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***Self-stafication* of corporate actors?
Tracing modes of corporate engagements with
Public International Law**

Anna Sophia Tiedeke

European University Institute

Academy of European Law

European Society of International Law

Annual Conference, Stockholm, September 2021

Self-stification of corporate actors?

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International Law**

Anna Sophia Tiedeke

ESIL Paper Series editors:

Adriana Di Stefano (University of Catania)

Evelyne Schmid (University of Lausanne)

Catharine Titi (University Paris II Panthéon-Assas)

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The 16th Annual Conference of the European Society of International Law, postponed from 2020, was held in Stockholm on 9-11 September 2021. The overall theme of the conference was 'Changes in International Lawmaking: Actors, Processes, Impact'. The conference examined changes in international lawmaking and how these changes are impacted by and impact on national and private norms and processes; that is, how they eventually affect the daily lives of people. The 2021 Annual Conference was hosted by the Stockholm Centre for International Law and Justice at Stockholm University.

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Abstract

While states only reluctantly have started to play a more active role in international lawmaking in cyberspace, in recent years we could observe a growing amount of interest of powerful digital corporations in international lawmaking processes and international law in general. This interest has manifested in practices, strategies, structures, and institutions they have developed and advanced. These practises have not remained unnoticed, and appear to influence the way in which digital corporations address and are addressed by states and intergovernmental organisations. These developments have provoked journalists and academics to compare these actors to “states”, and to frame them as “new governors”, “new sovereigns”, “semi-states” or “net states”. This paper seeks to show that speedy analogies lack explanatory potential. It will explain why analogising with the concept of the state, is a more complex and demanding task than some of these authors suggest. After proposing a change in perspective, the paper explores how the concept state can be mobilised in a more productive way. It will show that by looking at the concept of a state as “statification” (étatisation), a concept introduced by Michel Foucault in his lecture series at the Collège de France in 1978-1979, we have a better chance to discover “relevant similarities” between states and powerful digital corporations, which are practises of self-statification. Further the paper will demonstrate that through this exercise two entangled, yet conflicting trends become visible. The first trend is the reaffirmation of established international law and through performative practises of digital corporations. The second trend brings about challenges to international law through perforating practises of digital corporations. Ultimately, the paper will bring to light the necessity to take a closer look at the interrelations between different actors in international law and more precisely at the practises through which these relationships (and these actors themselves) are constructed and reconstructed. The paper intends to contribute to the ongoing debate about what tools and perspectives may prove to be productive when thinking about ways to understand and reconstruct the international institutional order.

Keywords

The concept of the state, TNCs, analogies, cyberspace, Foucault, international institutional order

Author Information

PhD Candidate at Humboldt University of Berlin and Researcher at the Leibniz-Institute for Media Research | Hans-Bredow-Institut (HBI).

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I welcome any kind of feedback and comments: a.tiedeke@leibniz-hbi.de.

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1. Introduction

When looking at international law in cyberspace we see a remarkable gap compared to other areas of international law. A gap regarding specific international law for cyberspace but more importantly a gap regarding the specific application and interpretation of international law in and to cyberspace. The only area of international law in which we can currently identify processes and a certain degree of commitment of states to establish the applicability of international law to cyberspace and the specification of application of international law in cyberspace is international law pertaining to international security. This effort is reflected in the United Nations Group of Governmental Experts (GGE) and Open-Ended Working Group (OEWG) processes¹, which have been set up in the framework of the United Nations Office for Disarmament Affairs (UNODA). In their most recent substantial reports published in 2021 both Groups underlined and reaffirmed their preference towards “voluntary, non-binding norms of responsible State behaviour” and recognised that additional norms could be developed over time.² Yet they did so without laying out a specific agenda for this endeavour. Some scholars

¹ For a detailed analysis of the GGE and OEWG processes see Marja Lehto, ‘The Rise of Cyber Norms’ in Nicolas Tsagourias and Russell Buchan (eds), *Research Handbook on International Law and Cyberspace* (2nd edn, Edward Elgar Publishing) <<https://www.elgaronline.com/view/edcoll/9781789904246/9781789904246.00011.xml>> accessed 6 April 2022.

² Open-ended working group (OEWG), ‘Open-Ended Working Group on Developments in the Field of Information and Telecommunications in the Context of International Security Final Substantive Report’ para. 7 and 24 <<https://www.un.org/disarmament/open-ended-working-group/>> accessed 4 July 2021. Group of Governmental Experts – UNODA, ‘Report of the Group of Governmental Experts on Advancing Responsible State Behaviour in

attempt to explain the difficulties in determining the precise substance of the rules with the fact that cyberspace operates under different pretexts and follows different logics than physical space, on the grounds on which the UN Charter was originally drafted, and post-World War II international law was developed. One of these scholars describes the difficulties in terms of differences in strategic environments and explains that “[s]tates will struggle to find cyber relevance in international law until new instruments of international law - or adaptations of current law - account for the core features of the cyber strategic environment (...)”.³ However, the open texture of public international law, reflected *inter alia* in Article 31 sec. 3 lit. b VCLT⁴ is in principle equipped to deal with changing circumstances. Regardless, the only comprehensive document addressing the problem of how international law applies to cyberspace are the Tallinn Manuals, representing the view of an international group of experts, funded by the NATO Cooperative Cyber Defence Centre of Excellence (CCDCOE) but does (explicitly) not reflect NATO doctrine or any other supporting state’s opinion juris.⁵

States’ reluctance and hesitance to make (formal) international law and/or specify the substance of established norms of international law for cyberspace is the fertile soil on which powerful digital Transnational Corporations (TNCs) have advanced and continue to advance their private normative orders and their own global norm development projects.⁶ While corporate actors have been dominant in informal-international lawmaking in other areas of international law for some time, in recent years, digital TNCs have started to increase their effort to develop structures, build institutions, and establish processes that have traditionally been under the exclusive purview of states or International Organisations (understood here in the narrow sense as intergovernmental organisations). What seems to be a novel development is that digital TNCs have started to argue with international law and get involved in international lawmaking.

While it is true that powerful corporations have played a role in international lawmaking in the past, their role had primarily been authorial in a descriptive sense and not in a normative sense.⁷ Or, as Peters put it, they had “a voice but no vote”.⁸ This distinction seems to have become blurred in cyberspace. Private actors seem to have acquired the authority to set and enforce their own set of rules independently from states. In the last decade private actors have not only developed sophisticated self-regulatory system, comprising of sets of corporate norms and private normative orders⁹, institutions and processes, they have also started to sponsor, advance, and influence international lawmaking initiatives, aimed at regulating inter-state relations. Private actors have started to use international law in their own right and have

Cyberspace in the Context of International Security (A/76/135) para. 15, 18, 89 lit.g <<https://www.un.org/disarmament/group-of-governmental-experts/>> accessed 6 April 2022.

³ Michael P Fisher-Keller, ‘Current International Law Is Not an Adequate Regime for Cyberspace’ (Lawfare, 22 April 2021) <<https://www.lawfareblog.com/current-international-law-not-adequate-regime-cyberspace>> accessed 18 June 2021.

⁴ Vienna Convention on the Law of Treaties, 1969 (Treaty Series, vol 1155, p 331).

⁵ Details regarding how the Tallinn Manuals have been used AJIL Unbound Symposium on Dan Efrony and Yuval Shany, ‘A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice’ (2018) 112 American Journal of International Law 583 with contributions of Fleur Johns, Nicholas Tsagourias, Lianne J.M. Boer, Kubo Mačák and Ido Kilovaty.

⁶ Kubo Mačák, ‘From Cyber Norms to Cyber Rules: Re-Engaging States as Law-Makers’ (2017) 30 Leiden Journal of International Law 877, 877.

⁷ Samantha Besson and José Luis Martí, ‘Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation’ (2018) 9 Jurisprudence 504, 506. Anne Peters, ‘Democracy as a Principle of the Global Constitutional Order’ in Jan Klabbers, Geir Ulfstein and Anne Peters (eds), The Constitutionalization of International Law (Oxford University Press 2011).

⁸ Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), The Constitutionalization of International Law (Oxford University Press) 225 <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199543427.001.0001/acprof-9780199543427>> accessed 28 June 2021.

⁹ Klaus Günther and Rainer Forst (eds), ‘Normative Ordnungen’ (2021). Matthias C Kettmann, ‘The Normative Order of the Internet: A Theory of Rule and Regulation Online’ (Oxford University Press 2020) <<https://oxford.universitypressscholarship.com/view/10.1093/oso/9780198865995.001.0001/oso-9780198865995>>.

developed a degree of autonomy (understood with Peters and Golia as the capacity of self-ordering¹⁰) while the capacity of state-crafted international law as “a mode of the self-constituting of society”¹¹ remains largely unused by states in cyberspace.

These developments raise important normative questions under international institutional law and potentially confronts states with the task to re-define the relationship they have with powerful digital TNCs. Further, digital TNCs seem to claim what Taylor describes as “a passive kind of political legitimacy, namely that they may explore activities that have traditionally been those of the state while remaining shielded from public scrutiny as purely for-profit actors”.¹² One case in point is the role corporations and in particular digital TNCs have occupied and have been requested to occupy, in the context of the Russia’s invasion of Ukraine. Global (digital) corporations and powerful CEOs, such as Microsoft or Tesla and SpaceX CEO, Elon Musk did not only take measures to comply with state-imposed sanctions, rather they have started to uphold international law on their own terms and by their own means.¹³ Moreover, and presumably even more striking, they have started to be addressed by states, especially by the Ukraine with demands to enforce international law. International legal norms which were designed to govern the relationship between states are suddenly being invoked against and by corporations, especially digital TNCs. In a sense, as Sanger notes, the conflict has already been globalised by the involvement of non-state actors.¹⁴

Against this backdrop, journalists and academics have started to resort to speedy analogies to the state and have started to frame powerful digital transnational corporations (digital TNCs) as “quasi-states”, “new governors”¹⁵, or to describe them as “semi-states”¹⁶, “net states”¹⁷ or “new sovereigns”¹⁸. This paper seeks to question the analytical value of these speedy analogies. It further develops and suggests an alternative approach of how to conceive of the novel practises exercised, and positions occupied by TNCs in the digital realm.

The paper will unfold as follows: It will commence with a thick description of the corporate engagement of three digital TNCs with public international law in three case studies (2.). The paper continues with addressing the question: “How to conceive of these practises?” (3.). As a first step to answering this question I will explain why I think it is (still) important to make use of the concept of the state as a starting point for reflection (3.1.). Then, I will proceed with mobilising “statification” as an analytical tool and suggest that this perspective as an alternative to speedy analogies (3.2.). This part of the paper proceeds with an explanation of the distinction between performative and perforating practises of digital TNCs (3.3.). The paper continues with the application of the analytical lens of statification to the case studies (4.). In

¹⁰ Angelo Jr Golia and Anne Peters, ‘The Concept of International Organization’ (2020) Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2020-27 In: J. Klabbers, Cambridge Companion to International Organizations Law, Cambridge: CUP, forthcoming. 9 <<https://www.ssrn.com/abstract=3659012>> accessed 6 April 2022.

¹¹ Philip Allott, ‘The Concept of International Law’ (1999) European Journal of International Law 20.

¹² Linnet Taylor, ‘Public Actors Without Public Values: Legitimacy, Domination and the Regulation of the Technology Sector’ (2021) 34 Philosophy & Technology 897, 907.

¹³ Brad Smith, ‘Microsoft Suspends New Sales in Russia’ (Microsoft On the Issues, 4 March 2022) <<https://blogs.microsoft.com/on-the-issues/2022/03/04/microsoft-suspends-russia-sales-ukraine-conflict/>> accessed 6 April 2022. Rose Croshier, ‘Understanding Elon Musk’s Delivery of Satellite Broadband to Ukraine’ (Center for Global Development | Ideas to Action) <<https://www.cgdev.org/blog/understanding-elon-musks-delivery-satellite-broadband-ukraine>> accessed 6 April 2022.

¹⁴ Andrew Sanger, ‘Piercing the State’s Corporate Veil: Using Private Actors to Enforce International Norms’ (EJIL: Talk!, 17 March 2022) <<https://www.ejiltalk.org/piercing-the-states-corporate-veil-using-private-actors-to-enforce-international-norms/>> accessed 6 April 2022.

¹⁵ Kate Klonick, ‘The New Governors: The People, Rules and Processes Governing Online Speech’ 131 Harvard Law Review 73.

¹⁶ Florian J Egloff, ‘Semi-State Actors in Cybersecurity’ (Oxford University Press 2022).

¹⁷ Alexis Wichowski, ‘Facebook and Google Are Actually “Net States.” And They Rule the World’ Wired <<https://www.wired.com/story/net-states-rule-the-world-we-need-to-recognize-their-power/>> accessed 30 June 2021.

¹⁸ Surya Deva, ‘Facebook as the New Sovereign? International Law’s Continued Struggle to Regulating Transnational Corporate Human Rights Abuses’ (2022) <<https://www.lcil.cam.ac.uk/press/events/2022/03/lcil-friday-lecture-facebook-new-sovereign-international-laws-continued-struggle-regulating>> accessed 6 April 2022.

the last sections, I draw conclusions and situate the paper in the context of a more general debate (5.).

2. Corporate Engagement with Public International Law: A Thick Description of Three Case Studies

2.1. Microsoft, Inc.

Microsoft was established in 1975 under US law and is a corporate actor who provides individual users, other private companies, but also governments with a wide range of digital services. Naturally, with its economic power, there comes a certain political power and a certain volume for its voice to be heard in lawmaking initiatives at national and global levels through what is commonly known as “lobbying”.¹⁹ So far the practises of Microsoft do not differ from other powerful TNCs. What is of interest in the context of this paper is the fact that around 2010 Microsoft has started to become very active in promoting compliance with Public International Law, without external compulsion. In 2014 Microsoft published a whitepaper on “International Cybersecurity Norms: Reducing Conflict in an Internet-Dependent World”.²⁰ In this White Paper Microsoft did not, as it could have been expected from a private company, address its own behaviour or that of competitors. Rather, Microsoft largely focuses on actions of states and their conduct in cyberspace²¹ and advocated for „the development of cybersecurity norms in order to define acceptable actions in cyberspace“²² and to move from „politically binding to legally binding instruments“. ²³ In fact, Microsoft proposed six norms to limit conflict in cyberspace drafted to address the conduct of states.²⁴ The six norms can be summarised as a demand for self-restraint of states.²⁵ In 2017, the EternalBlue security exploit, aimed at Microsoft’s operating system, was harnessed in a series of severe ransomware attacks.²⁶ In the same year Microsoft – continuing on the same path – proposed a “legally binding framework to govern states’ behaviour in cyberspace” they referred to as the “Digital Geneva Convention to protect cyberspace in times of peace”.²⁷ In this proposal they did not only refer to pre-existing treaty regimes of International Humanitarian Law (the Geneva Conventions) but also to binding treaties such as the treat on non-proliferation of nuclear weapons and the chemical weapons convention. What the proposal does not refer to is the Budapest Convention on Cybercrime. In the proposed three-pillar approach to address international issues in cybersecurity, Brad Smith, president of Microsoft wrote that: “we now need a Digital Geneva Convention that will commit governments to protecting civilians from nation-state attacks in times of peace”.²⁸ He further added:

¹⁹ Anne Peters, ‘Membership in the Global Constitutional Community’ in Jan Klabbers, Anne Peters and Geir Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press) 225 (context of NGOs) and 240 set seq. concerning what Peters refers to as “business actors” <<https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780199543427.001.0001/acprof-9780199543427>> accessed 28 June 2021.

²⁰ Angela McKay and others, ‘International Cybersecurity Norms Reducing Conflict in an Internet-Dependent World’ (Microsoft 2014) Whitepaper <<https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/REVroA>> accessed 6 April 2022.

²¹ *Ibid.*, 15.

²² *Ibid.*, 2.

²³ *Ibid.*, 3.

²⁴ *Ibid.*, 11–13.

²⁵ *Ibid.*, 20.

²⁶ Matt Burgess, ‘Everything You Need to Know about EternalBlue – the NSA Exploit Linked to Petya’ *Wired UK* <<https://www.wired.co.uk/article/what-is-eternal-blue-exploit-vulnerability-patch>> accessed 3 July 2021.

²⁷ A Digital Geneva Convention to protect cyberspace Digital Geneva Convention | Policy paper: <https://www.microsoft.com/en-us/cybersecurity/content-hub/a-digital-geneva-convention-to-protect-cyberspace>.

²⁸ ‘The Need for a Digital Geneva Convention’ (Microsoft On the Issues, 14 February 2017) <<https://blogs.microsoft.com/on-the-issues/2017/02/14/need-digital-geneva-convention/>> accessed 6 July 2021.

“[j]ust as the Fourth Geneva Convention recognized that the protection of civilians required the active involvement of the Red Cross, protection against nation-state cyberattacks requires the active assistance of technology companies. The tech sector plays a unique role as the internet’s first responders, and we therefore should commit ourselves to collective action that will make the internet a safer place, affirming a role as a neutral Digital Switzerland that assists customers everywhere and retains the world’s trust.”²⁹

As a second pillar he proposed an independent organisation that in his view could investigate and share publicly the evidence that attributes nation-state attacks to specific countries and should consist of technical experts from across governments, the private sector, academia, and civil society with the capability to examine specific attacks and share evidence demonstrating that a given attack was by a specific nation-state. Without meaningful critical appraisal the UNHRC picked up on the idea of a Digital Geneva Convention and published an analysis on their website.³⁰ Shortly after that announcement, the proposal was already featured on the United Nations’ homepage.³¹ Microsoft joined France in their “Paris Call for Trust and Security in Cyberspace”³² in December 2018. In the same year Microsoft expressed support for the “Cybersecurity Tech Accord Initiative”³³, which sought to facilitate the third pillar of Brad Smith’s proposal. The “Charter of Trust”³⁴ was launched in 2018 at the Munich Security Conference by Siemens³⁵ to “protect the data of individuals and companies, prevent damage to people, companies and infrastructure, and create a reliable foundation on which confidence in a networked, digital world can take root and grow”.³⁶

In recent years Microsoft has become very outspoken in their advocacy for international cyber (security) law and have stressed the urgent need for inter-state relations in the digital space. In 2019 Microsoft launched the “CyberPeace Institute”, which can be regarded as the realisation of the proposed “independent organisation” in the context of the Digital Geneva Convention proposal of 2017. The CyberPeace Institute was set up by Microsoft together with Mastercard, the Hewlett Foundation and other Organisations as a Geneva based non-governmental organisation, for the purpose of assisting victims and coordinating recovery efforts, improving accountability through the facilitation of collective analysis, research and investigation of cyberattacks and to promote responsible behaviour in cyberspace and advancing international laws and rules.³⁷ In October 2020, Microsoft announced the establishment of a United Nations Affairs Office in New York City.³⁸ In an Interview John Frank, Vice President of UN Affairs at Microsoft, stated that their goal is to advance “seven priorities: human rights, defending democracy, economic growth, education, broadband, environmental sustainability and digital empowerment of the UN itself”, claiming, that governments cannot

²⁹ Ibid.

³⁰ Joseph Guay and Lisa Rudnick, ‘What the Digital Geneva Convention Means for the Future of Humanitarian Action’ (UNHCR Innovation, 25 June 2017) <<https://www.unhcr.org/innovation/digital-geneva-convention-mean-future-humanitarian-action/>> accessed 2 June 2021.

³¹ ‘Digital Geneva Convention’ (UN News) <<https://news.un.org/en/tags/digital-geneva-convention>> accessed 28 June 2021.

³² ‘Paris Call for Trust and Security in Cyberspace — Paris Call’ <<https://pariscall.international/en/>> accessed 1 July 2021.

³³ ‘Cybersecurity Tech Accord’ (Cybersecurity Tech Accord) <<https://cybertechaccord.org/accord/>> accessed 1 July 2021.

³⁴ ‘Charter of Trust’ (Charter of Trust) <<https://www.charteroftrust.com/>> accessed 1 July 2021.

³⁵ ‘Charter of Trust - About’ (Charter of Trust) <<https://www.charteroftrust.com/about/>> accessed 3 July 2021.

³⁶ Ibid.

³⁷ Tom Burt Corporate Vice President, Customer Security & Trust, ‘CyberPeace Institute Fills a Critical Need for Cyberattack Victims’ (Microsoft On the Issues, 29 September 2019) <<https://blogs.microsoft.com/on-the-issues/2019/09/26/cyberpeace-institute-fills-a-critical-need-for-cyberattack-victims/>> accessed 6 April 2022.

³⁸ ‘Why Does Microsoft Have an Office at the UN? A Q&A with the Company’s UN Lead’ (On the Issues, 5 October 2020) <<https://news.microsoft.com/on-the-issues/2020/10/05/un-affairs-lead-john-frank-unga/>> accessed 29 June 2021.

tackle current global challenges alone.³⁹ In 2021 the Tech Accord and the CyberPeace Institute jointly published a “Multistakeholder Manifesto on Cybercrime: A call for responsible action and inclusion”.⁴⁰ With the Russia’s invasion in Ukraine, Microsoft reaffirmed its demand for a Digital Geneva Convention and got actively involved in the Ukrainian cyber defence.⁴¹ The CyberPeace Institute tracks Cyberattacks in general and in particular how the critical infrastructure and civilian targets are being targeted. The information about the attacks is made public available on the website. Apart from a description they further publish information on attribution of these attacks, including attribution to states.⁴²

To summarise: In the past decade Microsoft has demanded for changes in international law and the restriction of state behaviour in cyberspace as well as has with the CyberPeace Institute has and the United Nations Affairs Office designed specifically for the purpose to entered into dialogue with Intergovernmental organisations such as the UN HRC and the United Nations on these matters. It further cooperated through establishing and promoting non-governmental organisations with other non-state actors in promoting its preferences for a change in international law pertaining to cyberspace.

2.2. Meta’s Facebook and the Oversight Board

The second case study will examine Meta Platforms Inc.’s Facebook⁴³, which is still the largest so-called “social” media platform and the Oversight Board, which was set up as a (legally) separate yet deeply connected institution in 2020 to fulfil advisory as well as judiciary functions for the TNC, according to the its self-description.⁴⁴ In the past decade communication platforms such as Facebook have become important actors in the discourse on individual and societal rights to freedom of speech.⁴⁵ Facebook has a long history of rehashing its terms of service from rough rules of thumb based on the rationale to take down everything that “makes you feel bad in your gut”⁴⁶ through admissions that they were “making rules up”⁴⁷ to a sophisticated set of “community standards”⁴⁸ and “values”⁴⁹ to govern content moderation decisions. Facebook

³⁹ Ibid.

⁴⁰ Tech Accord and CyberPeace Institute, ‘The Multistakeholder Manifesto on Cybercrime: A Call for Responsible Action and Inclusion’ (Cybersecurity Tech Accord, 29 September 2021) <<https://cybertechaccord.org/the-multistakeholder-manifesto-on-cybercrime-a-call-for-responsible-action-and-inclusion/>> accessed 6 April 2022.

⁴¹ David E Sanger, Julian E Barnes and Kate Conger, ‘Tech Companies Help Defend Ukraine Against Cyberattacks - The New York Times’ (The New York Times, 28 February 2022) <<https://www.nytimes.com/2022/02/28/us/politics/ukraine-russia-microsoft.html>> accessed 6 April 2022.

⁴² CyberPeace Institute, ‘Ukraine: A Timeline Of Cyberattacks’ (CyberPeace Institute, 24 February 2022) <<https://cyberpeaceinstitute.org/ukraine-timeline-of-cyberattacks/>> accessed 6 April 2022.

⁴³ Facebook as a part of Meta Platforms, Inc., the Oversight Boards is incorporated as an LLC.

⁴⁴ “The purpose of the board is to protect free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook’s content policies. The board will operate transparently, and its reasoning will be explained clearly to the public, while respecting the privacy and confidentiality of the people who use Facebook, Inc.’s services, including Instagram (collectively referred to as “Facebook”). It will provide an accessible opportunity for people to request its review and be heard.” Charter of the Oversight Board ‘Governance | Oversight Board’ <<https://oversightboard.com/governance/>> accessed 6 April 2022.

⁴⁵ Evelyn Douek, ‘The Limits of International Law in Content Moderation’ (2020), SSRN Electronic Journal 42 <<https://www.ssrn.com/abstract=3709566>> accessed 2 June 2021.

⁴⁶ Andrew Marantz, ‘Why Facebook Can’t Fix Itself | The New Yorker’ The New Yorker (New York, 12 October 2020) <<https://www.newyorker.com/magazine/2020/10/19/why-facebook-cant-fix-itself>> accessed 3 July 2021.

⁴⁷ Matthias C Kettmann and Wolfgang Schulz, ‘Setting Rules for 2.7 Billion: A (First) Look into Facebook’s Norm-Making System; Results of a Pilot Study’ (2020) 1 28.

⁴⁸ Facebook Transparency Centre, ‘Facebook Community Standards’ <<https://transparency.fb.com/en-gb/policies/community-standards/>> accessed 6 April 2022.

⁴⁹ Ibid.: voice, authenticity, security, privacy, and dignity (voice is paramount).

has given journalists⁵⁰ and academics⁵¹ access to the company to study their norm development processes. In addition, they have started to publish information on their website which explains details of the procedure that is followed in “Writing Facebook’s Rulebook”⁵² and on their Product Policy Teams meetings (so called “minutes”) up to November 2020.⁵³ This step was taken after they had previously shared information about how they enforce community standards and their updated appeals process.⁵⁴ The community standards also pledge a commitment to human rights, which is specified in its “Corporate Human Rights Policy.”⁵⁵ In the first part of this policy document we can find the following statement:

*“We recognize all people are equal in dignity and rights. We are all equally entitled to our human rights, without discrimination. Human rights are interrelated, interdependent and indivisible.”*⁵⁶

This statement is followed by pledges to comply with various International Human Rights frameworks and, in particular, with the United Nations Guiding Principles on Business and Human Rights (UNGPs) and the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) references to other international human rights instruments are made with the reservation “depending on the circumstances”.⁵⁷

In 2019 Facebook started to work out the institutional setting for an Oversight Board to advise on, and adjudicate content moderation decisions.⁵⁸ The purpose of the board is currently described as “to promote free expression by making principled, independent decisions regarding content on Facebook and Instagram and by issuing recommendations on the relevant Facebook Company Content Policy.”⁵⁹ The idea for such an institution can be traced back to Noah Feldmann, Professor at Harvard Law School⁶⁰, and was picked up by Facebook CEO, Mark Zuckerberg. He called it a “Supreme Court” for Facebook. The Oversight Board was set up during an ambitious and elaborate process with the formal and informal involvement of a global and diverse group of experts⁶¹ and delivered its first decisions in January 2021.⁶² To the general public it was partially framed as a reaction to harsh criticism the company was faced with following the Cambridge Analytica scandal and publicly scrutinised content

⁵⁰ Simon van Zuylén-Wood, “Men Are Scum”: Inside Facebook’s War on Hate Speech’ (2019) Vanity Fair Hive <<https://www.vanityfair.com/news/2019/02/men-are-scum-inside-facebook-war-on-hate-speech>> accessed 4 July 2021. Jason Koebler and Joseph Cox, ‘The Impossible Job: Inside Facebook’s Struggle to Moderate Two Billion People’ (2018) Motherboard Tech by Vice <<https://www.vice.com/en/article/xwk9zd/how-facebook-content-moderation-works>> accessed 4 July 2021. Marantz (n 46).

⁵¹ *Inter alia* Klonick, ‘The New Governors: The People, Rules and Processes Governing Online Speech’ (n 15). Kettemann and Schulz (n 47).

⁵² ‘Writing Facebook’s Rulebook’ (About Facebook, 10 April 2019) <<https://about.fb.com/news/2019/04/insidefeed-community-standards-development-process/>> accessed 4 July 2021.

⁵³ ‘Product Policy Forum Minutes’ (About Facebook, 15 November 2018) <<https://about.fb.com/news/2018/11/content-standards-forum-minutes/>> accessed 4 July 2021.

⁵⁴ ‘Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process’ (About Facebook, 24 April 2018) <<https://about.fb.com/news/2018/04/comprehensive-community-standards/>> accessed 4 July 2021.

⁵⁵ ‘Facebook’s Corporate Human Rights Policy’ <<https://about.fb.com/wp-content/uploads/2021/03/Facebooks-Corporate-Human-Rights-Policy.pdf>> accessed 4 July 2021.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*; For further commitments and the introduction of a Human Rights Impact Assessment Report see Miranda Sissons, Director of Human Rights, ‘Our Commitment to Human Rights’ (Meta, 16 March 2021) <<https://about.fb.com/news/2021/03/our-commitment-to-human-rights/>> accessed 6 April 2022.

⁵⁸ ‘IG-7THR3S11 Case Decision 2020-004-IG-UA (28 January 2021)’ (Oversight Board, 28 January 2021) so far, the only Instagram case. <<https://oversightboard.com/decision/IG-7THR3S11/>> accessed 4 July 2021.

⁵⁹ ‘Oversight Board | The Board - The Purpose of the Board’ <<https://oversightboard.com/>> accessed 6 April 2022.

⁶⁰ Kate Klonick, ‘Inside the Making of Facebook’s Supreme Court | The New Yorker’ The New Yorker (12 February 2021) <<https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court>> accessed 6 April 2022.

⁶¹ *Ibid.*

⁶² Oversight Board, ‘Independent Judgement. Transparency. Legitimacy.’ <<https://oversightboard.com/>> accessed 6 April 2022.

moderation decisions.⁶³ The Oversight Board was formally set up by the Trust, which was funded by Facebook to the tune of 130m USD and operates on the grounds of its Charter⁶⁴ and its Bylaws⁶⁵. In the first two paragraphs of the Charter one can find the following statement:

“Freedom of expression is a fundamental human right. Facebook seeks to give people a voice so we can connect, share ideas and experiences, and understand each other.”

“Free expression is paramount, but there are times when speech can be at odds with authenticity, safety, privacy, and dignity. Some expression can endanger other people’s ability to express themselves freely. Therefore, it must be balanced against these considerations.”⁶⁶

This specific and the general commitments to international (human rights) law is particularly interesting against the backdrop of Article 7 of the Oversight Board Charter (OB Charter) where it emphasises that “[t]he board will not purport to enforce local law.”⁶⁷ Putting an even stronger emphasis on international (human rights) law. The twenty initial Oversight Board Members (soon to be forty) consist of a diverse group of high-level experts including law professors and practitioners, digital and human rights activists, a former ECtHR judge, one former minister, and one former head of state as well as award-winning journalists.⁶⁸ The Oversight Board is designed to function as an advisory as well as quasi-judiciary body that shall determine whether content on Facebook was deleted in line with Facebook’s own Community Standards, Facebook’s values (voice, authenticity, privacy, safety, and dignity) and human rights norms protecting free expression.⁶⁹ The decisions are binding for Facebook Inc. (Article 4 OB Charter). The Oversight Board considers appeals by users who disagree with the outcome of a decision of Facebook or Instagram (Article 2 OB Charter).⁷⁰ They can also consider cases Facebook refers to them. The selection of cases is made by the Case Selection Committee and the decisions are taken by the Board Members.⁷¹ The Case Selection Committee determines the criteria for the selection and prioritisation of cases. These criteria for selection are not set in stone but need to be documented. There is some guidance provided by the Charter that states that they should be reasons of “importance and precedential impact”. The decisions are taken by majority vote but can be overturned by a majority decision of Board Members.⁷² As of 31 March 2022, the Oversight Board has delivered decisions on twenty-three cases⁷³ with two further “cases” and one “policy advisory opinion request” referred by Meta pending. The cases concerned included issues from “bullying and harassment”, “cruel and insensitive content”, “dangerous individuals and organisations”, “hate speech”, “incitement to violence”, “misinformation”, “adult nudity”, “child safety” and “marginalised communities”. In every case and “policy advisory opinion request” the Oversight Board “may, at its discretion and where applicable, allow additional written submissions by individuals and groups”.⁷⁴ During

⁶³ ‘2 Days, 10 Hours, 600 Questions: What Happened When Mark Zuckerberg Went to Washington - The New York Times’ <<https://www.nytimes.com/2018/04/12/technology/mark-zuckerberg-testimony.html>> accessed 4 July 2021.

⁶⁴ ‘Oversight Board Charter’ <https://about.fb.com/wp-content/uploads/2019/09/oversight_board_charter.pdf> accessed 4 July 2021.

⁶⁵ ‘Oversight Board Bylaws’ <<https://www.oversightboard.com/sr/governance/bylaws>> accessed 4 July 2021.

⁶⁶ ‘Oversight Board Charter’ (n 64).

⁶⁷ Ibid.

⁶⁸ ‘Oversight Board’ <<https://oversightboard.com/meet-the-board/>> accessed 4 July 2021.

⁶⁹ ‘Governance | Oversight Board’ (n 44).

⁷⁰ Ibid. Change in scope of review: ‘The Oversight Board Is Accepting User Appeals to Remove Content from Facebook and Instagram | Oversight Board’ <<https://oversightboard.com/news/267806285017646-the-oversight-board-is-accepting-user-appeals-to-remove-content-from-facebook-and-instagram/>> accessed 3 November 2021.

⁷¹ Oversight Board Bylaws: <https://www.oversightboard.com/sr/governance/bylaws>.

⁷² Bylaws Article 1, Section 4.1: Oversight Board Bylaws: <https://www.oversightboard.com/sr/governance/bylaws>.

⁷³ ‘Decision | Oversight Board’ <<https://oversightboard.com/decision/>> accessed 4 July 2021.

⁷⁴ ‘Charter of the Oversight Board’ Article 3 <<https://oversightboard.com/governance/>> accessed 4 July 2021.

the appeals process the OB Charter foresees the option for the public to get involved by submitting a “public comment” through a form available on the Oversight Board website.⁷⁵ The Oversight Board defines specific areas of interest in which public comments would be appreciated⁷⁶ and stipulates terms for the submission of public comments.⁷⁷ From the decisions it has made so far we can see that the Oversight Board follows a specific line of argumentation in its reasoning. After the statement of facts and some points of clarification regarding the procedural steps, the competent panel (5 Members) proceeds with its reasoning as follows: In a first step it looks at the applicable community standards, in a next step it (in most cases briefly) considers Facebooks values, to finally arrive at international human rights standards. In this context it considers Article 19 ICCPR and the conditions under which restrictions to freedom of expression are considered to be appropriate, pursuant to Article 19 sec. 3 ICCPR. The setup and outline of the Oversight Board, which promotes itself to be “transparent”, “empowered”, “accessible” and “independent”⁷⁸, conveys these claims in its design (there no indicators of Facebook or Instagram resemblance to be found) but also in how information is made available online. The Oversight Board is further deliberately designed to allow for other companies outside of Meta Inc. to join the trust and submit cases to the Oversight Board, as well. All decisions and pending cases are made available online as well as the Charter of the Oversight Board and Bylaws under which the Oversight Board operates. However, there is no information to be found on the total number of submitted cases and the acceptance rate or criteria. While these frameworks do use legal language, information in general is provided in a very accessible way.

To sum up: Meta’s Facebook and the Oversight Board engage in promoting their commitment to human rights as guiding principles for content moderation. The Oversight Board is presented and acts as a judiciary and advisory institution considers international human rights law, in particular Article 19 and Article 19 sec. 3 ICCPR in its decision-making and reasoning.

2.3. Google, LLC

For more than a decade, the services and hardware provided by Google influence and facilitate our lives in almost all dimensions and plays a significant role in steering the ways in which we use cyberspace.⁷⁹ The company has reached a position that comes with unprecedented power. Unprecedented, not because it is an enormously valuable und successful company, but because it has the means to control digital as well as off-line behaviour (Google Maps, for example). They exercise control by design of their applications but also as a consequence of their access to unimaginable amounts of personal data generated by the broad spectrum of services offered by the company.⁸⁰ Since state officials and governments are also using these applications and are what Deeks refers to as “avid tech consumers”⁸¹, “these companies” she explains “have the potential to shape state behaviour in ways that more closely track with the states’ international law obligations, and they will do so when it is in their financial interest”. They further “have the potential to shape the popular understanding of what these obligations

⁷⁵ Ibid., Article 2 section 3 OB Charter.

⁷⁶ ‘Announcement of Case: 2021-008-FB-FBR | Oversight Board’ <<https://oversightboard.com/news/170403765029629-announcement-of-case-2021-008-fb-fbr/>> accessed 4 July 2021.

⁷⁷ ‘Public Comment Terms OSB.pdf’ <<https://osbcontent.s3-eu-west-1.amazonaws.com/Public+Comment+Terms+OSB.pdf>> accessed 5 July 2021.

⁷⁸ ‘Oversight Board | Independent Judgement. Transparency. Legitimacy.’ <<https://oversightboard.com/>> accessed 7 July 2021.

⁷⁹ Jeffrey Rosen, ‘The Deciders: The Future of Privacy and Free Speech in the Age of Facebook and Google’ 80 Fordham Law Review 15.

⁸⁰ Nicholas Carlson, ‘A List of Google Products’ <<https://www.businessinsider.com/a-list-of-google-products-2014-9>> accessed 4 July 2021.

⁸¹ Ashley Deeks, ‘A New Tool for Tech Companies: International Law’ (Lawfare, 30 May 2019) <<https://www.lawfareblog.com/new-tool-tech-companies-international-law>> accessed 1 July 2021.

are”.⁸² Google adapts borders displayed in Google maps according to location.⁸³ Its “traffic” and “business information” influences human behaviour. A case in point is the refugee movement after the Russian invasion of Ukraine.⁸⁴ Such as other digital TNCs, Google frequently proclaims its commitment to international law⁸⁵ and human rights⁸⁶ in published statements or documents or via membership in initiatives such as the Global Network Initiative (GNI).⁸⁷ In practice Google’s asserted commitments to international human rights law were made explicit in 2010 when they announced to terminate project Dragonfly and to cease operations in China for not wanting to censor search results. They published the following statement:

“We have decided we are no longer willing to continue censoring our results on Google.cn, and so over the next few weeks we will be discussing with the Chinese government the basis on which we could operate an unfiltered search engine within the law, if at all.”⁸⁸

While this is only one example of Google refusing censorship, they have complied to numerous state requests in the past without giving due consideration to international human rights law.⁸⁹ Another example (this time closer to home) was taken in the context of “Project Maven” on which Google had worked with the US Defense Department.⁹⁰ In this case, employees expressed their objection to the project through a coordinated petition demanding “that Project Maven be cancelled, and that Google draft, publicize and enforce a clear policy stating that neither Google nor its contractors will ever build warfare technology”.⁹¹ In the protest’s aftermath Google adopted a principle on Artificial Intelligence (AI) pledging to not to design or deploy AI for “technologies whose purpose contravenes widely accepted principles of international law and human rights”.⁹²

In summary: Google has made commitments to international law and has also justified some strategic business decisions with references to Public International Law. However, providing their services such as Google maps or the Google search engine or YouTube, Google does not claim to enforce International Law through the running of these services, yet, Google is

⁸² Ibid.

⁸³ Greg Bensinger, ‘Google Redraws the Borders on Maps Depending on Who’s Looking’ Washington Post (14 February 2020) <<https://www.washingtonpost.com/technology/2020/02/14/google-maps-political-borders/>> accessed 6 April 2022. Ethan R. Merel, “Google’s World: The Impact of Agnostic Cartographers on the State-Dominated International Legal System,” Columbia Journal of Transnational Law 54, no. 2 (2016): 424-453 and on humanitarian mapping: Fleur Johns, ‘LCIL Friday Lecture: “#HELP: Digital Humanitarian Mapping and New Cartographies of Governability” - Prof Fleur Johns, UNSW | Lauterpacht Centre for International Law’ <<https://www.lcil.cam.ac.uk/press/events/2021/02/lcil-friday-lecture-help-digital-humanitarian-mapping-and-new-cartographies-governability-prof-fleur>> accessed 6 April 2022.

⁸⁴ Rachel Lerman, ‘On Google Maps, Tracking the Invasion of Ukraine’ Washington Post (25 February 2022) <<https://www.washingtonpost.com/technology/2022/02/25/google-maps-ukraine-invasion/>> accessed 6 April 2022.

⁸⁵ ‘Digital Security and Due Process: A New Legal Framework for the Cloud Era’ (Google, 22 June 2017) <<https://blog.google/outreach-initiatives/public-policy/digital-security-and-due-process-new-legal-framework-cloud-era/>> accessed 6 April 2022.

⁸⁶ ‘About Human Rights at Google - Google’ <<http://www.google.com/my/human-rights/>> accessed 6 April 2022.

⁸⁷ ‘GNI Home’ (Global Network Initiative) <<https://globalnetworkinitiative.org/>> accessed 6 April 2022.

⁸⁸ Matt Sheehan, ‘How Google Took on China—and Lost’ (2018), MIT Technology Review <<https://www.technologyreview.com/2018/12/19/138307/how-google-took-on-china-and-lost/>> accessed 4 July 2021.

⁸⁹ For a recent example see Eileen Gua, ‘How YouTube’s Rules Are Used to Silence Human Rights Activists’ (MIT Technology Review, 24 June 2021) <<https://www.technologyreview.com/2021/06/24/1027048/youtube-xinjiang-censorship-human-rights-atajurt/>> accessed 6 April 2022.

⁹⁰ Daisuke Wakabayashi and Scott Shane, ‘Google Will Not Renew Pentagon Contract That Upset Employees - The New York Times’ The New York Times (1 June 2018) <<https://www.nytimes.com/2018/06/01/technology/google-pentagon-project-maven.html>> accessed 8 July 2021.

⁹¹ Ibid.

⁹² ‘AI at Google: Our Principles’ (Google, 7 June 2018) <<https://blog.google/technology/ai/ai-principles/>> accessed 8 July 2021.

influencing how information is structured, which may have an impact on how states take their decisions.

3. How to conceive of these practises?

Public and academic evaluations of these corporate-self descriptions, proclaimed commitments, and endeavours in the realm of international law advanced by these actors vary between disqualifications as “elaborated PR Stunts”⁹³ “political statements”⁹⁴ and framing of the companies as “big tech becoming governments”⁹⁵ or refer to them as “New Governors”⁹⁶ or “New Sovereigns”⁹⁷. The tools applied by these assessments and analyses have so far not been able to convey a comprehensive and deep understanding of the question if and how private digital actors may influence international lawmaking and interpretation of existing international law. This is because analyses either focus on specific practises (e.g., of social media platforms) or continue to look at them through the lens of their formal legal status as corporations⁹⁸, and thus as non-state actors. What these analyses cannot explain is why they refer to concepts such as “governments”, “states” and “sovereigns” or analogise in that way. Rather the categories appear to be mainly driven by intuition and/or heuristics. What is missing in international legal studies is an analytical tool that offers the possibility of contextualising and explicating the strategies and practises of powerful digital corporate actors thus the path to an analysis of the consequences the different role of private digital actors has for international law and its legitimacy remains necessarily sealed. This paper seeks to explore the potentials of a tool for analysis that enables us to take on a different perspective. One that approaches these practises in the language of public international law, while freeing us of the intellectual constraints of established state and non-state distinctions.

The next section explains why I think it is (still) important to take the concept of the state as a starting point for reflection when approaching the question of how to conceive of what digital TNCs are actually doing (3.1.). I will then proceed by mobilising Michel Foucault’s idea of “statification” as an analytical tool (3.2.), and will explain why it may prove to be analytically fruitful to distinguish performative and perforating practises (3.3.).

3.1. Taking the concept of the state as the starting point for reflection

Over the past few years, concepts which frame these powerful digital private actors as “net states”⁹⁹ or “networked statehood”¹⁰⁰ have been introduced (mainly) by scholars in support of their legal pluralism or societal constitutionalism arguments. These theoretical frameworks,

⁹³ Evelyn Douek, ‘Governing Online Speech: From “Posts-As-Trumps” to Proportionality and Probability’ (2021) 121 *Columbia Law Review* 21 et seq.

⁹⁴ Valentin Jeutner, ‘The Digital Geneva Convention: A Critical Appraisal of Microsoft’s Proposal’ (2019) 10 *Journal of International Humanitarian Legal Studies* 158. Tomáš Minárik and Kris van der Meij, ‘Geneva Conventions Apply to Cyberspace: No Need for a “Digital Geneva Convention”’ (CCDCOE) <<https://ccdcoe.org/news/2017/geneva-conventions-apply-to-cyberspace-no-need-for-a-digital-geneva-convention/>> accessed 28 June 2021. David Wallace and Mark Visger, ‘Responding to the Call for a Digital Geneva Convention: An Open Letter to Brad Smith and the Technology Community’ (2018) 6 *Journal of Law & Cyber Warfare* 3.

⁹⁵ Come, visit us Centre for Research on Multinational Corporations Sarphatistraat 30 1018 GL and Amsterdam Nederl, ‘How Big Tech Is Becoming the Government’ (SOMO, 5 February 2021) <<https://www.somo.nl/how-big-tech-is-becoming-the-government/>> accessed 3 July 2021.

⁹⁶ Klönick, ‘The New Governors: The People, Rules and Processes Governing Online Speech’ (n 15).

⁹⁷ Deva (n 18).

⁹⁸ Jeutner argues that the analogy between Microsoft and the ICRC is not convincing see Jeutner (n 94).

⁹⁹ ‘Facebook and Google Are Actually “Net States.” And They Rule the World’ WIRED <<https://www.wired.com/story/net-states-rule-the-world-we-need-to-recognize-their-power/>> accessed 15 June 2021.

¹⁰⁰ Angelo Jr Golia and Gunther Teubner, ‘Networked Statehood: An Institutionalised Self-Contradiction in the Process of Globalisation?’ (2021) *Transnational Legal Theory* 1

developed *inter alia* by Castells¹⁰¹, Teubner¹⁰², and Teubner together with Golia¹⁰³ may seem attractive at first sight, as they promise to free us from the (perceived) shackles of the (nation) state-centred structure of international law. However, when studying their approaches in detail, the reader is left wondering what exactly can be gained by overcoming the concept of the state. Following as Grzybowski and Koskenniemi express, there is

*“substantial doubt, however, whether the category of the state can really be disposed of that easily, whether cutting off the King’s head, in Foucault’s words, would actually preclude the reappearance of the state’s body in the form of variegated ‘doubles’ – as delineated system, subject, authority, etc. – and haunt our notions of politics, justice and law, if ‘in a very ghostly shape’ ”.*¹⁰⁴

Against this backdrop this paper aims to develop an analytical tool that can be understood as an alternative approach to the seemingly radical ideas of “net states”¹⁰⁵ and “networked statehood”.¹⁰⁶ I contend that these – admittedly – very sophisticated conceptual and theoretical approaches may be helpful in a descriptive sense but remain detached from the actual practises and realities of the practises of digital TNCs and states in cyberspace and, therefore, fail to meaningfully improve the reader’s understanding of how to conceive of the practises. They thereby tell us very little about how these practises influence the “relentlessly State-centric”¹⁰⁷ international legal system, which itself depends on constituting the state. As Eslava and Pahuja suggest “rather than international law, being a creation of the state, making and remaking the state is a project of international law”.¹⁰⁸ While to talk about a network society might be instructive and convincing from a descriptive point of view, to argue that networks “disaggregate the state and at the same time transcend the state”¹⁰⁹ does not tell us very much about what is actually happening and in a second set how this influences the international institutional set up of Public International Law. Referring to a system as “networked statehood”, without previously asking what the normative significance of states and statehood *is* and what the term state signifies, might be progressive, but ignores the fact that states have been the backbone of the international legal order for a very long time – presumably for very good reasons. Further, it ignores the fact that international law is built on and around the state. Interestingly, even though these scholars argue for the *network society*¹¹⁰, *societal*

¹⁰¹ Manuel Castells, ‘The Rise of the Network Society: The Information Age: Economy, Society and Culture’ (2nd Edition, with a New Preface, Wiley 2010) 77 et seq. <<https://www.wiley.com/en-us/The+Rise+of+the+Network+Society%2C+2nd+Edition%2C+with+a+New+Preface-p-9781405196864>> accessed 4 July 2021.

¹⁰² Gunther Teubner, ‘Societal Constitutionalism: Alternatives to State-Centered Constitutional Theory?’ in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds), *Transnational Governance and Constitutionalism* (Social Science Research Network 2006) <<https://papers.ssrn.com/abstract=876941>> accessed 4 July 2021.

¹⁰³ Golia and Teubner (n 100) 1.

¹⁰⁴ Janis Grzybowski and Martti Koskenniemi, ‘International Law and Statehood A Performative View’ in Robert Schuett and Peter MR Stirk (eds), *The Concept of the State in International Relations: Philosophy, Sovereignty and Cosmopolitanism* (Edinburgh University Press) 29 with references to Jens Bartelson, ‘Critique of the State’, pp. 34 and 181.

¹⁰⁵ Wichowski (n 17).

¹⁰⁶ Golia and Teubner (n 100).

¹⁰⁷ Fernando Lusa Bordin, ‘The Analogy between States and International Organizations’ (Cambridge University Press 2018) 3. Referring to José Alvarez, ‘Review of International Organizations and Their Exercise of Sovereign Powers’ (2007) 101 *The American Journal of International Law* 674, 678.

¹⁰⁸ Luis Eslava and Sundhya Pahuja, ‘The State and International Law: A Reading from the Global South’ (2020) 11 *Humanity: An International Journal of Human Rights, Humanitarianism, and Development* 118.

¹⁰⁹ Joost Pauwelyn, Ramses Wessel and Jan Wouters, ‘When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking’ (2014) 25 *European Journal of International Law* 733, 741 (emphasis in the original).

¹¹⁰ Castells (n 101). Or “diverse society of networks” Pauwelyn, Wessel and Wouters (n 109) 741 footnote 52.

*constitutionalism*¹¹¹, and *networked statehood*¹¹² beyond the state, they still refer to the state as a concept when developing and promoting their ideas. Inadvertently, they acknowledge that the concept of the state does (still) deserve our attention. These scholars, in one way or another, do acknowledge the normative significance of the concept of the state, not in an ontological sense, but as a way to analyse, understand and contest power, or at the very least in terms of vocabulary. States, as Besson explains, remain an “inescapable component of what some have misguidedly called politics or international law-making ‘beyond the State’”.¹¹³ Consequently, she continues “states should (...) be the first institution we should theorise and mobilise in an effort to approach the political and institutional structure of international law”.¹¹⁴ The persistent centrality of the state for the international legal order, its stable importance for the legitimacy of international law¹¹⁵, and its role as the central point of reference in the conception of other actors within the bounds of international law and basic unit of analysis¹¹⁶, makes it the perfect starting point for reflection.¹¹⁷ And even beyond that, the necessary starting point for developing an analytical tool with which we can examine the practises of powerful digital TNCs in cyberspace.

One aspect needs to be clarified: It is not necessarily productive to compare private actors to the state as a “given thing”¹¹⁸ or to compare the features of private actors to structural elements of the state (“*Staatsselemente*” or “*Staatsstrukturmerkmale*”).¹¹⁹ While it was surely an interesting thought experiment in and of itself and was already undertaken almost ten years ago by Chander in his paper, *Facebookistan*¹²⁰, it was unable to yield deep insights into how the international legal order is challenged by the practises of powerful digital TNCs. This is because analogies, while being an important and established element as a method of reasoning, are a very demanding exercise. It is not as simple as “treating like cases alike”. A necessary prerequisite for drawing analogies is to have the tools in place to produce the relevant elements, which can later be categorised as alike or unlike. Or, to put it differently, to find out what the relevant facts are before determining whether there is a lacuna in the law, which can then be addressed through analogical reasoning. Drawing analogies from the “elusive concept”¹²¹ of the state while concentrating exclusively on its structural elements does not tell us much about the “normative significance”¹²² of the state in the making of public international law. This argument is supported by a reviewer’s remarks on Bordin’s very insightful book titled *The Analogy between States and International Organisations*¹²³. While Bordin undertakes a thorough analysis of the normative foundations of analogical reasoning, in the end, he finds himself caught – as the reviewer remarks – in the trap of reducing “normative features of statehood into ‘structural’ ones (...) conflates statehood with (state)

¹¹¹ Teubner (n 102). Angelo Golia and Gunther Teubner, ‘Societal Constitutionalism (Theory Of)’ (2021) MPIL Research Paper No. 2021 - 08 <<https://papers.ssrn.com/abstract=3804094>> accessed 4 July 2021.

¹¹² Golia and Teubner (n 100).

¹¹³ Samantha Besson, ‘International Courts and the Jurisprudence of Statehood’ (2019) 10 *Transnational Legal Theory* 30.

¹¹⁴ *Ibid.*, 32.

¹¹⁵ For a discussion see: Besson and Martí (n 7) 511 et seq.

¹¹⁶ Fleur Johns, ‘Governance by Data’ (2021) 17 *Annual Review of Law and Social Science* 53, 65.

¹¹⁷ Fleur Johns argument goes into a similar direction, as she is arguing that “the practise of digitizing government operations is making of states - key units of analysis for law and social science scholarship - something other than they have been before”, ‘Governance by Data’ (2021) 17 *Annual Review of Law and Social Science* 53 (58).

¹¹⁸ Sebastien Jodoin, ‘International Law and Alterity: The State and the Other’ (2008) 21 *Leiden Journal of International Law* 1, 8. “The ontology of statehood is thus an inherently violent experience, as there is interpretative, groundless violence in the originary act of founding international law on the basis of the state”.

¹¹⁹ Montevideo Convention on the Rights and Duties of States of 1933.

¹²⁰ Anupam Chander, ‘Facebookistan’ (2012) 90 *North Carolina Law Review* 1807.

¹²¹ Grzybowski and Koskeniemi (n 104) 26.

¹²² Brad R Roth, ‘Legitimacy in the International Order: They Continuing Relevance of Sovereign States’ 33, 62 et seq.

¹²³ Bordin (n 107).

'government' (and 'government' with various governmental 'functions') and (state) 'sovereignty' or 'jurisdiction' with 'autonomy'".¹²⁴

This shows us that the problem with drawing analogies in this case is not the analogical reasoning itself, but the step that needs to be taken before the analogical reasoning commences. It is what Bordin, with reference to Brewer, frames as "abduction"¹²⁵ and describes as "the moment when the lawyers "discover" the relevant similarities between a novel set of facts and those covered by an existing rule"¹²⁶. However, as Vöneky, argues it is yet "questionable which criteria can be used to guide the selection of relevant similarities in international law".¹²⁷ As there seems to be no general tools available to discover what the "relevant similarities" are, especially in relation to something as elusive as the concept of the state. We, therefore, have to be very careful and reflect on the perspective we adopt when "discovering" the relevant similarities. On these premises there is a need to search for a perspective on the concept of the state that can offer useful insights for the specific question we wish to address before we start considering analogies. While Grzybowski and Koskeniemi, for instance, took on a "performative" perspective on statehood in the context of international relations¹²⁸, with the help of Michel Foucault this paper will look at the concept of the state from the perspective of governmentalities, put differently at the state as *statification*.

3.2. Mobilising Foucault's statification as an analytical tool

The section above documented the main arguments for the claim that the concept of the state remains a useful (or even necessary) starting point when reflecting on public international law. This section presents and explores how the perspective on the concept of the state as established by Michel Foucault in his studies of "governmentalities" can offer a unique and useful perspective. By drawing on Foucault's reflections on the state, I will attempt to demonstrate below that looking at the concept of the state as a constantly produced and reproduced process of "statification" (*étatisation*)¹²⁹, that is, from a "non-essentialist" perspective. This approach has certain advantages, as it acknowledges the "state as a site of political practise"¹³⁰. This holds true especially in the context of international lawmaking, which depends on a specific perspective on the practises of states. Statification places an emphasis on what states *do* (or rather are normatively expected to do) and not what states *are*, in that it allows us to focus on the practises of private actors and to potentially identify the relevant similarities to what states *do*. As Foucault put it in his lectures at the Collège de France of 31 January 1979:

« (...) c'est que l'État n'a pas d'essence. L'État ce n'est pas un universel, l'État ce n'est pas en lui-même une source autonome de pouvoir. L'État, ce n'est rien d'autre que l'effet, le profil, la découpe mobile d'une perpétuelle étatisation, ou

¹²⁴ Samantha Besson, Book Review 'The Analogy between States and International Organizations' (2020) 31 European Journal of International Law 771, 774.

¹²⁵ Bordin (n 107) 19, Fn. 16 referring to Brewer's "Exemplary reasoning".

¹²⁶ Grzybowski and Koskeniemi (n 104) 26.

¹²⁷ Silja Vöneky, 'Analogy in International Law', Max Planck Encyclopedia of Public International Law (Oxford University Press 2008) para 17.

¹²⁸ Ibid., while it must be noted that the performative approach to statehood was fully developed by Janis Grzybowski in his (unpublished) dissertation.

¹²⁹ M Foucault, The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979 (Palgrave Macmillan UK 2008) 77 et seq. <<https://www.palgrave.com/de/book/9781403986559>> accessed 7 July 2021. "Statification" is the English translation of "étatisation", which seems much more appropriate than the term "Verstaatlichung" (lit. "nationalisation") which is occasionally used in the German translation: Michel Foucault, 'Die Geburt der Biopolitik. Geschichte der Gouvernementalität II. Buch von Michel Foucault (Suhrkamp Verlag, 30 October 2006) 114 <<https://www.suhrkamp.de/buch/michel-foucault-die-geburt-der-biopolitik-geschichte-der-gouvernementalitaet-ii-t-9783518294093>> accessed 7 July 2021.

¹³⁰ Bob Jessop, 'Constituting Another Foucault Effect: Foucault on States and Statecraft' in Ulrich Bröcklin, Susanne Krasmann and Thomas Lemke (eds), Governmentality - Current issues and future challenges (Routledge 2010) 57.

de perpétuelles étatisations (...) L'État, ce n'est rien d'autre que l'effet mobile d'un régime de gouvernementalités multiples ».¹³¹

Throughout his work Foucault was concerned with understanding different power structures.¹³² While he was also looking at (traditional) state institutions (e.g., prisons, hospitals), Foucault was generally more interested in power which operates in a more subtle way. His intent to implicitly exclude the state from his focus of research was made explicit in his demand “to cut of the king’s head”, in an interview he gave in 1977, which has later been published under the title of “truth and power”.¹³³ However, shortly after the intended exclusion of the state was made explicit, Foucault claimed to have discovered a pattern which he describes as

*« de toute façon ça a bien toujours été le repérage de l'étatisation progressive, morcelée à coup sûr, mais continue, d'un certain nombre de pratiques, de manières de faire et, si vous voulez, de gouvernementalités. »*¹³⁴

In his lecture of 15 March 1978 he highlighted, that

*« [l']apparition précisément de l'État à l'horizon d'une pratique réfléchie (...) a eu une importance absolument capitale dans l'histoire de l'État et dans la manière dont se sont effectivement cristallisées les institutions de l'État. »*¹³⁵

What may appear as a contradiction at first sight, makes perfect sense on second consideration, as Foucault discovered the state to be of central importance in his study of biopolitics. He came to realise that doing away with the state would ultimately result in leaving specific aspects out of the realm of this research and would create blind spots or what Biebricher refers to as “theoretical blanks”¹³⁶. Jessen and von Eggers, operationalise Giorgio Agamben’s critique of Foucault’s theory of the state, to (re-)mobilise Foucault not merely as a thinker of the state by revisiting the ideas of the state as an “object of knowledge, reflexive prism, practico-reflexive prism”¹³⁷ as a “strategic schema principle of intelligibility”.¹³⁸ In that the governmentality perspective allows us to look at the state as practises of governing as well as the practises of reflecting on practises of governing.¹³⁹ What has become of interest to Foucault, is the moment in which states begin to reflect of their practises as state practise.¹⁴⁰

¹³¹ Michel Foucault, *La Naissance de la biopolitique. Cours au Collège de France (1978-1979)* (Sciences humaines Philosophie Hautes Etudes 1978) 79.: “(...) is that the State has no essence. The State is not a universal, the State is not in itself an autonomous source of power. The State, it is nothing else than the effect, the profile, the mobile cutting of a perpetual statification, or of perpetual statification (...) The State, it is nothing else than the mobile effect of a regime of multiple governmentalities” (translation by the author).

¹³² Michel Foucault, *The Foucault Reader* (Paul Rabinow ed, Penguin Random House) <<https://www.penguinrandomhouse.com/books/55035/the-foucault-reader-by-michel-foucault/>> accessed 8 July 2021.

¹³³ Michel Foucault, ‘Truth and Power (1977)’ in Craig J Calhoun (ed), *Contemporary Sociological Theory* (Blackwell 2007).

¹³⁴ Michel Foucault, ‘La Naissance de la biopolitique. Cours au Collège de France (1978-1979)’ (n 129) 79. “(...) in any case it has always been the identification of the progressive, fragmented, but continuous statehood of a certain number of practices, ways of doing things and, if you like, of governmentalities” (translation by the author).

¹³⁵ Michel Foucault, ‘Sécurité, territoire, population: cours au Collège de France’, 1977-1978 (Michel Senellart, François Ewald and Alessandro Fontana eds, Seuil : Gallimard 2004) 282. “The very appearance of the state on the horizon of a reflective practice (...) has been absolutely crucial in the history of the state and in the way the institutions of the state have actually crystallised” (translation by the author).

¹³⁶ Thomas Biebricher, ‘Foucault, Gouvernementalität und Staatstheorie’ (2012) *TranState Working Papers* 3 <<http://hdl.handle.net/10419/59588>> accessed 20 March 2022.

¹³⁷ Michel Foucault, *Security, Territory, Population: Lectures at the College De France, 1977 - 78* (Arnold I Davidson ed, Palgrave Macmillan UK 2009) 276.

¹³⁸ *Ibid.*, 290.

¹³⁹ Biebricher (n 136) 7.

¹⁴⁰ Mathias Hein Jessen and Nicolai von Eggers, ‘Governmentality and Statification: Towards a Foucauldian Theory of the State’ (2020) 37 *Theory, Culture & Society* 53, 62.

The moment in which the state constructs what is there to be governed and how to govern. In the words of Jessen and von Eggers “the thing that the different governmental practices are beginning to be centred around and concentrated on”.¹⁴¹ They focus “on Foucault’s notion of the state as a process of ‘statification’ which emphasises the state as something constantly produced and reproduced by processes and practices of government, administration and acclamation.”¹⁴² Only in this way, they argue, “the state appears as a given entity which is necessary for the multiplicity of governmental technologies and practices in modern society to function”.¹⁴³

Looking at the state as statification and thus as a “‘principle of intelligibility’ – something which brings a multiplicity of governmental practices into existence, and through which these practices are understood and appear as a unity or as emanating from a central place”¹⁴⁴ offers a perspective which is not obfuscated by formalistic distinctions between state and non-state actors. A distinction which is still deeply ingrained in international legal thought. Instead, it brings to light the necessity to look at the practises and interactions between different actors as well as the self-conception of these actors when engaging in governmentalities. This allows us and to concern ourselves with the preconditions for the constitution of categories such as state and non-state actors.

In fact, it forces us to focus on the line separating them. However, not in a way that keeps our focus limited to the line and accepts it as a given fact, as this would only allow us to describe it. Rather it draws our attention to how the line comes to life, how it is constructed and re-constructed and allows us to examine the texture and characteristics of that line. Statification has to be understood as the “reflected practice of governing”¹⁴⁵, as a particular kind of acting and of positioning oneself while acting – or to put it differently as a particular kind of active self-conception, but at the same time a particular kind of active “other-conception”.¹⁴⁶ For Public International Law the constant construction (and fiction) of sameness amongst states is the backbone of the international legal system. The (fictional) sameness is reaffirmed through the principle of sovereign equality and the particular practises engaged in by states. From a traditional Public International Law perspective, the reflected practises of governing can be described as states governing their affairs vis-à-vis other states through the sources available to them under international law and with the help of intergovernmental organisation such as the United Nations, while reflecting on these as the outcome of their consent – as the normatively relevant practises under international law. The relevant practises of states in international lawmaking, are therefore acting authorial in a normative sense, including the (authoritative) interpretation of established international law¹⁴⁷, understood as the “competence to establish a specific meaning of law as binding”.¹⁴⁸

From this point of view, we can find out what states *do* in international lawmaking (or are normatively expected to do). This goes beyond looking at what we traditionally conceive of as “state practises”. In that it provides an insightful starting point to analyse the practises of digital TNCs. The analytical lens of statification goes beyond and points us to how and from which position states address non-state actors. This allows us either to discover or to rule out relevant similarities between the practises of states and of digital TNCs. Henceforth, it allows us to look

¹⁴¹ Ibid.

¹⁴² Ibid., 53.

¹⁴³ Ibid.

¹⁴⁴ Ibid., 54.

¹⁴⁵ Biebricher (n 136) 15.

¹⁴⁶ The construction of “otherness” by state centric international law has actually become a topic of interest in (critical) international legal scholarship recently, inter alia Jodoïn (n 118). In the context of Human Rights Philip Alston, ‘The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’ in Philip Alston (ed), *Non-state actors and human rights* (Oxford Univ Press 2005). In the context of International Criminal Responsibility Arlie Loughnan (ed), ‘Others’, Self, Others and the State: Relations of Criminal Responsibility (Cambridge University Press 2019).

¹⁴⁷ ‘Vienna Convention on the Law of Treaties (1969)’ 31.

¹⁴⁸ Ingo Venzke, ‘Authoritative Interpretation’, *Max Planck Encyclopedia of International Procedural Law* (Oxford University Press 2018) para 3.

at the practises of digital TNCs from a different angle as it shows us that it is not only relevant what they do but also what kind of position digital TNCs adopt *vis-à-vis* states, when engaging with International Law and the importance of how they reflect on it. This change in perspective is necessary since we would otherwise stay blind to what Pauwelyn, Wessel and Wouters describe as “new actors, new processes, and new outputs” and the way in which have become relevant in contemporary global law¹⁴⁹ and especially so in cyberspace.

3.3. *Distinguishing performative and perforating practises of digital cyberspace*

For analytical purposes it is helpful to distinguish two categories, which can be described as *performative* practises and *perforating* practises of digital TNCs. This terminology warrants some explanatory remarks. The ordinary meaning of the word “performative” signifies to display the characteristics of a specific role. Further, and drawing on insights from speech act theory¹⁵⁰ it is understood as an utterance that constitutes an act. In the previous sections, I have explained that the perspective of statification emphasises the practises of states and conceives of “subject formation” as the outcome of these practises. As international law is a language the relevant practises of actors can equally be referred to as speech acts. The referred to speech acts thus conveys more than semantic. Rather performative practises shall be understood as the performance of the position of digital TNCs under international law. Performative practises affirm the role traditionally foreseen for digital TNCs in the institution set up of public international law. When complying within international law, interpreting their corporate set of rules (e.g., terms of service) according to international law or adhering to state-imposed sanctions regimes, digital TNCs affirm the position they are supposed to occupy under (traditional) Public International Law. Performative practises of digital TNCs may enhance what Ruggie has framed their “social licence to operate.”¹⁵¹ Hence, performative practises of private actors affirm the authority of international law by resorting to it. These practises do not themselves claim authorship in a normative sense.

Perforating practises do equally constitute speech acts. However, these practises are qualitatively different from performative practises. The term perforating refers to the act of passing through or into something by breaking through. Perforating practises are practises of digital TNCs create a sense of sameness, in the way they interact with and address states in the language of international law. With these practises, digital TNCs claim participation rights in fora which had been exclusively reserved for states and do claim authorship in a normative sense. Importantly, the image of perforation, framed as “piercing the corporate veil” is not unknown to us as lawyers. It is well established in the context of corporate law and the possible consequence the abuse of the company as a separate legal entity may have for shareholder’s liability. Interestingly, Sanger just recently transplanted this image to states, when referring to the perforating practises of non-state actors as “piercing the state’s corporate veil”.¹⁵² He further describes the situation as “[i]ndividuals and companies have come to be treated as, and to portray themselves as, global political actors in their own right, and not merely as subjects of international law”.¹⁵³ Perforating practises of digital TNCs thus describe a specific positioning of the private actor through applying and enforcing their own interpretation of international law independently from states or by driving international lawmaking initiatives

¹⁴⁹ Pauwelyn, Wessel and Wouters (n 109) 734.

¹⁵⁰ Such as JL Austin, ‘How to Do Things with Words: The William James Lectures Delivered in Harvard University in 1955’ (JO Urmson and Marina Sbisa eds, Second Edition, Oxford University Press 1976). Austin described ‘performative utterance’ as speech act that create relations in the world. Also John Searle, ‘What Is a Speech Act?’ in Max Black (ed), *Philosophy in America* (Cornell University Press 1965).

¹⁵¹ Prepared Remarks by SRSG John G. Ruggie, ‘Public Hearings on Business and Human Rights’ <<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>> accessed 6 April 2022.

¹⁵² Sanger (n 14).

¹⁵³ *Ibid.*

and, at the same time, by occupying positions different from those foreseen for them under international law.

4. Looking through the lens of self-statification as an analytical tool

This section ties the theoretical approach back to the three cases studies described in section 2. and applies the analytical lens of self-statification to Microsoft (4.1.), Meta's Facebook and the Oversight Board (4.2.), and Google (4.3.). The analysis will be followed by a brief assessment of the insights gained by this change in perspective (4.4.).

4.1. Microsoft, Inc

For the analysis the underlying claims Microsoft makes with its demand for "Digital Geneva Convention" are of specific interest. Two underlying claims can be distinguished: The first one is that international law is frequently breached by states in cyberspace (and that there is a gross economic loss endured by the private sector as a consequence of this) and the second one is that in order to remedy these breaches a new international framework, namely the proposed a "Digital Geneva Convention" is necessary. While the claim that international law is breached, cannot be interpreted as an invalidation of international law as such¹⁵⁴, the insinuation of the necessity of a novel convention does (at least indirectly) suggest that the existing framework is insufficient. The suggestion of a new Convention represents substantial contestation of the status quo with authorial ambitions. Under the current circumstances, where there is still no definitely established consensus on how international law applies in cyberspace, these statements "create uncertainty and can have destabilizing effects"¹⁵⁵ on contemporary initiatives such as the Programme of Action¹⁵⁶ initiated by France and Egypt in October 2020.

Further, when making these claims, Microsoft takes on a specific role, especially when we take into consideration which role Microsoft foresees for the tech sector (itself) in the new set up:

„The tech sector today operates as the first responders to nation-state attacks on the internet. A cyber-attack by one nation-state is met initially not by a response from another nation-state, but by private citizens.“¹⁵⁷

This statement is interesting for two reasons. First, Microsoft is arguing to impose specific obligation on state and in inter-state relations, second, it is promoting institution building, all while promoting the tech sector as a "neutral Digital Switzerland". Interestingly, the positioning of Microsoft seems to be recognised by states and international organisations, as its proposal was later promoted by the UNHRC as well as on the UN news page. In that the "sameness" between digital TNCs and states Microsoft is implying through its practises is (to a certain degree) mirrored by states. Importantly, the positioning of Microsoft does go beyond occasional practises but has been institutionalised, as the opening a UN Affairs Office at its headquarters in New York City shows. This claim for authorship in international lawmaking, from a position implying "sameness" can be described as perforating practises. While Microsoft could not (yet) realise the tech sector to be regarded "Digital Switzerland" it – together with a

¹⁵⁴ This can be followed from the general idea underlying the reasoning of the ICJ in Nicaragua case, when the court noted that "[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits) (1986), ICJ Rep 14, 98, para 186. I thank the anonymous reviewer for suggesting to making that reference.

¹⁵⁵ Jeutner (n 94) 164.

¹⁵⁶ Geneva Internet Platform digwatch, 'France And Partners Propose A Programme Of Action For Advancing Responsible State Behaviour In Cyberspace | Digital Watch Observatory' <<https://dig.watch/updates/france-and-partners-propose-programme-action-advancing-responsible-state-behaviour>> accessed 6 April 2022.

¹⁵⁷ Microsoft (n 28).

number of other TNCs – took the first steps in realising its promoted plans for a “Red Cross-like” institution and set up the “CyberPeace Institute”. This Non-Governmental Organisation (NGO), apart from engaging in advocating for Cyber Peace and to respect International Humanitarian Law it does engage in analysing and documenting the attribution of cyberattacks.¹⁵⁸ As the NGO does not itself engage in attribution, its practises are solely of performative character.

4.2. Meta’s Facebook and the Oversight Board

From a formal legal perspective there are two separate private entities involved in this situation.¹⁵⁹ However, the strong connection between the two justifies looking more closely at their practises as one. As described in the case study, Facebook published an impressive number of statements and documents that emphasise its commitment to international human rights law. These practises can be described as performative practises. Practises which use international human rights law as window dressing.

However, there is a different category of practise evolving which will be of particular interest for this analysis and warrants a closer look. It is the quality of these practises and the position that is seized upon when acting. Facebook, as a platform company, is in the position to enforce its own interpretation of human rights law unilaterally on its privately owned platform, either via what is referred to as human content moderation or by using algorithms. What we can see is the development of a largely independent and “platform specific” interpretation of human rights. While there is the demand that states shall ensure that “companies apply human rights standards”¹⁶⁰ in practise digital TNCs have established their own “operationalised” version. This applies especially for what we can describe as “new” categories of speech, not defined by international human rights frameworks such as hate speech.¹⁶¹ With what Kaye describes as its “double ambiguity”¹⁶², hate speech presents itself as a perfect opportunity for Facebook to establish its own understanding of this category of speech.

In its community standards, Facebook provides detailed information about the development of this “speech category” and the “policy rationale”.¹⁶³ With the Oversight Board the practises became more sophisticated. In its decisions so far, the Oversight Board is (even though it considers community standards and values first) it is also directly applying International Human Rights Standards to content moderation decisions on Facebook. The Oversight Board takes the primary vertical responsibility of states, toward individuals to protect human rights and provides individuals with what they frame “principled decision” regarding alleged violations of their user rights and human rights via Facebook. This can be described as a novel positioning of Facebook through the Oversight Board as a decision-making body competent in (indirectly) resolving cases concerning human rights. A position which had been reserved for either state’s domestic courts applying international human rights law or for International Human Rights Courts (*inter alia* the ECtHR).¹⁶⁴ While the dispute resolution mechanism established via the

¹⁵⁸ CyberPeace Institute (n 42).

¹⁵⁹ Facebook as a part of Meta Platforms, Inc., the Oversight Boards is incorporated as an LLC.

¹⁶⁰ Human Rights Council Thirty-eighth session and 18 June–6 July 2018 (eds), ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression’ <<https://www.undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F38%2F35&Language=E&DeviceType=Desktop&LangRequested=False>> accessed 6 April 2022.

¹⁶¹ ‘OHCHR - Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression - A/74/486’ paras 1–4 <<https://www.undocs.org/Home/Mobile?FinalSymbol=A%2F74%2F486&Language=E&DeviceType=Desktop>> accessed 6 April 2022.

¹⁶² *Ibid.*

¹⁶³ Meta Transparency Center, ‘Hate Speech | Transparency Centre’ <<https://transparency.fb.com/en-gb/policies/community-standards/hate-speech/>> accessed 6 April 2022.

¹⁶⁴ Lottie Lane, ‘The Horizontal Effect of International Human Rights Law in Practice: A Comparative Analysis of the General Comments and Jurisprudence of Selected United Nations Human Rights Treaty Monitoring Bodies’ (2018) 5 European Journal of Comparative Law and Governance 5, 15.

Oversight Board operates according to its Charter and bylaws, when considering cases, in its reasoning the Oversight Board resorts directly to international human rights law. In particular it addresses freedom of expression according to Article 19 ICCPR, and considers whether or not the restrictions satisfy the requirements set out by Article 19 sec. 3 ICCPR. It applies the established three step test and asks if the restrictions are, first legal (based on law), second, legitimate, and third, necessary and proportionate.

With each of these steps the Oversight Board conveys an authoritative claim and a very particular kind of positioning, that implies “sameness” to states. Not only does it apply a “law-test” in the first step of its considerations, treating Facebooks Community Standards and values effectively as “law”, but with it comes the recognition that Facebook (or Instagram) may have to consider not only the rights of their users but also any “rights of others”.¹⁶⁵ In its reasoning the Oversight Board makes no restriction in regard to “others”, in particular it does not limit its reasoning to “other users”. Rather, the Oversight Board considers the rights of individuals and groups, irrespective of the question of whether or not they have a Facebook or Instagram account (thus and irrespective of them having a contractual relationship with Meta’s Facebook). In that it expands the scope of application and decision-making power beyond users of the platform(s) claiming authority in the sense of authoritative interpretation of Human Rights on platforms. This position, however, is not recognised by states or international organisations. As Special Rapporteur David Kaye clarifies that “[c]ompanies do not have the obligations of Governments, but their impact is of a sort that requires them to assess the same kind of questions about protecting their users’ right to freedom of expression”.¹⁶⁶ He later draws a line when stating: “companies are not in the position of Governments to assess threats to national security and public order, and hate speech restrictions on those grounds should be based not on company assessment but on legal orders from States, themselves subject to the strict conditions established under article 19 (3) of the Covenant.”¹⁶⁷

To grant the responsibility for removal of content to social media companies without judicial oversight has been subject to growing criticism by states as it would prevent access to remedy in case of human rights violation.¹⁶⁸ David Kaye further criticises that these “companies remain enigmatic regulators, establishing a kind of “platform law” in which clarity, consistency, accountability and remedy are elusive”.¹⁶⁹ In that the authorial ambitions and positioning of Facebook and the Oversight Board towards states currently remains performative. However, recently, the Oversight Board has become a topic of interest in the context of discussions about effective Human Rights remedies online, reflected *inter alia* in the report of Special Rapporteur Khan on “Disinformation and freedom of opinion and expression”¹⁷⁰ as well as the Public Comment of Special Rapporteur Varennes,¹⁷¹ and the report of by the UN High Commissioner

¹⁶⁵ ‘UN Human Rights Committee General Comment No. 34 Article 19: Freedoms of Opinion and Expression General Remarks’ <https://www.cambridge.org/core/product/identifier/S0002930000101204/type/journal_article> accessed 5 July 2021.

¹⁶⁶ ‘OHCHR - Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression - A/74/486’ (n 161) para 41.

¹⁶⁷ *Ibid.*, para 47 b).

¹⁶⁸ ‘OHCHR | Comments on Legislation and Policy - Comments on the Online Safety Bill – GBR 5/2022’ <<https://www.ohchr.org/en/special-procedures/sr-freedom-of-opinion-and-expression/comments-legislation-and-policy>> accessed 6 April 2022.

¹⁶⁹ Human Rights Council Thirty-eighth session and 18 June–6 July 2018 (n 160) s 1.

¹⁷⁰ Human Rights Council (ed), ‘Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on Disinformation and Freedom of Opinion and Expression, Irene Khan A/HRC/47/25’ para 73 footnote 109 <<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F47%2F25&Language=E&DeviceType=Desktop&LangRequested=False>> accessed 6 April 2022.

¹⁷¹ ‘Public Comment by UN Special Rapporteur on Minority Issues Relating to Cases on Hate Speech and Minorities’ (OHCHR) <<https://www.ohchr.org/en/statements/2020/12/public-comment-un-special-rapporteur-minority-issues-relating-cases-hate-speech>> accessed 6 April 2022.

for Human Rights.¹⁷² The Oversight Board is addresses as “novel experiment”¹⁷³, “welcome development”¹⁷⁴ and “ambitious initiative”¹⁷⁵. Against this backdrop, and in the light of reoccurring criticism regarding the adequacy of the normative equivalence paradigm for human rights protection online¹⁷⁶, it is conceivable that states change or nuance their position towards the Oversight Board in the future, which might result in a different positioning towards the Oversight Board. The position of the Oversight Board in the international institutional set up may than have to be reevaluated.

4.3. Google, LLC

Together with Microsoft and Facebook’s Meta, Google has a history of publishing statements promoting international law especially human rights law.¹⁷⁷ Putting these commitments in practise, Google went on justifying its decision to cease providing its services in China (Hong Kong could follow¹⁷⁸) with its services potentially to be used by China to violate international human rights law. The same justification was invoked when Google decided to withdraw from “Project Maven”, a collaborative development project with the U.S Department of Defense. However, in both instances rather than positioning itself with a sense of “sameness” to states, Google affirm its role as a TNCs under International Law, when it changes its business strategies as a reaction to public and employee pressure. The absence of a normative authorial claim becomes even more evident, when considering the fact that Google Cloud services are still provided in authoritarian states, such as Saudi Arabia. In this case, the proclaimed commitment to human rights does seem to constitute adequate reason for Google to reconsider its business operations. These practises have the effect (or are presumably intended to have the effect) to enhance Google’s “social licence to operate”¹⁷⁹ but instead remain touch ups as they fail to convey a sense of principled decision making. Rather, the use of international law by Google presents itself as assemblage of attempts to justify business decisions, and Google’s mission statement “don’t be evil” has been reduced to what LaJeunesse, former Public Policy Executive at Google, framed as “a footnote”.¹⁸⁰ Leaving Google with largely uncontrolled de facto power to structure and change how the world in which international law operates is constructed, through its services.¹⁸¹

¹⁷² Human Rights Council (ed), ‘Combating Intolerance, Negative Stereotyping and Stigmatization of, and Discrimination, Incitement to Violence and Violence against, Persons Based on Religion or Belief Report of the United Nations High Commissioner for Human Rights A/HRC/49/86’ para 70 <<https://undocs.org/Home/Mobile?FinalSymbol=A%2FHRC%2F49%2F86&Language=E&DeviceType=Desktop&LangRequested=False>> accessed 6 April 2022.

¹⁷³ Human Rights Council, ‘A/HRC/47/25’ (n 170) 73.

¹⁷⁴ Human Rights Council, ‘A/HRC/49/86’ (n 172) 70.

¹⁷⁵ ‘Public Comment by UN Special Rapporteur on Minority Issues Relating to Cases on Hate Speech and Minorities’ (n 171).

¹⁷⁶ Dafna Dror-Shpoliansky and Yuval Shany, ‘It’s the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology’ 34.

¹⁷⁷ With reference to the Universal Declaration of Human Rights Google, ‘Human Rights’ <<http://www.google.de/human-rights/>> accessed 6 April 2022.

¹⁷⁸ ‘The Internet Is Changing Drastically for Hong Kong’s Citizens’ (MIT Technology Review) <<https://www.technologyreview.com/2020/07/08/1004876/the-internet-is-changing-drastically-for-hong-kongs-citizens/>> accessed 6 April 2022.

¹⁷⁹ Prepared Remarks by SRSG John G. Ruggie, ‘Public Hearings on Business and Human Rights’ <<https://media.business-humanrights.org/media/documents/files/reports-and-materials/Ruggie-remarks-to-European-Parliament-16-Apr-2009.pdf>> accessed 6 April 2022.

¹⁸⁰ Nitasha Tiku, ‘A Top Google Exec Pushed the Company to Commit to Human Rights. Then Google Pushed Him out, He Says.’ Washington Post <<https://www.washingtonpost.com/technology/2020/01/02/top-google-exec-pushed-company-commit-human-rights-then-google-pushed-him-out-he-says/>> accessed 6 April 2022.

¹⁸¹ In particular though Google Maps: Ethan R. Merel, ‘Google’s World: The Impact of Agnostic Cartographers on the State-Dominated International Legal System’ *Columbia Journal of Transnational Law* 54, no. 2 (2016): 424-453.

4.4. Assessment

By applying statification as an analytical tool we are able to distinguish performative and perforating practises of digital TNCs. We were able to see that performative and perforating practises convey different normative claims. In that this exercise has proved helpful to broaden our perspective on what “relevant similarities” between states and other actors in international law – in this case between states and digital TNCs – may look like, and more importantly where to look for them. While this analysis has brought to light, that to date it would be premature and unjustified to refer to digital TNCs as “relevantly similar” to states – understood as statification. Yet, looking through this analytical lens of statification revealed how we can conceive of the normative significance of states in international lawmaking and consequently how the practises of digital TNCs relate to the practises of states in international lawmaking. The analytical lens made two entangled, yet conflicting trends visible.

The first trend is the reaffirmation of international law and, in particular, human rights law through the performative practises of digital TNCs. At first sight, this trend may convey a very optimistic picture, as this could be interpreted to improve the protection of human rights and adherence to international law, globally. In that it could open up new ways for human rights advocates and non-governmental organisations to advance their agendas¹⁸² and for International Law to proliferate, generally. Seeing digital TNC, promoting international law as a powerful global regulatory instrument, enforcing international human rights, and defending them against state and non-state violation might even provoke some to invoke a new and positive development for the application of universal human rights and the international rule of law.¹⁸³ This optimistic sketch was filled with some colour by David Kaye, (then) Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, when he explained that digital TNCs “have tools to deal with content in human rights-compliant ways, in some respects a broader range of tools than that enjoyed by States. This range of options enables them to tailor their responses to specific problematic content, according to its severity and other factors”.¹⁸⁴ What Kaye describes is his conviction that digital TNCs may have more fine-grained instruments available to them to ensure tailored human rights protection and/or restrictions. However, and rightfully so, scholars have been¹⁸⁵ and remain¹⁸⁶ sceptical about the potentials international human rights law may have, in particular for improvement of content moderation decisions.

These reservations bring us to the second, and entangled trend, which is that the use and incorporation of international law in the repertoire of digital TNCs’ toolbox may gradually modify international law. When digital TNCs apply human rights and international law more generally, they apply their own “operationalised” version, which often neglects conflicting rules and inconsistencies.¹⁸⁷ Further, digital TNCs have the ability to change their rules unilaterally at any point in time.¹⁸⁸ Yet, under international law, digital TNCs enjoy a considerable amount of

¹⁸² The Global Network Initiative already took advantage of these new opportunity: ‘Global Network Initiative’ (n 87).

¹⁸³ Jay Butler, ‘The Corporate Keepers of International Law’ (2020) 114 *American Journal of International Law* 189.

¹⁸⁴ ‘OHCHR - Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression - A/74/486’ (n 161).

¹⁸⁵ Douek (n 45).

¹⁸⁶ Brenda Dvoskin, ‘International Human Rights Law Is Not Enough to Fix Content Moderation’s Legitimacy Crisis | Berkman Klein Center’ (16 September 2020) <<https://cyber.harvard.edu/story/2020-09/international-human-rights-law-not-enough-fix-content-moderations-legitimacy-crisis>> accessed 1 April 2022. Brenda Dvoskin, ‘Why International Human Rights Law Cannot Replace Content Moderation | Berkman Klein Center’ (10 October 2019) <<https://cyber.harvard.edu/story/2019-10/why-international-human-rights-law-cannot-replace-content-moderation>> accessed 6 April 2022.

¹⁸⁷ Such as the differences between regimes, e.g., ICCPR and CERD.

¹⁸⁸ How dynamic these changes are is evidenced by the numerous content policy revisions on Meta’s Facebook after Russia’s invasion in Ukraine: Ryan Mac, Mike Isaac and Sheera Frenkel, ‘How War in Ukraine Roiled Facebook and Instagram - The New York Times’ *The New York Times* (30 March 2022) <https://www.nytimes.com/2022/03/30/technology/ukraine-russia-facebook-instagram.html?campaign_id=190&emc=edit_ufn_20220402&instance_id=57418&nl=updates-from-the-

autonomy, also in the interpretation and enforcement of international law. Thereby, digital TNCs are exercising “influence and power in their own right”.¹⁸⁹ While it is true that by arguing with established international law, a sense of responsibility is conveyed¹⁹⁰, looking at the eclectic practises of digital TNCs we must concede that they remain, what Lustig and Benvenisti described as “Good Depots”.¹⁹¹ What this shows us is that the relationship between states and digital TNCs is in need for reconsideration, as the “sense of responsibility” does not translated into (legal) accountability¹⁹² or responsibility under international law.

5. Conclusion

Kindled by reoccurring seemingly intuition driven speedy analogies drawn between digital TNCs and states in International Law, this paper suggests a different perspective on the concept of the state. That is, to look at the state from a non-essentialist perspective – at the state as *statification*. The paper explained that in that way the state can be mobilised as a principle of intelligibility. To conceive of statification as a “reflected practice of governing”¹⁹³, understood – as a particular kind of acting and of positioning while acting. Or to put it differently: as a particular kind of active self-conception and simultaneously, a particular kind of active “other-conception”. It has demonstrated that the state does not exist as such, but only in relationships of “sameness” and “otherness”, which it constructs and reconstructs through its practises. By examining in detail, the modes of corporate engagement with Public International Law in three case studies, through the lens of statification, we were able to discover what needs to be considered when exploring relevant seminaries between the practises of states and of digital TNCs, which are practises of self-stification. Through this exercise, it has become visible that currently invoked analogies remain either superficial or premature and thus lack explanatory potential. The analysis has revealed that digital TNCs have the potentials to be very effective in enforcing their own set of rules, and thus carry in them a potential for an effective promotion and enforcement of international law. Equally, we have seen that the lack of adherence to international law, the modification or exploitation of international law for business purposes may have sever and potentially harmful effects.

Moreover, and on a more abstract level, the analysis has revealed that if we want to better understand what Pauwelyn, Wessel and Wouters describe as “a rich tapestry of novel forms of cooperation, ostensibly outside international law (...)” we need to take a closer look at the relationships between different actors in international law and more precisely at the practises through which these relationships are constructed and reconstructed. Or, and to stay with the

newsroom®i_id=118961132&segment_id=87352&te=1&user_id=6df6feb12f40663ef47b548d01ac9168>
accessed 6 April 2022.

¹⁸⁹ Sanger (n 14).

¹⁹⁰ Jutta Brunnée and Stephen J Toope (eds), ‘An Interactional Theory of International Legal Obligation’, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010).

¹⁹¹ With a reference to the seminal work of John Stuart Mill: Doreen Lustig and Eyal Benvenisti, ‘The Multinational Corporation as “the Good Despot”: The Democratic Costs of Privatization in Global Settings’ 15 *Theoretical Inquiries in Law* 125.

¹⁹² The existing UNGP do not provide a legal accountability mechanisms ‘UN Guiding Principles on Business and Human Rights, 2011’ <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 8 July 2021. However, in 2014 an Open-ended Intergovernmental Working Group with the mandate to elaborate on a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business (OEIWG) was established by the HRC (A/HRC/RES/26/9, para. 1). The third draft of the Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Human Rights Council, ‘Third Revised Draft of the OEIWG of Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises’ <<https://www.ohchr.org/sites/default/files/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf>> accessed 6 April 2022. Further a framework agreement was proposed to the OEIWG by O’Brien <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session2/Claire_OBrien.doc> accessed 6 April 2022.

¹⁹³ Biebricher (n 136) 15.

image proposed by Pauwelyn, Wessel and Wouters, we need to find out more about the fabric of the tapestry and the weaving techniques from which it was created. Only then will we be able to say something meaningful about the merits of the claim to “novelty” of the modes of cooperation and whether these are actually happening “outside” of international law. A better understanding of the relationships between different actors is the necessary to attempt to reconstruct the international institutional order.¹⁹⁴ By suggesting *self-statification* as an analytical lens, this paper should be understood as a contribution to the ongoing debate about what tools and perspectives may prove to be productive when thinking about ways to reconstruct the international institutional order.

¹⁹⁴ Samantha Besson, 'Reconstruire l'ordre institutionnel international: Leçon inaugurale prononcée le jeudi 3 décembre 2020' (Collège de France 2021) <<http://books.openedition.org/cdf/11868>> accessed 6 April 2022.