of the list of protected rights in the ECHR, and their inclusion was delayed until the adoption of Article 1 of the First Protocol (A1P1) in 1952.[3] This chapter sets out the historical context for the adoption of the ECHR and the normative foundations of European human rights. In contrast to the exceptionalist thesis that the ECHR sought to give expression to a sui generis European conception of human rights founded on liberal market freedoms, this chapter argues that the normative foundations of the

[1] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, ETS 5. The original signatories were Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Turkey and the UK.

[2] Denmark, Iceland, Ireland, Italy and Luxembourg ratified in 1953. Pierre-Henri Teitgen recounts that, to his shame, France, which had played a leading role in the adoption of the Convention and was one of the original signatories, did not ratify the Convention until 3 May 1974. Originally, this was due to socialist opposition to the A1P1, then France's role in the Algerian war and finally General De Gaulle's unwillingness to accept control of domestic policies by a 'foreign' supranational court. Pierre-Henri Teitgen, *Faites entrer le témoin suivant: 1940–1958: de la Résistance à la Ve République* (Rennes: Ouest France, 1988), p. 483.

[3] Council of Europe, *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS No. 009.