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Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts

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Abstract

International human rights law (IHRL) is still largely state-centred. This is an obstacle when it comes to making cross-border problems such as transboundary environmental harm and transnational surveillance amenable to human rights claims. The state-centredness of IHRL is challenged by three phenomena associated with transnationalization processes: by extraterritorial harmful effects; by complex (multi-stage, multi-level and public–private) cross-border cooperation impacting the enjoyment of rights and, finally, by cross-border conduct of non-state actors with an adverse impact on rights abroad. The central argument defended in this article is that existing IHRL can accommodate these challenges if some of its core concepts are given a 'transnational interpretation', thus by complementing the traditional state-centred conception of IHRL. The article discusses transnational interpretations of three core doctrinal concepts, namely jurisdiction, interference and human rights obligations. It is shown that examples for transnational interpretations of international human rights can be found, for example, in the case law of the European Court of Human Rights and some recent European Union and US cooperation treaties.

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1 Introduction

Speaking of 'transnational law' and of 'processes of transnationalization in law' is presently *en vogue*.[1] Both concepts, however, are a cause of confusion; their use is a provocation to familiar conceptions of law, its sources and jurisdiction.[2] However, despite all conceptual uncertainty, there are two points common to all endeavours to define 'transnational law': First, there is the perception that both state and international law suffer from a deficient 'problem-solving capacity' with regard to the challenges of globalization such as transnational terrorism, transboundary pollution or migration.[3] Second, scholars using the concept of 'transnational law' usually acknowledge that it does not have one distinct legal source but, rather, that transnational legal norms can derive from domestic, international or supranational law.[4] In general, the term 'transnational' means 'cross-border'. Rather than 'proving' that transnational law 'exists' (and how it can be defined), this article takes a more modest approach. Instead of identifying 'transnational norms', I start by examining the processes of transnationalization and use a 'transnational law' perspective as a tool to interpret IHRL under the conditions of globalization.[5]

Transnationalization processes are an important corollary of globalization.[6] These processes have been observed in many fields of law: in criminal law,[7] in environmental law,[8] in labour law,[9] European law[10] and Internet law,[11] to name a few. 'Transnationalization' shall be defined here as a process of growing cross-border interaction, cooperation and transaction by state actors, economic actors, and civil society

1 The literature on transnational law has grown exponentially in recent years. For overviews, see L. Viellechner, *Transnationalisierung des Rechts* (2013); G.C. Shaffer (ed.), *Transnational Legal Ordering and State Change* (2013); G.-P. Calliess, *Transnationales Recht: Stand und Perspektiven* (2014).

2 Murphy, 'The Dynamics of Transnational Counter-Terrorism Law: Towards a Methodology, Map, and Critique', in F. Fabbrini and V. Jackson (eds), *Constitutionalism across Borders in the Struggle against Terrorism* (2016) 78, at 83.

3 Calliess and Maurer, 'Transnationales Recht – eine Einleitung', in Calliess, *supra* note 1, at 4.

4 See Slaughter, 'A Liberal Theory of International Law', 94 *American Society of International Law Proceedings* (2000) 240, at 245.

5 For a related approach, see Murphy, *supra* note 2, at 82 (defining transnational law not 'as a field of law with material or jurisdictional scope but, rather, as a methodology to understand the operation of law under globalization'); Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism', 21 *Transnational Law and Contemporary Problems* (2012) 305, at 307. In contrast to Murphy and Zumbansen, however, I would insist that there is a constitutive difference between 'transnational law' (norms and principles) and a corresponding method.

6 For the difference between 'globalization' and 'transnationalization', see Hofmeister and Breitenstein, 'Contemporary Processes of Transnationalization and Globalization', 23 *International Sociology* (2008) 480, at 480 (claiming that 'processes are transnational, effects are global').

7 Boister, 'Further Reflections on the Concept of Transnational Criminal Law', 6 *Transnational Legal Theory* (2015) 9.

8 Dilling and Markus, 'Transnationalisierung des Umweltrechts', 27 *Zeitschrift für Umweltrecht* (2016) 3.

9 Kocher, 'Corporate Social Responsibility und Transnationalisierung des Arbeitsrechts', in Calliess, *supra* note 1, at 479.

10 Franzius, 'Transnationalisierung des Europarechts', in Calliess, *supra* note 1, at 403.

11 Spindler, 'Transnationalisierung und Renationalisierung des Rechts im Internet', in Calliess, *supra* note 1, at 193.

actors.[12] What is curiously lacking is an account of the transnationalization of IHRL. With this, I refer to the problem of how processes of transnationalization impact the conceptualization of IHRL. IHRL, as it is traditionally conceived, is largely 'state-centred law'.[13] First, international human rights responsibilities are primarily territorial (with 'territory' being one of the classical attributes of statehood).[14] Second, IHRL paradigmatically concerns the bipolar normative relationship between a (non-state) rights holder and the state as duty bearer. Private actors generally are not considered to be directly bound by IHRL (although there have been several attempts to extend the range of duty bearers in the recent past).[15] Similarly, international organizations – although they can be bound by international human rights – are commonly not parties to international human rights treaties.[16] Third, IHRL is 'external state law' in a procedural sense because judicial findings on international legal obligations only bind the parties of a case and do not, of themselves, have an effect *erga omnes*.[17] Fourth, the latter point results in an 'epistemic' state-centredness. Judicial findings on what is due to the individual by virtue of his or her international human rights are made with respect to the specific situation of that individual, which requires a determination relative to the situation and the state.[18] The lack of transnationalization of IHRL increasingly results in problematic protection gaps – for example, the inability of IHRL to capture instances of transboundary pollution or harmful cross-border effects of domestic economic policy as international human rights issues.

In recent times, the literature has pointed to a shift away from 'state-centredness' in some areas of IHRL: regarding jurisdiction (by acknowledging situations of extraterritorial human rights application) and regarding the types of duty bearers (by discussing the possibility of human rights obligations of transnational corporations and international organizations).[19] This article seeks to contribute to this literature, first, by analysing IHRL from a transnational law perspective. This perspective is problem-centred

[12] See Bruszt and Holzhacker, 'Three Converging Literatures of Transnationalization and the Varieties of Transnationalization', in L. Bruszt and R. Holzhacker (eds), *The Transnationalization of Economies, States, and Civil Societies* (2009) 1, at 3, 10–12.

[13] See Nowak and Januszewski, 'Non-State Actors and Human Rights', in M. Noortmann, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (2015) 113, at 124.

[14] ECtHR, *Belozorov v. Russia and Ukraine*, Appl. no. 43611/02, Judgment of 15 October 2015, para. 86. All ECtHR decisions are available online at http://hudoc.echr.coe.int/.

[15] See Clapham, 'Non-State Actors', in D. Moeckli, S. Shah, and S. Sivakumaran (eds), *International Human Rights Law* (2014) 531, at 535–538. See in detail section 4.A below.

[16] See G. Verdirame, *The UN and Human Rights: Who Guards the Guardians?* (2011).

[17] Helfer, 'The Effectiveness of International Adjudicators', in C. Romano, K.J. Alter and Y. Shany (eds), *The Oxford Handbook of International Adjudication* (2014) 464, at 471–472 (referring to an 'artifact of sovereignty').

[18] The state relativity of international human rights law is also reflected in the amount of money granted to individuals with respect to non-pecuniary damage in ECtHR cases. See Altwicker-Hámori, Altwicker and Peters, 'Measuring Violations of Human Rights: An Empirical Analysis of Awards in Respect of Non-Pecuniary Damage under the European Convention on Human Rights', 76 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (*ZaöRV*) (2016) 1, at 19–21 (referring to 'the overall context in which the breach occurred').

[19] Vandenhole and van Genugten, 'Introduction: An Emerging Multi-Duty-Bearer Human Rights Regime?', in W. Vandenhole (ed.), *Challenging Territoriality in Human Rights Law: Building Blocks for a Plural and Diverse Duty-Bearer Regime* (2015) 1, at 2 (for an overview on the literature). See also L.J. McConnell, *Extracting Accountability from Non-State Actors in International Law* (2016).

(rather than source-centred), follows a functional (rather than a territorial) logic and accepts competing multipolar, regulatory approaches to common problems.[20] It provides valuable diagnostic insights regarding protection gaps arising in IHRL under the conditions of globalization. Second, the article employs the transnational law perspective as a transformative tool to show how central concepts of IHRL must be interpreted to meet the globalization challenge.[21]

The article is structured around three central phenomena associated with transnationalization processes that pose problems to the current conceptualization of IHRL, namely, transnational harmful effects, interference by aggregate effect and transnational activity by non-state actors. In particular, transnationalization processes, which are associated with a growing interdependence of states in policy matters (for example, on issues of migration), tend to augment situations involving (negative) cross-border 'externalities' – situations 'where one person's decision affects someone else, but where there is no mechanism to induce the decision-maker to fully account for the spill-over effect'.[22] For example, a policy decision may be taken by a foreign government to continue the operation of a disposal site for hazardous waste in the proximity of the border despite known risks to the health of persons living in the neighbouring country. Transnationalization has also led to a new complexity of cross-border cooperation due to a new functional division of labour among states (for example, when one state systematically collects information on individuals on behalf of another). Furthermore, transnationalization processes are associated with increased cross-border activity by non-state (private) actors impacting the enjoyment of international human rights abroad (for example, cross-border pollution due to a privately operated factory). The final section considers the realizability of transnationalized interpretations of IHRL as well as potential objections. It concludes that there are cautious but welcome signals of an increasingly transnationalized understanding of IHRL.

2 Transnational Harmful Effects

A *Problem*

Processes of transnationalization make it more likely that one state's policy choices and decisions affect the enjoyment of human rights by individuals abroad. This is the case, for example, when states engage in surveillance aiming at detecting security risks before they cross the border. Today, transnational surveillance does not depend anymore on organs of the state being actually physically present on the territory where the monitored individual resides.[23] Interception of electronic communication may be

[20] For an excellent overview, see Shaffer, 'Theorizing Transnational Legal Ordering', 12 *Annual Review of Law and Social Science* (2016) 231.

[21] On the impact of globalization on international law, see J.P. Trachtman, *The Future of International Law: Global Government* (2013), at 73.

[22] J. Leitzel, *Concepts in Law and Economics: A Guide for the Curious* (2015), at 108.

[23] See Deeks, 'An International Legal Framework for Surveillance', 55 *Virginia Journal of International Law* (2015) 291, at 298–300.

facilitated as it passes through another state's territory or through the use of drones, satellites and so on.[24] As widely discussed in the context of the revelations by Edward Snowden, transnational surveillance potentially impacts the privacy rights of millions of foreign citizens.[25] Another example is transboundary pollution, which may affect obligations under the right to life or private life.[26]

How can these cross-border acts be addressed as human rights problems? In general, human rights of persons abroad may be affected either by extraterritorial conduct of foreign state organs or by the extraterritorial effect of domestic acts. The first phenomenon of extraterritorial conduct is, by now, widely accepted in IHRL doctrine and well researched.[27] Extraterritorial conduct that triggers human rights obligations includes instances of arrest, kidnapping or detention abroad by foreign agents,[28] the use of armed force or a military presence abroad[29] or acts of states on the high seas.[30] The second phenomenon of extraterritorial effect of domestic acts and its significance under IHRL is far less clear.[31] Nevertheless, some developments connected with transnationalization – mobility of risks, increased socio-political interdependence – have made domestic conduct with extraterritorial effects a likely cause of intrusion upon the enjoyment of human rights abroad.

One may distinguish between domestic acts with indirect extraterritorial effect on human rights and domestic acts with a more direct effect.[32] The first constellation refers to the exposure of an individual to a human rights-infringing act or situation in a third state, usually by extradition from that state (the so-called *Soering* constellation).[33] The human rights responsibility of the extraditing state to protect

[24] See Jenkins, 'Identity, Surveillance and Modernity: Sorting Out Who's Who', in K. Ball, K.D. Haggerty and D. Lyon (eds), *Routledge Handbook of Surveillance Studies* (2012) 159, at 165.

[25] See Statement by Edward Snowden to the European Parliament, available at www.europarl.europa.eu/document/activities/cont/201403/20140307ATT80674/20140307ATT80674EN.pdf.

[26] ECtHR, *Budayeva and Others v. Russia*, Appl. no. 15339/02, Judgment of 20 March 2008, paras 129–145 (limited, however, to the domestic context). See the International Court of Justice (ICJ) in the *Aerial Herbicide Spraying Case (Ecuador v. Colombia)*, Application by Ecuador, 31 March 2008, para. 37, available at www.icj-cij.org/docket/index.php?p1=3&case=138&code=ecol&p3=0 (claiming 'that by aerially spraying toxic herbicides at locations at, near and over its border with Ecuador, Colombia has violated Ecuador's rights under customary and conventional international law'. Quoted by Boyle, 'Human Rights and the Environment: Where Next?', 23 *European Journal of International Law* (*EJIL*) (2012) 613, at 635. The case was later withdrawn by Ecuador. See ICJ Press Release no. 2013/20, 17 September 2013, available at www.icj-cij.org/docket/index.php?p1=3&case=138&code=ecol&p3=6.

[27] For recent treatments, see M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (2011); K. da Costa, *The Extraterritorial Application of Selected Human Rights Treaties* (2013); N. Bhuta (ed.), *The Frontiers of Human Rights: Extraterritoriality and Its Challenges* (2016).

[28] See, e.g., the famous case ECtHR, *Öcalan v. Turkey*, Appl. no. 46221/99, Judgment of 12 May 2005.

[29] See ECtHR, *Al-Skeini and Others v. United Kingdom*, Appl. no. 55721/07, Judgment of 7 July 2011.

[30] See ECtHR, *Hirsi Jamaa and Others v. Italy*, Appl. no. 27765/09, Judgment of 23 February 2012.

[31] See Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects', 25 *EJIL* (2015) 1071, at 1090 (arguing that the European Union [EU] is exceptional in being bound by broad human rights obligations concerning the extraterritorial effects of its policy measures).

[32] See S. Skogly, *Beyond National Borders: States' Human Rights Obligations in International Cooperation* (2006), at 155.

[33] ECtHR, *Soering v. United Kingdom*, Appl. no. 14038/88, Judgment of 7 July 1989 (concerning a German national, detained in England on charges of murder, who faced extradition to the USA where he risked being sentenced to death).

the individual from certain human rights-infringing acts (for example, torture, death penalty) or manifestly human rights-deficient situations in a third state has long been recognized in international and regional human rights adjudication.[34] The constellation of direct extraterritorial effect is more problematic and refers to situations where an act of a state has direct influence on the enjoyment of human rights by individuals in a third state.[35] The topic of human rights obligations of states arising from direct extraterritorial effects of domestic acts has been discussed mainly in respect of three areas: transboundary environmental harm or nuisance,[36] extraterritorial harmful effects of domestic economic policies[37] and the extraterritorial collection and processing of personal data (transnational surveillance).[38]

A preliminary question is whether extraterritorial effects of domestic acts should give rise to human rights claims in the first place. Regarding the first scenario mentioned above – transboundary pollution – Alan Boyle argues that direct extraterritorial environmental harm should justify human rights claims.[39] Central to his argument is that IHRL should be treated similarly to international environmental liability conventions and private international law on which transnational lawsuits may be based.[40] If these norms lead to cross-border individual claims, then, according to Boyle, the situation should not be different under IHRL.[41]

Concerning the second scenario of cross-border harmful effects of domestic economic policy, the European Union (EU) provides an illuminating example. The EU recognizes, on the level of its primary treaty law, that the effects of its (external and internal) actions may give rise to extraterritorial human rights obligations.[42] The obligation is concretized in the context of exports by member states by an EU regulation requiring that '[m]ember states should comply with the Union's general provisions on external action, such as … respect for human rights … when establishing, developing

[34] See Human Rights Committee (HRC), *Chitat Ng v. Canada*, Communication no. 469/1991, UN Doc. CCPR/C/49/D/469/1991 (1994), para. 14.2. For further differentiation, see Peters and Altwicker, 'Die Verfahren beim EGMR', in S. Leible and J.Ph. Terhechte (eds), *Europäisches Rechtsschutz- und Verfahrensrecht (Enzyklopädie Europarecht)* (2014) 403, at 406.

[35] See Skogly, *supra* note 32, at 155.

[36] For a discussion, see Boyle, *supra* note 26, at 633–641.

[37] See S. Suranovic, *A Moderate Compromise: Economic Policy Choice in an Era of Globalization* (2010), at 224–226 (discussing the problem of free trade agreements with states where labour rights are systematically violated).

[38] See Austin, 'Technological Tattletales and Constitutional Black Holes: Communications Intermediaries and Constitutional Constraints', 17 *Theoretical Inquiries in Law* (2016) 451.

[39] Boyle, *supra* note 26, at 640 (furthermore arguing that the human rights impact of environmental decisions on individuals in another state should be accounted for in a domestic decision-making process).

[40] Boyle, *supra* note 26, at 638–639.

[41] *Ibid.* (arguing that the restrictive *Bankovic* reasoning does not apply to transboundary pollution, that norms of international environmental law, e.g., the Aarhus Convention, do not differentiate between persons within or outside domestic borders and that, in general, the principle of non-discrimination requires polluting states not to treat differently environmental harm merely because of its extraterritoriality). Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters 1998, 2161 UNTS 447.

[42] See again Bartels, *supra* note 31 for details.

and implementing their national export credit systems and when carrying out their supervision of officially supported export credit activities'.[43] However, as Lorand Bartels argues, obligations flowing from extraterritorial effects of EU acts are understood as a political commitment rather than as judicially enforceable.[44]

For a number of reasons, the third scenario of transnational surveillance most obviously leads to protection gaps, calling for a transnational extension of international human rights obligations. For example, the United Kingdom's (UK) Investigatory Powers Tribunal rejected the extraterritorial application of the right to private life to claimants abroad who had argued that they had been subject to secret surveillance measures by the UK government.[45] In other words, being (potentially) the target of secret transnational surveillance abroad does not bring these persons within the jurisdiction of the UK in the meaning of Article 1 of the European Convention on Human Rights (ECHR). Such an argument may be short-sighted. First, it may be politically prudent to endorse a broad conception of extraterritorial human rights obligations. Laura Donohue holds that the 'U.S. failure to ensure privacy protections [for foreign individuals subject to surveillance measures by the National Security Agency (NSA)] may lead to a loss in U.S. competitiveness'.[46] Donohue mentions the example of cloud computing; if US-based service providers cannot ensure their customers enough protection against privacy intrusions in a broad understanding, users will relocate their personal data to other providers.[47] The argument is that the lack of privacy protection induces Internet users to rely on non-US service providers, leading to potential economic loss. Second, in the 'age of surveillance', control over a person should no longer depend on 'factual' or 'physical' control. Control over a person's data can be just as effective.[48] Third, the intensity of intrusion by some transnational surveillance acts is certainly comparable to that occurring domestically. This is hardly questionable in the case of transnational, targeted surveillance. The central argument here is that the purpose of targeted surveillance is clearly to control the affected person's conduct.[49] For example, on the basis of targeted intelligence information gathered or shared by public authorities transnationally, an individual may be barred from entering a country, travel restrictions may be imposed or so on. The individual loses control over her personal data and cannot be sure, given the extent of international cooperation in some parts of the world, whether or not it is made available to her government.

[43] European Parliament and the Council Regulation 1233/2011, OJ 2011 L 326/45, recital 4 (quoted by Bartels, *supra* note 31, at 1077, n. 24).

[44] See Bartels, *supra* note 31, at 1091.

[45] *Human Rights Watch Inc & Ors v. Secretary of State for the Foreign & Commonwealth Office & Ors*, 16 May 2016, [2016] UKIPTrib 15, 165-CH, para. 58 (relying on the *Banković* reasoning).

[46] Donohue, 'Section 702 and the Collection of International Telephone and Internet Content', 38 *Harvard Journal of Law and Public Policy* (2015) 117, at 227–228.

[47] *Ibid.*, at 228.

[48] See Aust, 'Spionage im Zeitalter von Big Data: Globale Überwachung und der Schutz der Privatsphäre im Völkerrecht', 52 *Archiv des Völkerrechts* (2014) 375, at 397 (referring to Anne Peters and Peter Margulies).

[49] Richards, 'The Dangers of Surveillance', 126 *Harvard Law Review* (2012) 1934, at 1949.

B *Transnational Effects as a Jurisdictional Problem*

In terms of IHRL, the problem posed by extraterritoriality is, primarily, one of jurisdiction. 'Jurisdiction' is a term with many meanings.[50] In the human rights context, it can best be understood as a responsibility giving rise to specific legal obligations.[51] Here, jurisdiction functions as a 'threshold criterion'.[52] As Samantha Besson observes, in human rights cases, jurisdiction is an 'all or nothing' concept.[53] For the present context, this means that either human rights apply or they do not apply in situations of transnational harmful effects. The question, thus, is under which circumstances states incur this responsibility through the extraterritorial effects of their domestic conduct.

The test used by international judicial bodies to establish jurisdiction (of contracting parties) in the context of human rights treaties relies on variations of the notion of factual 'control'.[54] While there is a presumption that a state exercises (effective) control over its territory,[55] the necessary type and degree of control must be verified in situations of extraterritoriality. In general, two types of control are distinguished by international human rights bodies: 'control over persons' and 'control over territory'.[56] Usually, a qualified degree of control is required to establish extraterritorial jurisdiction; the degree of power exercised must amount to 'effective control'.[57] This standard model of jurisdiction covers a wide range of extraterritorial activities by states.

In the context of the ECHR, there are two basic tests to establish extraterritorial jurisdiction: the 'effective control over an area' test and the 'agent authority and control' test.[58] The first part, 'effective control over an area', is uncontroversial. In these cases,

[50] Milanovic, *supra* note 27, at 21–40.

[51] See C. Ryngaert, *Jurisdiction in International Law* (2015), at 22–26 (on the meaning of 'jurisdiction' in general international law as a delimitation of spheres of competence or authority).

[52] ECtHR, *Catan and Others v. Republic of Moldova and Russia*, Appl. no. 43370/04, 8252/05, 18454/06, Judgment of 19 October 2012, para. 103.

[53] Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to', 25 *Leiden Journal of International Law* (2012) 857, at 878.

[54] For the ECHR, see *Al-Skeini and Others*, *supra* note 29, paras 130–150. For the Inter-American Convention on Human Rights (IACHR), see IACommHR, Case P-900–08, *Case of Djamel Ameziane v. United States*, Report no. 17/12 (Admissibility), 20 March 2012, para. 30. For the International Covenant on Civil and Political Rights, see HRC, *General Comment no. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add 1326 (2004), para. 10. International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.

[55] *Hirsi Jamaa*, *supra* note 30, para. 71. For restrictions, see ECtHR, *Ilaşcu and Others v. Moldova and Russia*, Appl. no. 48787/99, Judgment of 8 July 2004, para. 312.

[56] See Milanovic, *supra* note 27, at 127–172, 173–208 (distinguishing between and criticizing a 'spatial model' and a 'personal model' of extraterritorial human rights jurisdiction).

[57] See da Costa, *supra* note 27, at 55–57 (for the ICCPR), at 93–254 (for the ECHR). For the IACHR, see Cerna, 'The Extraterritorial Scope of Human Rights Treaties: The American Convention on Human Rights', in F. Coomans and M.T. Kamminga (eds), *Extraterritorial Applications of Human Rights Treaties* (2004) 141.

[58] *Al-Skeini and Others*, *supra* note 29, paras 133–142. Confusingly, the ECtHR has also used the criterion of 'ultimate authority and control over acts and omissions of officials'. See, e.g., ECtHR, *Al-Jedda v. United Kingdom*, Appl. no. 27021/08, Judgment of 7 July 2011, para. 84. However, the ECtHR seems to reserve this criterion for the context of acts by international organizations and does not apply it to foreign state acts. See also Peters, 'Die Anwendbarkeit der EMRK in Zeiten komplexer Hoheitsgewalt und das Prinzip der Grundrechtstoleranz', 48 *Archiv des Völkerrechts* (2010) 1, at 34–35.

there is usually some physical presence of organs of the foreign state exercising control over (parts of) a territory of another state (for example, in *Loizidou v. Turkey* concerning the occupation of the northern part of Cyprus by Turkish troops).[59] Furthermore, the European Court of Human Rights (ECtHR) has given the 'effective control over an area' part a wide interpretation; physical presence in another state's territory is not a necessary requirement to establish jurisdiction under this head. In some cases, the ECtHR uses the test of 'effective overall control'.[60] By further qualifying the control element, the ECtHR thus lowers the threshold for jurisdiction; 'overall' control does not mean 'detailed' control (in the sense of a military command chain). It is sufficient that 'the local administration had survived as a result of the Contracting State's military and other support'.[61] A tangible and substantial (military, political, financial or economic) influence of a state on a foreign state's territory may be sufficient (for example, in *Ilaşcu and Others v. Moldova and Russia* in which the ECtHR affirmed Russia's jurisdiction given that its military, economic and political support was essential to uphold governance in the separatist Transdniestrian region).[62]

The ECtHR has not given the second part – 'agent authority and control' – a similarly broad interpretation. The decisive restriction is that, in practice, the application of the 'agent authority and control' test is limited to cases where the state agent is physically present in the foreign territory and as a result of that presence determines the conduct of an individual.[63] In other words, it is control through physical presence or physical determination that is considered necessary by the ECtHR to establish jurisdiction under the 'agent authority and control' test, not the cross-border production of (adverse) effects on non-state actors.

What are the consequences of this two-part model of jurisdiction for domestic acts with extraterritorial effects? The problem with regard to the three examples of extraterritorial effect mentioned above – transboundary environmental harm, cross-border harmful economic policies and transnational surveillance – is that the tests for extraterritorial conduct by states developed by international and regional judicial bodies – namely, effective control over persons or territory – seem to be misplaced. One can hardly argue that a foreign state exercises 'effective control' over a person abroad when it secretly collects or processes the person's data. This is even clearer if one compares this situation to those of extraterritorial kidnapping or arrests of persons where human rights obligations are commonly assumed under the standard model.[64]

[59] ECtHR, *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 23 March 1995.

[60] *Ibid.*, para. 56.

[61] ECtHR, *Kyriacou Tsiakkourmas and Others v. Turkey*, Appl. no. 13320/02, Judgment of 2 June 2015, para. 150 (referring to Turkey's effective overall control over northern Cyprus). For criticism, see Peters, *supra* note 58, at 35–37.

[62] *Ilaşcu*, *supra* note 55, paras 353–394.

[63] See *Al-Skeini and Others*, *supra* note 29, paras 134–137. For recent criticism on the 'physical presence' criterion, see the opinion by Lloyd Jones LJ in *Al-Saadoon & Ors v. Secretary of State for Defence*, [2016] EWCA Civ 811, paras 58–74 (arguing that 'it will be necessary to attempt to distinguish between different types and degrees of physical power and control and that this will result in fine and sometimes tenuous distinctions').

[64] *Öcalan*, *supra* note 28.

In other words, the two-part model does not capture situations where there is only minimal or no physical presence of an actor 'on the ground'.[65] In fact, although not involving domestic acts with extraterritorial effects in any strict sense, the infamous *Banković* case has been read as a rejection by the ECtHR of human rights obligations resulting from extraterritorial effects.[66] In this case, the Court denied that the states of the North Atlantic Treaty Organization exercised jurisdiction through bombing during air strikes.[67]

C *Effective Control over Situations*

Accepting that there are circumstances beyond the control of persons or areas in which state conduct should give rise to human rights responsibilities, how does jurisdiction need to be interpreted to capture these instances? To do so, the standard test of jurisdiction should be extended to the (effective) 'control over situations' (with extraterritorial effects on the enjoyment of human rights). In this way, the physical presence of state agents in foreign territory would no longer be a necessary condition of jurisdiction. Instead, in this transnationalized version of the jurisdictional test, the focus lies on the control of (harmful) circumstances (for example, large-scale pollution, cross-border surveillance activities targeting individuals).[68] Two objections may be raised against this suggestion: it may be feared that a transnationalized version would lead to 'unlimited' human rights jurisdiction, and it may be objected that 'jurisdiction' as the decisive threshold criterion is obsolete altogether.

Regarding the first objection that the situational control test of jurisdiction would lead to unlimited jurisdiction in human rights cases, one may respond that there are limiting factors. The first limiting factor restricting the situational control jurisdiction is the necessary concreteness of the normative relationship between the rights holder and the duty bearer (that is, the person or entity who may be held accountable).[69] For human rights obligations to arise, the normative relationship must be sufficiently individualized – that is, the cross-border effects must be concentrated on identifiable

[65] This line of reasoning seems to underpin the decision made by the ECtHR, *Banković and Others v. Belgium and 16 Other Contracting States*, Appl. no. 52207/99, Decision of 12 December 2001. Similarly, Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention', 20 *EJIL* (2009) 1223, at 1238 (arguing that the '"effective control" cases … suggest that jurisdiction is a functional concept requiring a fairly substantial factual showing that, by virtue of a signatory state's intervention into another country or region, the signatory state has enough of a physical presence that it can exercise real administrative or regulatory powers').

[66] Fastenrath, 'Art. 1', in K. Pabel and St. Schmahl (eds), *Internationaler Kommentar zur Europäischen Menschenrechtskonvention* (2012) 1, para. 92.

[67] *Banković and Others*, *supra* note 65. For an overview of the criticism, see Milanovic, '*Al-Skeini* and *Al-Jedda* in Strasbourg', 23 *EJIL* (2012) 121, at 123–124.

[68] In another context, a jurisdictional test resembling the 'effective control over situations' test was endorsed by the 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, January 2013, Principle 9, available at www.etoconsortium.org/en/main-navigation/library/maastricht-principles/ (mentioning 'situations in which the State … is in a position to exercise decisive influence or to take measures to realize' rights abroad).

[69] See Besson, *supra* note 53, at 878.

individuals. This reflects the fact that legal obligations of any sort, including human rights obligations, can only be fulfilled in a concrete context or relationship (determined, that is, by an identifiable group of affected rights holders and duty bearers by a time- and space-specific event or series of events and by an identifiable, recognized protected legal interest).[70] In other words, there must be a sufficient 'jurisdictional link' between the situation controlled by a contracting state and the affected individual.[71] The concreteness and precision requirement is crucial, especially with regard to extraterritorial effects jurisdiction.

Under the transnationalized model, state governments and other public authorities are under an obligation to consider the cross-border human rights effects of their acts and omissions, but it is clear that not any act or omission by State A establishes a sufficient jurisdictional link with a non-state actor in State B. A second limiting factor is the impact intensity of the harmful effects on the enjoyment of human rights abroad. Not every disturbance that can be traced to circumstances controlled by a foreign state will trigger jurisdiction. The dangerousness of the effects, impact duration, choice of means and the vulnerability of the targeted or affected individuals, as well as the overall security context in the state where the affected individuals reside, should play a role in determining jurisdiction. 'Jurisdiction', in other words, is a normative concept; the determination of which involves a value judgment to be assessed in the light of the functions of IHRL.

The second objection alludes to the possibility of a different solution to the problem of transnational harmful effects. Marko Milanovic suggests distinguishing between negative obligations (for example, the obligation not to kill arbitrarily) and positive obligations of rights (for example, the obligation to protect an individual from harm by third parties). While the negative obligation to respect human rights is not territorially limited, the positive dimension of human rights is restricted to situations where a state (or other public entity) has full control over the area.[72] This solution certainly captures instances of transnational harmful effects by state conduct. It has the merit of producing predictable results, and it takes the idea of the universality of rights seriously.[73] Furthermore, it is consistent with recent ethical accounts that argue that what we primarily owe to distant strangers is 'non-intervention'.[74] However, two problems remain: first, it may not always be easy to clearly distinguish between 'negative' and 'positive' obligations[75] and, second, there may be instances where an extraterritorial obligation to protect should be accepted even in the absence of full territorial control by the duty bearer.[76]

[70] *Ibid.*, at 878.

[71] See Peters and Altwicker, *supra* note 34, at 406.

[72] Milanovic, *supra* note 27, at 215.

[73] M. Milanovic, 'Foreign Surveillance and Human Rights, Part 3: Models of Extraterritorial Application', *EJIL: Talk* (27 November 2013), available at www.ejiltalk.org/foreign-surveillance-and-human-rights-part-3-models-of-extraterritorial-application/.

[74] L.E. Lomasky and F.R. Tesón, *Justice at a Distance: Extending Freedom Globally* (2015), at 1–6.

[75] See ECtHR, *Mouvement Raëlien Suisse v. Switzerland,* Appl. no. 16354/06, Judgment of 13 July 2012, para. 50.

[76] See section 4.C below.

Therefore, the present solution retains the idea of jurisdiction as a threshold criterion that must be met before obligations can arise for duty bearers. The suggested jurisdictional test of 'effective control over situations' has until now only been implicitly part of the rulings by international human rights bodies.[77] The first example relates to the extraterritorial effects of an entry ban. In the *Nada* case, the applicant was prohibited (by Swiss legislation implementing a United Nations (UN) Security Council resolution) to enter and travel through Switzerland.[78] The entry ban was imposed on the applicant as his name was added to the list annexed to the Federal Taliban Ordinance.[79] Since the applicant was a resident of an enclave (belonging to Italy), travelling through Switzerland was the only way for him to see his doctors in Italy and Switzerland and to visit family and friends.[80] The *Nada* case is about extraterritorial effects; the Swiss entry ban had a concrete effect on the enjoyment of human rights by an identifiable individual abroad.[81] For the establishment of jurisdiction, it is irrelevant if Switzerland had legal control over the situation (whether it had the authority to issue an exceptional permission). It is sufficient that the situation of entry into the territory was controlled by Switzerland and that this situation had a significant human rights-curtailing effect on the applicant.

The second example where jurisdiction based on extraterritorial effects becomes relevant is transnational surveillance. The international case law on this topic is in flux; in contrast to the UK Investigatory Powers Tribunal, some human rights bodies seem more ready to accept jurisdiction in these cases.[82] For example, the UN Human Rights Committee (HRC) in its concluding observations on the US report, *inter alia*, expressed its concern about the transnational surveillance conducted by the NSA.[83] This in turn implies that acts of transnational surveillance may trigger human rights jurisdiction and legal obligations of states. Furthermore, the UN General Assembly in its resolution on '[t]he right to privacy in the digital age' recently confirmed that this right applies to all sorts of communication, including the use of the Internet.[84] The resolution also explicitly refers both to the extraterritorial dimension of surveillance

[77] Interestingly, the long-standing case law on jurisdiction by the ECtHR explicitly mentions extraterritorial effects. See ECtHR, *Chiragov and Others v. Armenia*, Appl. no. 13216/05, Judgment of 16 June 2015, para. 167: 'While a state's jurisdictional competence is primarily territorial, the concept of jurisdiction within the meaning of Article 1 of the Convention is not restricted to the national territory of the High Contracting Parties and the state's responsibility can be involved because of acts and omissions of their authorities *producing effects outside their own territory*' (emphasis added).

[78] ECtHR, *Nada v. Switzerland*, Appl. no. 10593/08, Judgment of 12 September 2012.

[79] *Ibid.*, para. 21. Verordnung über Massnahmen gegenüber Personen und Organisationen mit Verbindungen zu Usama bin Laden, der Gruppierung 'Al-Qaïda' oder den Taliban, 2 October 2000, available at www.admin.ch/opc/de/classified-compilation/19996052/index.html.

[80] *Ibid.*, para. 27.

[81] Unfortunately, the ECtHR missed the opportunity to clarify the extraterritoriality problem in this case. This point is also stressed by Meyer, 'Der Fall Nada vor dem EGMR: Nichts Neues zur Normhierarchie zwischen UN-Recht und EMRK? Besprechung zu EGMR HRRS 2013 Nr. 224 (Nada v. Schweiz)', 14 *Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht* (2013) 79.

[82] See note 45 above.

[83] HRC, Concluding Observations on the Fourth Periodic Report of the United States of America, UN Doc. CCPR/C/USA/CO/4, 23 April 2014, para. 22.

[84] GA Res. 68/167, 21 January 2014.

and to the mass cross-border collection of personal data.[85] Similarly, the ECtHR has repeatedly held that the 'systematic collection and storing of data by security services on particular individuals … constituted an interference with these persons' private lives'.[86] It is likely to apply this line of reasoning to extraterritorial situations as well.[87]

Using the 'effective control over situations' criterion in instances of transnational surveillance leads to the following conclusions: transnational surveillance activities trigger human rights jurisdiction when they focus on a concrete individual, especially if they allow for the profiling of that individual. In these cases, the extraterritorial effects of a situation controlled by a foreign state on the enjoyment of human rights are sufficiently intense and trigger the need for human rights obligations to arise.[88] In contrast, cases of bulk transnational surveillance (not focusing on a specific target) lack a sufficient jurisdictional link with a foreign non-state actor and do not, as such, establish the government's effective control over situations. The dividing line between jurisdiction-triggering bulk surveillance and human rights-'neutral' foreign surveillance activities is, admittedly, a thin one. From a human rights perspective, as IHRL protects individual rights (not group rights), what ultimately matters is the intensity of the intrusion on the individual's enjoyment of international human rights, and this is arguably different in cases of bulk surveillance as compared to targeted surveillance. However, the more dense or the more comprehensive transnational bulk surveillance becomes, the more likely an individual will enter into the foreign 'radar' and the more bulk surveillance will functionally resemble 'effective control over territory' and, consequently, should be subject to human rights' obligations.[89]

A third example of potential extraterritorial effects jurisdiction concerns the case of *Mohammed Ben El Mahi and Others v. Denmark*.[90] In this case, the applicants implicitly relied on a model of extended jurisdiction in a cross-border context.[91] The case concerned the 'Danish cartoon controversy'. The applicants were a Moroccan national residing in Morocco and two associations operating in that country. They complained that the Danish authorities had permitted the publication of certain cartoons of the Prophet Mohammed. The ECtHR, applying the standard test of effective control over persons or territory, did not find a 'jurisdictional link' between the applicants and Denmark. Under the transnationalized model of 'effective control over situations', the result would be the same; the legal issue would be whether Denmark had 'effective control over a situation', taking into account the effects of Denmark's alleged omission on the applicants abroad. The result would be that jurisdiction must be rejected;

[85] *Ibid.*, preamble. See also GA, Report of the Office of the United Nations High Commissioner for Human Rights on the Right to Privacy in the Digital Age, UN Doc. A/HRC/27/37, 30 June 2014 (on the protection and promotion of the right to privacy in the context of domestic and extraterritorial surveillance).

[86] ECtHR, *Uzun v. Germany*, Appl. no. 35623/05, Judgment of 2 September 2010, para. 46.

[87] A first opportunity for the ECtHR to do so will arise in the pending case of ECtHR, *Big Brother Watch v. United Kingdom*, Appl. no. 58170/13 (communicated).

[88] For a similar conclusion (though for different reasons) see Aust, *supra* note 48, at 396–397.

[89] See *ibid.*

[90] ECtHR, *Mohammed Ben El Mahi and Others v. Denmark*, Appl. no. 5853/06, Judgment of 11 December 2006.

[91] *Ibid.*

the normative relationship between Denmark and the applicants residing in Morocco was not sufficiently concrete for human rights obligations to arise. The applicants had neither been singled out from the mass of the global population by an act attributable to Denmark nor by a particular harmful effect of the alleged omission by Denmark. Thus, while the jurisdictional test of 'effective control over situations' would widen the applicability of human rights treaties, it would not be borderless.

In sum, a transnational interpretation of human rights jurisdiction suggests complementing the existing two-part model, adding a third test of 'effective control over situations'. Thereby, the increasingly relevant problem of extraterritorial harmful effect of state conduct (especially transboundary environmental harm, cross-border harmful economic policies and transnational surveillance), associated with the processes of transnationalization, can be adequately captured.

3 Transnational Composite Acts

A *Problem*

Transnationalization has led to an increase in international cooperation and to new (hybrid) types of cooperation, often involving the collaboration of (multiple) state and non-state actors. These acts of international cooperation may be called 'transnational composite acts', relating to a series of cross-border actions or omissions by multiple state and/or non-state actors acting cooperatively. The human rights impact of these new types of cooperation is often neglected. The general problem is sometimes analysed as one of 'shared responsibility'.[92] The growing literature on this topic usually takes a more general approach that is not human rights specific and focuses on questions of jurisdiction/attribution and dispute settlement. In contrast, I will concentrate on the human rights-specific question of how to conceptualize 'interferences' in situations of transnational composite acts. A human rights-specific approach to composite acts is needed because the categories of general international law do not adequately capture the distinct rights' *problematique* consisting of a particular kind of 'interference', as will be outlined below. In other words, transnational composite acts must, first of all, be made available to human rights reasoning by addressing them in the language of rights.

A first example of a transnational composite act concerns the system of collection and processing of passenger name records (PNR) data.[93] The 2012 EU–US PNR Agreement obliges an aircraft carrier, which is typically a non-state actor, to transfer

[92] See Nollkaemper and Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework', 34 *Michigan Journal of International Law* (2013) 359; den Heijer, 'Shared Responsibility before the European Court of Human Rights', 60 *Netherlands International Law Review* (*NILR*) (2013) 411; d'Asprement *et al.*, 'Sharing Responsibility between Non-State Actors and States in International Law: Introduction', 62 *NILR* (2013) 62.

[93] See Annex to the Agreement between the United States of America and the European Union on the Use and Transfer of Passenger Name Records to the United States Department of Homeland Security, OJ 2012 L 215/5.

PNR data (including the name, email and postal address of the passenger, the forms of payment and baggage information and the seat number) directly to the US Department of Homeland Security (DHS), which further processes the data.[94]

A second example relates to the transfer of financial transaction data from European service providers to the USA. Under the EU–US Agreement on the Terrorist Finance Tracking Program (EU–US TFTP Agreement), the processing and transfer of financial data is initiated by the US Treasury Department, which serves production orders directly to the providers of the international financial payment messaging services (designated providers).[95] Simultaneously, a copy of the request is sent to EUROPOL.[96] EUROPOL then verifies whether the US request conforms to several requirements relating to the protection of privacy of the affected data subjects (for example, whether the request clearly substantiates the necessity of the acquisition of the data).[97] Once EUROPOL has confirmed the conformity of the US request with the requirements of the EU–US TFTP Agreement, the designated provider – a non-state actor – 'is authorised and required to provide' the data directly to the US Treasury Department.[98]

A third example relates to bulk (or strategic) transnational surveillance (assuming here that some instances of bulk surveillance trigger jurisdiction).[99] A case concerning a 'transnational composite act' is currently pending before the ECtHR. In *Big Brother Watch and Others v. United Kingdom*, the applicants (non-governmental organizations [NGOs] and an academic based in Berlin) complained about the practice of cross-border surveillance by the UK and its allies (the so-called Five-Eyes).[100] The applicants contended that they were likely to have been the subject of widespread collection, processing and transfer of personal data by the secret service network, of which the UK is a part.

B *Transnational Composite Acts as a Problem of Interference*

From a human rights perspective, 'transnational composite acts' pose a problem relating to the concept of 'interference' with the enjoyment of international human rights (assuming jurisdiction of, and attribution to, a state actor).[101] In IHRL, there is a curious lack of academic analysis of the concept of interference.[102] The ECtHR has

[94] *Ibid.*, Art. 15(1).

[95] Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program (EU–US TFTP Agreement), OJ 2010 L195/5, Art. 4(1).

[96] *Ibid.*, Art. 4(3).

[97] *Ibid.*, Art. 4(4), Art. 4(2).

[98] *Ibid.*, Art. 4(5).

[99] As argued above, this is not necessarily the case (see text accompanying note 89 above).

[100] *Big Brother Watch and Others*, *supra* note 87. For a legal assessment, see International Commission of Jurists, *Big Brother Watch and Others v. the United Kingdom*, 9 February 2016, available at www.icj.org/wp-content/uploads/2016/02/UK-ICJ-AmicusBrief-BBWothers-ECtHR-legalsubmission-2016.pdf.

[101] On the problems of jurisdiction/attribution in these cases, see den Heijer, *supra* note 92.

[102] The Convention text speaks of 'interference' in Art. 8(2) ECHR; of 'restrictions' in Art. 10(2) ECHR; of 'limitations' in Art. 9(2) ECHR and refers to 'deprivation' in Art. 1(1) Protocol no. 1.

gradually refined the concept of interference with Convention rights; interferences may not only consist in 'direct interferences' – that is, 'orders or commands' to perform or abstain from specific conduct. Instead, the ECtHR also recognizes 'indirect interferences' – that is, situations in which the governmental act is directed at one person (or the general public) but has negative consequences for a third party (an example being official warnings against sects).[103] The concept of interference is related to (but distinct from) that of jurisdiction; an interference with human rights can only exist if jurisdiction and, thus, the applicability of human rights have been established.[104] The applicability of human rights, therefore, depends on whether the state has jurisdiction over the people alleging a human rights violation (see section 2 above).

'Transnational composite acts' are characterized by a set of acts by state actors and, sometimes, non-state actors, which only in aggregate constitute an 'interference' with an international human right. Often, for example, the infringing act of one actor presupposes a prior act taken in another jurisdiction by another actor. Thus, in the first example, processing and using PNR data by the DHS is dependent on the act of collecting and transferring such data by the aircraft carrier. In the second example, the transfer of the data is dependent on a positive decision by EUROPOL. In the third example, one can argue that it is the widespread practice of surveillance measures by the secret services network, together covering large parts of the globe, and the sharing of information that lead to an interference with international human rights.

C *Interference by Aggregate Effect*

How can a human rights interference by 'transnational composite acts' be conceptualized? The term 'composite act' is not yet established in IHRL. However, a concept with 'family resemblance' capturing the underlying idea can be found in the international law on state responsibility. Article 15 of the International Law Commission's (ILC) Draft Articles on State Responsibility (ARSIWA), which concerns a breach consisting of a composite act, runs as follows: 'The breach of an international obligation by a State through a series of actions or omissions defined in aggregate as wrongful occurs when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.'[105] This definition is useful as it conceptualizes the legal consequences of the aggregate effect of acts and omissions.

In the case law of the ECtHR, there have been indications that the aggregation of acts may amount to an interference. For example, in *Ülke v. Turkey* the ECtHR argued that due to the 'gravity and the repetitive nature' of the acts against the applicant, they constituted an interference '*in the aggregate*'.[106] In the 'extraordinary rendition'

[103] See ECtHR, *Leela Förderkreis E.V. and Others v. Germany*, Appl. no. 58911/00, Judgment of 6 November 2008.

[104] See Besson, *supra* note 53, at 862–863.

[105] See International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (ARSIWA), UN Doc. A/56/10 (2001), Art. 15, 43, at 46–47.

[106] ECtHR, *Ülke v. Turkey*, Appl. no. 39437/98, Judgment of 24 January 2006, para. 63 (emphasis added).

cases, the ECtHR based its finding of a violation by the territorial state, *inter alia*, on the notion that the territorial state, while it had not itself been engaged in acts of torture, 'facilitated the whole process, created the conditions for it to happen and made no attempt to prevent it from occurring'.[107] In these cases, too, the interference depends on composite acts. Furthermore, several cases by the ECtHR cite Article 15 of the ARSIWA, on a breach consisting of a composite act, without, however, fleshing out in detail how this translates into human rights law.[108]

To summarize, processes of globalization leading to a rise in the complexity of cross-border cooperation are challenges not only to the conceptualization of jurisdiction/attribution but also to the concept of 'interference'. A transnationalized interpretation of 'interference' includes 'transnational composite acts', accounting for the fact that in some situations of complex cross-border cooperation the interference lies in the aggregate adverse effect of a series of actions.

4 Transnational Activity by Non-State Actors

A *Problem*

From their beginnings, transnationalization processes have been associated with, and propelled by, the increase in cross-border transactions (especially relating to trade, investment and workforce),[109] cross-border movement (especially relating to migration)[110] or cross-border conduct (especially relating to harmful or criminal activity) by non-state actors.[111] Insofar as the cross-border activity by non-state actors has the effect of dominating people's lives abroad, the problem of making these acts and omissions responsive to IHRL arises.[112] In recent years, the problem of applying IHRL to cross-border activities by non-state actors has been discussed with regard to transnational corporations (TNCs),[113] private military and security companies[114] and globally operative financial or Internet service providers.[115]

[107] ECtHR, *Al Nashiri v. Poland*, Appl. no. 28761/11, Judgment of 24 July 2014, para. 517.

[108] E.g., ECtHR, *El-Masri v. Former Yugoslav Republic of Macedonia*, Appl. no. 39630/09, Judgment of 13 December 2012, para. 97.

[109] Calliess and Maurer, *supra* note 3, at 8–11 (referring to the 'old' and 'new' *lex mercatoria*).

[110] See A. Farahat, *Progressive Inklusion: Zugehörigkeit und Teilhabe im Migrationsrecht* (2014).

[111] See N. Boister, *An Introduction to Transnational Criminal Law* (2012).

[112] See G. Teubner, *Constitutional Fragments: Societal Constitutionalism and Globalization* (2012), at 131.

[113] Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 *American Journal of International Law* (*AJIL*) (2007) 819. For a problem overview, see HRC, Report on the Second Session of the Open-Ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises with respect to Human Rights, UN Doc. A/HRC/34/47, 4 January 2017. See also C. Kaufmann *et al.*, *Extraterritorialität im Bereich Wirtschaft und Menschenrechte* (2016), available at www.skmr.ch/cms/upload/pdf/160815_SKMR_Studie_Extraterritorialitaet.pdf.

[114] S. Chesterman and A. Fisher (eds), *Private Security, Public Order* (2009).

[115] Weber, 'Human Rights Due Diligence as New Policy in Financial Institutions', in R.P. Buckley, E. Avgouleas and D.W. Arner (eds), *Reconceptualising Global Finance and Its Regulation* (2016) 404.

A straightforward option to bring the cross-border activities of non-state actors within the reach of IHRL, of course, would be to extend the range of duty bearers by including non-state actors – in other words, by acknowledging the 'direct horizontal effect' of international human rights.[116] Indeed, some international policy instruments aim at establishing human rights responsibilities for non-state actors.[117] Proponents of this approach point to ethical, theoretical and policy reasons for making the circle of duty bearers more inclusive.[118] However, a change in the range of duty bearers would amount to nothing less than a 'paradigm shift' within IHRL. In line with the approach adopted here, advocating the (transnational) re-interpretation of existing IHRL but not its amendment, the extension of the range of duty bearers is not an option. First, no international human rights instrument currently provides for a 'direct horizontal effect' of its guarantees.[119] Second, it would currently be unlikely to find sufficient state support for an extension, particularly, in the absence of a 'uniform and consistent State practice' regarding corporate responsibilities.[120] Third, the current conceptual framework of IHRL concerns balancing individual interests with collective (public) interests. However, TNCs or other non-state actors do not (primarily) pursue collective interests such as 'national security' or the 'protection of public order' but, rather, aim at generating monetary or other material benefits for their association. Therefore, just as the formal extension of duty bearers is currently implausible, it is equally impossible to interpret the existing international human rights framework in such a way that it could cover non-state actors as duty bearers. If these options are discarded, the problem must be restated as follows: how can existing IHRL be interpreted to make the cross-border activity of non-state actors responsive to human rights concerns?

B *Transnational Activity by Non-State Actors as an Attribution Problem*

Presently, cross-border activity by non-state actors comes within the reach of IHRL if the territorial state has 'jurisdiction' (in the human rights' sense) and if the act or omission is attributable to it. It is important to distinguish both of these issues;

[116] Of course, the follow-up question is whether any actor can be a potential duty bearer of international human rights obligations or whether additional conditions must be fulfilled (e.g., a state-equivalent power potential). See Vandenhole and Genugten, *supra* note 19, at 4–5.

[117] See prominently Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003; HRC, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, UN Doc. A/HRC/17/31, 21 March 2011.

[118] Whelan, Moon and Orlitzky, 'Human Rights, Transnational Corporations and Embedded Liberalism: What Chance Consensus?', 87 *Journal of Business Ethics* (2009) 367.

[119] See Knox, 'Horizontal Human Rights Law', 102 *AJIL* (2008) 1, at 10–14. See also HRC, General Comment no. 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add 1326, 29 March 2004, para. 8.8 (stating that the ICCPR does not, as such, have 'direct horizontal effect as a matter of international law').

[120] This is also acknowledged by John Ruggie, see HRC, Business and Human Rights: Mapping International Standards of Responsibility and Accountability for Corporate Acts, UN Doc. A/HRC/4/35, 19 February 2007, para. 34.

'jurisdiction' is about the problem if human rights apply at all to the facts of a case.[121] 'Attribution of conduct' is about the related, but distinct, problem under which conditions 'conduct consisting of an act or omission or a series of acts or omissions is to be considered as the conduct of the State'.[122] Borrowing a helpful distinction introduced by David Miller, attribution is about ascribing 'outcome responsibility', whereas jurisdiction is about 'remedial responsibility': 'Outcome responsibility' concerns the question who shall bear the resulting burdens and benefits of an act or omission, 'remedial responsibility' concerns the identification of 'an agent whose job it is to put that situation right.'[123] It should be noted that, just like 'attribution' and 'jurisdiction', both concepts require a normative (not merely a causal or factual) determination.

From a practical point of view, the distinction between 'jurisdiction' and 'attribution' is important because different legal tests apply;[124] the jurisdictional or 'remedial' question must be answered with a view to the specific functions of IHRL (which may be different under a less state-centred, transnational conception).[125] Thus, the special nature of human rights (as opposed to ordinary international legal rules) suggests an autonomous (human rights) conception of jurisdiction – for example, the two-part jurisdictional test used by the ECtHR (effective control over territory and effective control over persons) – and, if one accepts the argument here, its extension to 'effective control over situations'.[126] The latter extension is crucial in this context; in many cases involving cross-border activities of non-state actors, the question of 'jurisdiction' will depend on whether transnational harmful effects are included in the conception of jurisdiction (for example, the cross-border emissions by a privately operated factory).

In contrast, the attribution problem is of a more general nature. Even in a human rights context, its solution does not primarily depend on the functions of IHRL but, rather, on more general considerations such as legal certainty and consistency with other fields of international law.[127] It is no wonder, then, that human rights courts like the ECtHR regularly seek to interpret questions of attribution consistently with general international law (while insisting on an autonomous conception of jurisdiction).[128] For that matter, the ECtHR also relies on the rules on state responsibility that

[121] See Besson, *supra* note 53, at 862.

[122] ARSIWA, *supra* note 105, at 43, 80.

[123] Miller, 'Holding Nations Responsible', 114 *Ethics* (2004) 240, at 245, 247.

[124] *Catan and Others*, *supra* note 52, para. 115 (stating that 'the test for establishing the existence of "jurisdiction" under Article 1 of the Convention has never been equated with the test for establishing a State's responsibility for an internationally wrongful act under general international law').

[125] For a (rare) sociological treatment, see Mahlmann, 'Neue Perspektiven einer Soziologie der Menschenrechte', in Mahlmann (ed.), *Gesellschaft und Gerechtigkeit: Festschrift für Hubert Rottleuthner* (2011) 331, at 333–338.

[126] See sections 2.B and 2.C above.

[127] The two primary links being the 'institutional link' (e.g., an organ of the state committing a wrongful act) and the 'control link' (e.g., where a de facto organ commits a wrongful act). See M. Hirsch, *The Responsibility of International Organizations toward Third Parties: Some Basic Principles* (1995), at 62.

[128] Lawson claims that the Court 'has consistently applied the principles articulated in the ARSIWA, *supra* note 105, without, however, referring expressly to the Draft Articles. Lawson, 'Out of Control: State Responsibility and Human Rights', in M. Castermans *et al.* (eds), *The Role of the Nation-State in the 21st Century* (1998) 91, at 115. Indeed, the ECtHR, starting at least with *Loizidou v. Turkey*, Appl. no. 15318/89, Judgment of 18 December 1996, para. 52), has occasionally emphasized that its findings on attribution are 'in conformity with the relevant principles of international law governing State responsibility'.

are considered to apply in the context of IHRL.[129] Two attribution scenarios familiar from the law on state responsibility seem particularly relevant to cross-border contexts. The first relates to the exercise of governmental authority by non-state actors abroad (captured by Article 5 of ARSIWA), and the second concerns situations of conduct directed or controlled by a state (captured by Article 8 of ARSIWA).

Case law on the attribution of cross-border conduct by non-state actors is rare, if it exists at all. The most advanced case law on this matter is again by the ECtHR. As a starting point, the ECtHR would likely interpret attribution consistently with the ARSIWA rules in cross-border cases too. The ECtHR does not differentiate between the two attribution scenarios but uses a mix of criteria to determine attribution – namely, the entity's 'legal status (under public or private law); the nature of its activity (a public function or an ordinary commercial business); the context of its operation (such as a monopoly or heavily regulated business); its institutional independence (the extent of State ownership); and its operational independence (the extent of State supervision and control)'.[130]

Of particular importance is the interpretation of the 'nature of the activity', which resembles the criterion of the exercise of governmental authority in the Article 5 ARSIWA scenario. Here, the ECtHR has held, for example, that the power of 'detention'[131] or the provision of vital public services and infrastructure (heating, water supply, sewage systems)[132] involve the performance of governmental tasks. It is crucial to note that, under general international law, the mere exercise of a governmental function by a private individual or entity is not sufficient but that a legal act by the state empowering the non-state actor to exercise elements of governmental authority is required.[133] Therefore, if such a governmental function were exercised by non-state actors extraterritorially (for example, capturing a terrorist suspect abroad by non-governmental agents) or if the provision of certain public services impacted the enjoyment of human rights abroad (for example, cross-border emissions by a privately operated waste disposal site), the attribution of conduct would be possible where the non-state actor acted on the basis of a formal legal empowerment by the state. An example for such a formal legal empowerment is the (former) German law on the retention of telecommunication data of calls from abroad by service providers. Under the former German statute on telecommunication, service providers had

[129] See ARSIWA, *supra* note 105, Art. 1, which does not distinguish between wrongful acts of states *vis-à-vis* other states and wrongful acts *vis-à-vis* non-state actors abroad. See McCorquodale, 'Non-State Actors and International Human Rights Law', in S. Joseph and A. McBeth (eds), *Research Handbook on International Human Rights Law* (2010) 97, at 102; Costa, 'European Mechanisms', in J. Crawford *et al.* (eds), *The Law of International Responsibility* (2010) 763.

[130] ECtHR, *Liseytseva and Maslov v. Russia*, Appl. no. 39483/05, Judgment of 9 October 2014, para. 187 (stating that, in contrast to the law on state responsibility, none of the listed factors was determinative on its own).

[131] ECtHR, *Bureš v. Czech Republic*, Appl. no. 37679/08, Judgment of 18 October 2012, para. 77.

[132] ECtHR, *Liseytseva and Maslov v. Russia*, Appl. no. 39483/05, Judgment of 9 October 2014, paras 208–210.

[133] Ryngaert, 'State Responsibility and Non-State Actors', in M. Noortmann, A. Reinisch and C. Ryngaert (eds), *Non-State Actors in International Law* (2015) 163, at 166.

to store telecommunications traffic data for six months.[134] According to the German Federal Constitutional Court, the (private) service providers must be regarded as mere 'auxiliaries' to the state authorities, entrusted with a public task and no discretionary power of their own. Therefore, the act of storing and providing traffic data must, so the German Constitutional Court decided, be attributed to the state.[135]

The other element of operational and institutional 'independence' in the ECtHR formula on attribution is strongly reminiscent of the criterion of 'control' in the Article 8 ARSIWA scenario. The ECtHR has rarely relied on this article explicitly.[136] The leading case of *Liseytseva and Maslov v. Russia* concerned the state's failure to enforce final judgments against municipally owned companies within a reasonable time (Article 6(1) of the ECHR).[137] In this case, the ECtHR had the opportunity to further delineate its conception of 'control' or 'independence' in the context of the question of whether the state was responsible for the companies' debts. The ECtHR stressed that the question of 'independence' must be determined on a case-by-case basis.[138] What is required is an assessment of the degree of the state's 'actual involvement' (for example, in the management of an enterprise's assets), whether 'binding instructions' were given and all 'other circumstances evidencing the actual degree of State control in a particular case'.[139] Given that the companies in question 'did not enjoy sufficient institutional and operational independence' from the state, the ECtHR held the state responsible for the Convention's violation.[140]

In light of the trend of privatization and outsourcing of formerly governmental functions, it is important to ensure that the rules governing jurisdiction and attribution in human rights cases do not lead to protection gaps. However, the attribution solution fails in cases where governmental authority is either exercised by non-state actors abroad without a formal empowerment by the state or in cases where their extraterritorial conduct is not sufficiently controlled by the state. In these cases, the agents act independently from the state, and their conduct cannot be attributed to it. Problematic are cross-border harmful emissions by a privately operated factory; if the territorial state does not in any way exercise control over the operations of the factory,

[134] See Telekommunikationsgesetz der Bundesrepublik Deutschland (German Statute on Telecommunication), BGBl I-1190, 22 June 2004, s. 113a (former).

[135] Federal Constitutional Court (Germany), *Telecommunications Traffic Data Retention*, BVerfGE 125, 260 (2010), para. 193.

[136] For an exceptional explicit reference, see ECtHR, *Liseytseva and Maslov v. Russia*, Appl. no. 39483/05, Judgment of 9 October 2014, para. 205.

[137] *Ibid.*

[138] *Ibid.*, para. 205. This approach is consistent with the ICJ's finding in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports (2007) 43, at 208 (requiring evidence for effective control 'in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations').

[139] ECtHR, *Liseytseva and Maslov v. Russia*, Appl. no. 39483/05, Judgment of 9 October 2014, para. 206.

[140] *Ibid.*, paras. 214, 219.

then any attribution solution will likely fail.[141] A further transnational problem – which currently fails to be considered as a human rights problem – is the performance of cross-border security tasks by globally operative private military and security companies (PMSC) such as Securitas AB or G4S.[142]

In 2014, employees of Blackwater, a PMSC, killed 17 Iraqi civilians and were later convicted for manslaughter and murder by a US federal court.[143] The UN established a 'Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination'.[144] In 2010, the Working Group came up with a Draft Convention on Private Military and Security Companies, establishing, *inter alia*, a state duty to ensure human rights compliance of PMSCs.[145] Given the degree of state independence of private security companies acting abroad, the jurisdiction/attribution solution would also likely fail.[146] Therefore, the rather narrow construction of attribution of the conduct of non-state actors in the law on state responsibility may lead to protection gaps concerning the application of human rights in cross-border situations. The question, thus, is if and how an alternative route may be devised under the existing IHRL.

C *Transnational Obligation to Protect*

A solution in the endeavour to make cross-border activity by non-state actors amenable to IHRL is to transnationalize the obligation to protect. According to this interpretation, a state does not only have the obligation to respect the international human rights of persons abroad, but a state also faces – under certain conditions – a transnational obligation to protect.[147] The obligation to protect is a sub-category of the so-called positive obligations requiring the state to take positive action to preserve or

[141] This is in line with general international law, which accepts that 'transboundary damage resulting from the activities of industry or business will not in normal circumstances by attributable to the State'. Boyle, 'Liability for Injurious Consequences of Acts Not Prohibited by International Law', in Crawford *et al.*, *supra* note 129, at 95, 98.

[142] R. Abrahamsen and M.C. Williams, *Security beyond the State: Private Security in International Politics* (2011), at 1, 46.

[143] See 'Blackwater Convictions: The Exception, Not the Rule – UN Expert Body Calls for Global Regulation of Private Security', available at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15217&LangID=E.

[144] Office of the United Nations High Commissioner for Human Rights, The Use of Mercenaries As a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination, UN Doc. E/CN.4/RES/2005/2, 7 April 2005, para. 11.

[145] Draft of a Possible Convention on Private Military and Security Companies (PMSCs) for Consideration and Action by the Human Rights Council, Annex, UN Doc. A/HRC/15/25, 2 July 2010, Art. 7. See also International Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989, 2163 UNTS 75; Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict, UN Doc. A/63/467-S/2008/636, 17 September 2008.

[146] See Hoppe, 'Passing the Buck: State Responsibility for Private Military Companies', 19 *EJIL* (2008) 989, at 992.

[147] On the dimensions of human rights, see Shue, 'The Interdependence of Duties', in P. Alston and K. Tomaševski (eds), *The Right to Food* (1984) 83, at 85.

otherwise cater to a protected legal interest (in contrast to 'negative obligations' that demand non-interference with a protected legal interest).[148] The obligation to protect requires authorities to take preventive action against harmful acts – for example, through criminal law provisions and effective law enforcement.[149] Structurally, the obligation to protect is directed at the prevention of acts adversely impacting the enjoyment of a human right or the materialization of life-threatening risks stemming from non-state actors or sources outside the effective control of the state (such as natural disasters or foreign states).[150]

In a transnational interpretation, the obligation to protect requires a state, under certain conditions, to afford protection in two different scenarios. First, the state has a transnational human rights obligation to protect persons abroad against harmful effects resulting from the cross-border activities by non-state actors based in its territory (external dimension of the transnational obligation to protect). This is also called an 'extraterritorial obligation to protect'.[151] In areas other than IHRL, this dimension of a transnational obligation to protect has already gained ground. An example is Article 3 of the ILC's Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities.[152] It imposes on the state in the territory of which the hazardous activities are planned or are carried out to 'take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof'.[153] With respect to human rights, several voices in the literature have called for embracing such a transnational obligation to protect especially with regard to the cross-border activities of TNCs and their subsidiaries in foreign states.[154] International courts and tribunals have not yet relied on this dimension of a transnational human

[148] On positive obligations under the ECHR in general, see A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (2004); Klatt, 'Positive Obligations under the European Convention on Human Rights', 71 *ZaöRV* (2011) 691; D. Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (2012); Lavrysen, 'The Scope of Rights and the Scope of Obligations: Positive Obligations', in E. Brems and J. Gerards (eds), *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights* (2013) 162.

[149] ECtHR, *O'Keeffe v. Ireland*, Appl. no. 35810/09, Judgment of 28 January 2014, para. 148.

[150] See also Krieger, 'Funktionen von Grund- und Menschenrechten', in O. Dörr, R. Grote and T. Marauhn (eds), *EMRK/GG: Konkordanzkommentar zum europäischen und deutschen Grundrechtsschutz* (2nd edn, 2013), vol. 1, 287, at 318.

[151] See Coomans and Kamminga, 'Comparative Introductory Comments', in Coomans and Kamminga, *supra* note 57, at 1, 6.

[152] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, UN Doc. A/56/10 (2001), Art. 3, at 370, 372.

[153] *Ibid.* See ECtHR, *Apanasewicz v. Poland*, Appl. no. 6854/07, Judgment of 3 May 2011 (on the obligation to protect the right to private life in a case concerning the unlawful construction by the applicant's neighbour of a concrete production plant that was a source of considerable nuisance).

[154] McCorquodale and Simons, 'Responsibility beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law', 70 *Modern Law Review* (2007) 598, at 615. See also Skogly, *supra* note 32, at 70; A. Papp, *Extraterritoriale Schutzpflichten: Völkerrechtlicher Menschenrechtsschutz und die deutsche Außenwirtschaftsförderung* (2013). For criticism, see von Bernstorff, 'Business and Human Rights: On the Expansion of International Human Rights Obligations to Abusive Corporate Practices', in C. Binder *et al.* (eds), *Corporate Social Responsibility and Social Rights* (2010) 35, at 51.

rights obligation to protect. However, in the above-mentioned case of *Ben El Mahi and Others v. Denmark*, relating to the cartoon controversy, the ECtHR could have framed the substantive issue as a transnational human rights obligation to protect. The substantive question was whether Denmark had an obligation to take positive measures against the Danish newspaper that had published the cartoons in order to safeguard the Morocco-based applicants' right to freedom of religion and non-discrimination.[155]

Second, the state also has a transnational human rights obligation to protect persons within its own territory against harmful effects resulting from transnational activities by foreign actors outside its effective control (internal dimension of the transnational obligation to protect). This dimension of the transnational obligation to protect was at issue in the case of *Schrems*, decided by the Court of Justice of the European Union (CJEU).[156] The case concerned the conditions under which personal data may be transferred from private companies based in the EU to third countries under the 'safe harbour privacy principles'. The CJEU required the European Commission, when making a safe harbour decision, to assess whether the protection of privacy in the third country was 'essentially equivalent to that guaranteed within the European Union'.[157] Essentially, *Schrems* delineated the contours of a transnational obligation to protect the right to privacy of European citizens against harm by a foreign power (in this case, the USA). The state must take into account the internal dimension of the transnational human rights obligation to protect already when negotiating international cooperation agreements.

A transnational human rights obligation to protect must be construed as an obligation of conduct, not of result. The applicable standard is 'due diligence', meaning that the obligation to protect 'is to be interpreted in such a way as not to impose an excessive burden on the authorities, bearing in mind, in particular, the unpredictability of human conduct and operational choices which must be made in terms of priorities and resources'.[158] The obligation-to-protect solution has the advantage that it fits well with the existing framework of IHRL. To summarize, in order to avoid protection gaps resulting from the consistent interpretation of IHRL with the law on state responsibility, the obligation to protect should be given a transnational interpretation.

5 Conclusion: Realization and Potential Objections

The impact of transnationalization processes – understood as processes of growing cross-border interaction, cooperation and transaction by state, economic and civil society actors – on IHRL is increasingly recognized. In order to meet the legal challenges

[155] ECtHR, *Mohammed Ben El Mahi and Others v. Denmark*, Appl. no. 5853/06, Judgment of 11 December 2006. It should be emphasized that the ECtHR correctly rejected human rights jurisdiction in this case. See section 2.C above.

[156] Case 362/14, *Maximilian Schrems v. Data Protection Commissioner*, [2015] ECR I-650.

[157] *Ibid.*, para. 74.

[158] ECtHR, *O'Keeffe v. Ireland*, Appl. no. 35810/09, Judgment of 28 January 2014, para. 144. See Case 362/14, *Maximilian Schrems v. Data Protection Commissioner*, [2015] ECR I-650, para. 63. For general considerations, see Ryngaert, *supra* note 133, at 177–180.

posed by these processes, I have argued that certain core concepts of IHRL such as 'jurisdiction', 'interference' and 'obligation' can and should be given a transnationalized interpretation. While the state remains a central actor in transnationalization processes, the state-centred conception of IHRL must be extended to better capture the human rights problems posed by these processes. Three potential objections and questions in response to the argument presented here shall be addressed. First, does 'transnationalized' IHRL represent an autonomous category of rights requiring a legal source of their own? The article deals with transnationalization by interpretation (which, as it is argued here, becomes necessary to meet the legal challenges of globalization). 'Transnationalized rights', therefore, are international human rights in a transnational interpretation and, thus, do not form a separate legal order with a distinct legal source.

Second, which institutions – apart from the courts – are involved in the transnationalization of human rights? Given that transnationalized rights are international (or domestic and supranational) human rights in a novel interpretation, all organs entrusted with the application of these rights are potentially engaged in developing transnationalized interpretations of rights. While the transnationalization of human rights law will likely be in the hands of courts, other actors have started to enter the scene. The first group is transnational civil society actors (NGOs, think tanks, networks).[159] For example, in the field of transnational surveillance, more than 400 NGOs have signed the International Principles on the Application of Human Rights to Communications Surveillance, a 'Magna Carta' for a transnationalized understanding of the right to privacy.[160] A second group of actors that may contribute to a transnationalized understanding of human rights are domestic and regional parliaments. Parliaments are in a unique position to create, on the level of statutory law, binding, human rights-inspired obligations concerning not only the extraterritorial conduct of their state organs but also the cross-border activities of TNCs based in their territory. A third group involved in the transnationalization of human rights are national governments – for example, the recent EU–US agreement on the transfer of financial messaging data contains a transnationalized interpretation of the human rights principle of proportionality.[161]

Third, why would states be willing to submit to transnationalized interpretations of human rights as new limits to their power? To this intricate question, only tentative answers can be given. First, the stability of international cooperation regimes is increasingly dependent on their compatibility with human rights. For example, the 2009 EU–US TFTP Agreement did not receive the consent of the European Parliament and had to be renegotiated particularly because of its alleged incompatibility with European

[159] For a general account of the importance of non-govermental organizations in the development of human rights, see A. Neier, *International Human Rights Movement* (2012).

[160] International Principles on the Application of Human Rights to Communications Surveillance, 10 July 2013, available at https://en.necessaryandproportionate.org/text.

[161] See preamble of the 2010 EU–US TFTP Agreement, *supra* note 95 (stating that 'the principle of proportionality guiding this Agreement and implemented by both the European Union and the United States … as derived from the European Convention on Human Rights and Fundamental Freedoms … and … reasonableness requirements … as well as through prohibitions on overbreadth of production orders and on arbitrary action by government officials').

fundamental rights.[162] Second, advisory rulings by powerful courts (for example, the CJEU) are likely to exert significant influence on the human rights design of international cooperation regimes.[163] Third, in some cases, market power and the possibility of relocating services may induce a government to address foreign human rights concerns. For example, when SWIFT, a Belgium-seated company offering global financial messaging services for cross-border money transfers, decided to move the stored data from the USA to Europe, the US government was forced to negotiate an agreement with the EU on the processing and transfer of SWIFT data back to the USA.[164] Fourth, a factor motivating governments to embrace transnationalized interpretations of human rights is their reputation. For example, while the US government still does not recognize the extraterritorial application of human rights, the recent Presidential Policy Directive 28 nevertheless declares the 'privacy interest' (not the right to privacy!) to be applicable to transnational surveillance activities: '[O]ur signals intelligence activities must take into account that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside, and that all persons have legitimate privacy interests in the handling of their personal information.'[165]

Thus, there are, albeit cautious, signals not only that the project of transnationalizing rights is a normative ideal but also that protecting rights while acting transnationally is gradually becoming a reality.

[162] European Parliament, Legislative Resolution of 11 February 2010 on the Proposal for a Council Decision on the Conclusion of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for purposes of the Terrorist Finance Tracking Program, Doc. P7_TA(2010)0029 (2010), available at www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2010-0029&language=EN.

[163] Advocate General Mengozzi recently found the Draft Agreement between Canada and the European Union on passenger name records data partially incompatible with the right to privacy and the right to protection of personal data contained in the EU Charter of Fundamental Rights. See *Opinion 1/15*, 8 September 2016, Opinion of AG Mengozzi, ECLI:EU:C:2016:656, available at www.curia.eu.

[164] Pfisterer, 'Second SWIFT Agreement between the European Union and the United States of America: An Overview', 11 *German Law Journal* (2010) 1173, at 1175.

[165] Office of the Press Secretary, Presidential Policy Directive: Signals Intelligence Activities, White House, 17 January 2014, para. 4, available at www.whitehouse.gov/the-press-office/2014/01/17/presidential-policy-directive-signals-intelligence-activities.