
COMMENT

GERMANY'S SUPPORT OF ASSAD: CORPORATE COMPLICITY IN THE CREATION OF THE SYRIAN SURVEILLANCE STATE UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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I. INTRODUCTION

“Uncomplaining acceptance of the reality of society gives man indomitable courage and strength to remove all removable injustice and unfreedom. As long as he is true to his task of creating more abundant freedom for all, he need not fear that either power or planning will turn against him and destroy the freedom he is building by their instrumentality.”¹

“[M]arket societies must construct elaborate rules and institutional structures to limit the individual pursuit of gain or risk degenerating into a

1. KARL POLANYI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 268 (2d ed. 2001).

Hobbesian war of all against all . . . They must also act to channel the energies of those economic actors motivated largely by gain into a narrow range of legitimate activities. In summary, the economy has to be embedded in law, politics, and morality.”²

The availability of liberation technologies, or information and communication technologies utilized by individuals seeking greater freedoms and rights, has changed the nature of modern democratization movements by facilitating pro-democracy and anti-democracy efforts alike.³ The revolutionary potential of social media has been well documented, as it has played an important role in helping to unseat authoritarian leaders throughout the Arab Spring.⁴ However, these technologies can also provide the state with advanced surveillance capabilities and help governments crush democratic movements before they can get off the ground.⁵

The extent to which dictators employ repressive surveillance techniques varies widely.⁶ While obtaining reliable news from many of these war-torn states is a challenge, press reports indicate that dictators such as Bashar al-Assad have used intrusive surveillance

2. Fred Block & Karl Polanyi, *Karl Polanyi and the Writing of “The Great Transformation”*, 32 *THEORY & SOC’Y* 275, 297 (2003).

3. See Ronald Deibert & Rafal Rohozinski, *Liberation vs. Control: The Future of Cyberspace*, 21 *J. DEMOCRACY* 43, 44 (2010) (alluding to the ability of dictatorships to use liberation technologies to invade the privacy of its citizens by tracking and tracing digital information to specific people); Larry Diamond, *Liberation Technology*, 21 *J. DEMOCRACY* 69, 70 (2010) (“Liberation technology is any form of information and communication technology (ICT) that can expand political, social, and economic freedom.”).

4. See, e.g., Tanja Aitamurto, *How Social Media Is Keeping the Egyptian Revolution Alive*, PBS (Sept. 13, 2011), <http://www.pbs.org/mediashift/2011/09/how-social-media-is-keeping-the-egyptian-revolution-alive256.html> (highlighting the ongoing use of Twitter and Facebook for pro-democracy activism in Post-Mubarak Egypt); Justin Bomberowitz, *The Libyan Revolution Through Social Media*, BOSTINNO, (Aug. 22, 2011), <http://bostinno.com/2011/08/22/the-libyan-revolution-through-social-media/> (describing the importance of Twitter, Facebook, YouTube, and blogs in the Libyan revolution).

5. See, e.g., Diamond, *supra* note 3, at 71 (comparing authoritarian violence accomplished through the Internet to 19th century violence committed through the use of the telegraph).

6. See generally *The Technology Helping Repressive Regimes Spy*, NPR (Dec. 14, 2011), <http://www.npr.org/2011/12/14/143639670/the-technology-helping-repressive-regimes-spy> (discussing the variety of surveillance techniques employed in the Middle East, including text message analysis systems, email and cellphone surveillance, and the monitoring of internet traffic).

tools to track individuals' movements, access electronic files, and even detain and torture members of the opposition.⁷ Unfortunately, stories of detention and torture, aided by cutting-edge Western surveillance technology, are not uncommon.⁸ Many dictators cannot maintain effective surveillance without these Western companies, such as Trovicor GmbH (Trovicor), which provides both technological infrastructure and maintenance services.⁹ Not only does this type of surveillance allow egregious rights violations to go unfettered, it also prolongs bloody conflicts in transitioning states like Syria.¹⁰

This comment makes a case for state liability for extraterritorial human rights abuses committed by corporations under the framework of the European Convention on Human Rights (ECHR) and explains that the European Court of Human Rights (ECtHR) has already laid the foundation to find such a violation. Part II will discuss the current status of the ECHR. It will also explain the jurisdictional requirement laid out in Article 1 of the ECHR and describe when the ECtHR has

7. *See Monitoring the Opposition: Siemens Allegedly Sold Surveillance Gear to Syria*, SPIEGEL ONLINE, Apr. 11, 2012, <http://www.spiegel.de/international/business/ard-reports-siemens-sold-surveillance-technology-to-syria-a-826860.html> [hereinafter *Monitoring the Opposition*] (describing the Syrian regime's suppression of the opposition through use of surveillance technology, provided by the German company Trovicor, that is capable of tracking a speaker's location and identity).

8. *See, e.g.,* Meg Roggensack & Betsy Walters, *Excuses, Excuses: Surveillance Technology and Oppressive Regimes*, HUMAN RIGHTS FIRST (Nov. 18, 2011), <http://www.humanrightsfirst.org/2011/11/18/excuses-excuses-surveillance-technology-and-oppressive-regimes/> (providing examples of detention and torture made possible by Western surveillance technologies in states like Iran, Bahrain, Syria, Libya, Egypt, and Yemen).

9. *See generally* EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* 178 (2012) (detailing Western companies' disregard for engaging in proactive measures to limit the human rights abuses that occur through the use of their surveillance technologies).

10. *See* Roggensack & Walters, *supra* note 8 (mentioning that Syria does not have laws to limit the Government's ability to use surveillance technologies, allowing these technologies to prop up the repressive regime); *cf.* Ellen Nakashima, *Iran Aids Syria in Tracking Opposition via Electronic Surveillance*, *U.S. Officials Say*, WASH. POST, Oct. 9, 2012, http://articles.washingtonpost.com/2012-10-09/world/35500619_1_surveillance-software-syrians-president-bashar (describing how Syria has used surveillance strategies learned from Iran to track rebel groups via social media and send Syrian forces to identified areas to hamper opposition efforts).

asserted its authority outside of the traditional confines of the Council of Europe. Furthermore, it will describe how different cases have dealt with the positive obligations of states under Article 8, which codifies a right to privacy, and when these obligations have been enforced.

Part III will argue that the ECHR provides the ECtHR jurisdiction over the extraterritorial effects of a corporation's actions through the state agent theory. And, importantly, it will argue that Germany violated its positive obligation to respect the rights in Article 8 of the ECHR by failing to regulate the German company Trovicor GmbH (Trovicor) after it facilitated the creation of a Syrian surveillance state.

Part IV recommends that a more stringent and binding version of the Global Network Initiative be created in order to hold companies responsible for failing to uphold clear standards of corporate social responsibility. It also recommends that Germany adopt more stringent dual-use export control regulations in order to prevent its companies from exporting their technology to repressive regimes that use the technology to commit human rights violations. Additionally, it suggests that the exceptions to the World Trade Organization's (WTO) General Agreement on Tariffs and Trade (GATT) be expanded to include violations of human rights, so that when states like Germany impose stricter regulations on exports, they will not violate their WTO duties. Lastly, Part V concludes that Germany can be held liable under the ECHR for the actions of Trovicor and that the ECtHR should clarify its international precedent on the liability of a member state for extraterritorial human rights violations by companies.

II. BACKGROUND

On September 3, 1953, the European Convention on Human Rights (ECHR), drafted by the Council of Europe, entered into force.¹¹ The Council of Europe drafted the ECHR in response to the human rights violations of the Second World War.¹² With memories

11. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221 [hereinafter *ECHR*].

12. See GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* xxi, xxii–xxiii (2000) (recounting the evolution of

of the Holocaust fresh in the minds of the Council, the drafters of the ECHR questioned traditional notions of sovereignty and sought to curb the power of states by adopting strong substantive protections of rights and granting broad jurisdiction to the European Court of Human Rights (ECtHR), the judicial body that hears complaints under the ECHR.¹³ Like most human rights conventions, the ECHR not only requires states to refrain from committing violations, but also imposes positive obligations requiring a state to take affirmative steps to protect and promote the rights codified in the ECHR.¹⁴

In fact, many have praised the European system for achieving the most effective protection of human rights, as compared to the protection provided by other regional systems of human rights.¹⁵ Despite the ECHR's effectiveness, however, concerns of a governance gap, caused by globalization and the inability to control corporate activities, remain.¹⁶ Minimizing governance gaps is an extremely important task for human rights advocates because these gaps pose some of the most serious risks to human rights.¹⁷

international human rights after the Nuremberg trials and explaining how instruments like the European Convention were the first major regional response).

13. See *generally id.* (discussing the historical basis for the creation and development of case law for the European Court of Human Rights).

14. See Tawhida Ahmed & Israel de Jesus Butler, *The European Union and Human Rights: An International Law Perspective*, 17 EUR. J. INT'L L. 771, 771–75 (2006) (providing that the European Union (EU) member states may be bound by customary international law to protect certain human rights, thereby challenging traditional notions of community and sovereignty by subjecting those states to positive obligations and providing a place for international law to help guide domestic decision-making).

15. See Carole J. Petersen, *Bridging the Gap?: The Role of Regional and National Human Rights Institutions in the Asia Pacific*, 13 ASIAN-PAC. L. & POL'Y J. 174, 184–86 (2011) (highlighting that the ECHR not only has placed strict responsibilities on states that are party to the Convention, but also has served as a model internationally for the promotion of various human rights, including the right to a private life).

16. See EUROPEAN COALITION FOR CORPORATE JUSTICE & AMNESTY INT'L, GREEN PAPER ON THE REVIEW OF COUNCIL REGULATION (EC) NO 44/2001 ON JURISDICTION AND RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS 3 (2009) [hereinafter ECCJ & AI], available at http://ec.europa.eu/justice/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/amnesty_international_and_european_coalition_for_corporate_justice_en.pdf (defining governance gaps as failures in legal mechanisms to deter human rights abuses from occurring through the creation of liability for entities such as corporations).

17. See WORLD ECONOMIC FORUM, GLOBAL RISKS 2010: A GLOBAL RISK

A. ARTICLE 1 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
AND EXTRATERRITORIAL JURISDICTION

Article 1 of the ECHR states that contracting parties to the ECHR—states that comprise the Council of Europe—are responsible for guaranteeing the rights defined by the ECHR to any person within the jurisdiction of the respective states.¹⁸ The term “within their jurisdiction” has been the subject of much jurisprudential interpretation as applicants have advocated for an expansion of the ECHR’s protection beyond the territorial confines of the member states.¹⁹ A major impetus for these new interpretations is the ECtHR’s willingness to move away from the “ultimate control and authority test” to determine jurisdiction towards the much laxer “effective authority and control test,” which has resulted in more findings of jurisdiction.²⁰ Thus, the concept of jurisdiction has expanded substantially, making way for the Court to apply an extraterritorial interpretation.²¹

NETWORK REPORT 8 (2010), available at http://www3.weforum.org/docs/WEF_GlobalRisks_Report_2010.pdf (indicating that governance gaps are so uniquely dangerous because the growing interconnectedness of our globalized world provides more space for gaps to appear).

18. See *ECHR*, *supra* note 11, art. 1 (“The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”).

19. See Olivier De Schutter, *The Accountability of Multinationals for Human Rights Violations in European Law*, in *NON-STATE ACTORS AND HUMAN RIGHTS* 227, 238-51 (Philip Alston ed., 2005) (documenting the ECtHR’s cases that have interpreted Article 1 of the Convention, and noting that the European Commission of Human Rights has stipulated that “within their jurisdiction” can apply to agents of the State including diplomatic or consular agents, the military, and persons or property over which these actors exercise authority).

20. See Laura Henderson, Note, *With (Great) Power Comes (Great) Responsibility: A Move Toward Greater Responsibility for States Exercising Power Abroad*, 28 *UTRECHT J. INT’L & EUR. L.* 50, 54 (2012) (observing that the Court in *Al-Jedda v. United Kingdom* moved away from the ultimate authority and control test, thereby allowing more responsibility to be attributed to the extraterritorial actions of member states by accepting a lower threshold for control).

21. See *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 *Eur. H.R. Rep.* 18 ¶¶ 149–50 (2011) (finding that the actions of United Kingdom (UK) troops in Basra, Iraq, fell within the UK’s jurisdiction for purposes of Article 1 of the ECHR); see also Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 *NW. J. INT’L HUM. RTS.* 262, 294-95, 300 (2008) (describing the basis for civil and criminal accountability for the extraterritorial actions of corporations in the European context as a means to

Initially, in *Bankovic v. Belgium* (2001), the ECtHR limited the scope of Article 1 by using a fact-specific inquiry to analyze extraterritorial positive obligations, and by holding that, for a positive obligation to exist, the foreign state in question should have existed previously under the territorial confines of the ECHR.²² The *Bankovic* Court, therefore, appeared to seriously diminish the possibility of extraterritorial jurisdiction.²³ After this decision, the international community generally understood that Article 1 of the ECHR was essentially or primarily territorial in its application, only circumventable in exceptional circumstances.²⁴

The ECtHR has recently reversed this trend, however, and affirmed a broader interpretation of Article 1 jurisdiction.²⁵ In *Al-Skeini v. the United Kingdom* (2011), the Court formally listed the exceptions to the “essentially territorial” application of Article 1, when it held the United Kingdom responsible for the actions of its troops in Iraq.²⁶ First, the spatial model allows for jurisdiction when a Convention state exercises effective control, through initiating military action, over an area.²⁷ Second, the personal model allows for jurisdiction through the actions taken abroad by an agent of a state that is a party to the ECHR.²⁸ This can include the actions of a

ensure that corporations pay a penalty for violating human rights and victims receive reparations).

22. See Alexandra Ruth & Mirja Trilsch, *International Decision: Bankovic v. Belgium (Admissibility)*, 97 AM. J. INT'L L. 168, 170–72 (2003) (describing how the ECtHR seemed to narrow the holdings in *Loizidou v. Turkey* and *Cyprus v. Turkey* when it found that NATO bombings in Kosovo were not within the jurisdiction of Article 1).

23. See *id.* at 172 (highlighting that the *Bankovic* decision marked a drastic switch from the Court's previous decisions which seemed to expand the notion of jurisdiction beyond mere territoriality).

24. See *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333 ¶ 80 (establishing jurisdiction “only when the territory in question was one that, but for the specific circumstances, would normally be covered by the Convention”).

25. See Paolo Ronchi, *Al-Skeini v. UK: The Borders of Human Rights*, L.Q. REV. (forthcoming) (explaining the recent expansion of the territorial notions in Article 1, but also conveying the lack of clarity provided by the Court on this issue).

26. See *Al-Skeini*, 53 Eur. H.R. Rep. 18 ¶¶ 149–50 (utilizing a hybrid test to hold that the United Kingdom was responsible for the actions of its troops abroad because the UK exercised effective control over Iraq as an occupying power and its troops fulfilled the public power function by providing a security role).

27. *Id.* ¶ 138; Ronchi, *supra* note 25, at 3.

28. *Al-Skeini*, 53 Eur. H.R. Rep. 18 ¶¶ 133–36; see Cedric Ryngaert, *Clarifying*

diplomatic or consular agent in a foreign territory, any agent that exercises an executive or judicial public power function in a foreign territory, or a state agent that takes custody of an individual in a foreign territory.²⁹ As a result, the ECHR has gradually extended its territorial scope, opening the door for more cases to be brought before the ECtHR to test the limits of the formal exceptions to territorial jurisdiction.³⁰

B. POSITIVE OBLIGATIONS AND THE RIGHT TO PRIVACY UNDER THE EUROPEAN CONVENTION

Article 8 of the ECHR is widely recognized as establishing an individual's right to a private life.³¹ As compared to other international instruments, such as the International Covenant on Civil and Political Rights (ICCPR), the ECHR places a higher burden upon member states by requiring them to respect the right to privacy.³²

The ECHR, of which Germany is a party, provides a robust basis for imposing a positive obligation on states to protect an individual's

the Extraterritorial Application of the European Convention on Human Rights, 28 *UTRECHT J. INT'L & EUR. L.* 57, 60 (2011) (identifying the personal model of jurisdiction and the lack of explanation provided by the ECtHR on its meaning).

29. *Al-Skeini*, 53 *Eur. H.R. Rep.* 18 ¶¶ 134–36; cf. Ryngaert, *supra* note 26, at 60 (suggesting that positive obligations can and should extend through state agents because states need to be deterred from engaging in irresponsible behavior beyond their borders).

30. See Tarik Abdel-Monem, *The Long Arm of the European Convention on Human Rights and the Recent Development of Issa v. Turkey*, 12 *AM. U. HUM. RTS. BRIEF* 9, 11 (highlighting Russia as a likely candidate to be brought before the ECtHR for extraterritorial violations); Ronchi, *supra* note 25, at 4 (indicating that the Court has failed to elaborate on the State agent exception despite the potential importance of the exception).

31. Lee A. Bygrave, *Data Protection Pursuant to the Right to Privacy in Human Rights Treaties*, 6 *INT'L J.L. & INFO. TECH.* 247, 248 (1998).

32. See *ECHR*, *supra* note 11, art. 8(1) (“Everyone has the right to respect for his private . . . life.”); ALASTAIR MOWBRAY, *THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS* 1-2 (2004) (explaining that members of the European Convention on Human Rights must take positive actions to prevent violations of the convention even when a violation occurs between two private parties); *id.* at 250–59 (comparing the ICCPR's text to that of the ECHR and noting that while the ECHR has broad protections it has not fully developed its data protection laws).

right to privacy.³³ Although a negative obligation exists when a third party acts on behalf of a state, the ECHR also imposes a positive obligation when a third party acts independent of the state.³⁴ This authority derives from the requirement of states to respect the right to privacy and allows the ECtHR to hold a state liable for failing to take reasonable measures to prevent a third party from violating the rights codified in the ECHR.³⁵ As seen in *Fadeyeva v. Russia* (2005), the Court has most thoroughly developed the concept of positive obligations to control the actions of corporate entities in the case of environmental polluters, finding that governments have the responsibility to prevent corporations from diminishing an individual's right to enjoy his or her private life when private

33. *Germany*, COUNCIL OF EUROPE, <http://hub.coe.int/country/germany> (last visited Apr. 5, 2013) (noting that Germany ratified the ECHR on December 5, 1952; see MOWBRAY, *supra* note 32, at 1–3 (contextualizing the development of positive obligations in the European Court and recapping some of the earliest discussions of them). Compare *ECHR*, *supra* note 11, art. 8(2) (prohibiting violations of the right to privacy except “in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”), with U.N. Human Rights Commission, *CCPR General Comment No. 16: Article 17 (Right to Privacy), The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17)*, ¶¶ 3–4 (Aug. 4, 1988), available at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/23378a8724595410c12563ed004aee cd?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/23378a8724595410c12563ed004aee cd?Opendocument) (explaining that violations of the right to privacy, include arbitrary or unlawful searches, which are unreasonable given the circumstances, such as when public authorities fail to justify the data mining of personal information of an individual).

34. See DANIEL AUGENSTEIN, *STATE RESPONSIBILITIES TO REGULATE AND ADJUDICATE CORPORATE ACTIVITIES UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 7 (2011) (delineating between negative obligations, which enforce non-interference with rights by a state, and positive obligations, which require a state to respect and actively prevent third parties, like corporations, from violating the rights created by the ECHR).

35. See *ECHR*, *supra* note 11, art. 8(1) (stating that everyone has the right to respect of their private life); STEVEN GREER, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS: ACHIEVEMENTS, PROBLEMS, AND PROSPECTS* 215 (2006) (discussing the proactive requirement that states take reasonable positive measures to prevent violations of the Convention from taking place before they occur, even when committed by private parties); MOWBRAY, *supra* note 32, at 186, 225 (summarizing the extra requirements placed on a state through positive obligations, including the duty of states to protect individuals from having their rights in the ECHR violated by private persons).

corporations cause severe deterioration of the natural environment.³⁶

In these circumstances, the ECtHR has found a positive obligation is established when a sufficient nexus exists between the harm caused and the state.³⁷ The ECtHR often accounts for deference provided to the judgment of the state, also known as the state's margin of appreciation, by looking to whether the state has taken effective and reasonable measures to prevent prohibited behavior.³⁸ The ECtHR has held, however, that a state's knowledge of the frequent violation of human rights, coupled with the state's failure to act reasonably, can severely diminish the margin of appreciation afforded to the state.³⁹ Then, as offered in *Fadeyeva*, the ECtHR provides an extensive analysis using the so-called fair balance test, weighing the rights of an individual against the interests of society to determine whether a state fulfills its positive obligation.⁴⁰ Thus, the

36. See *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 257 ¶ 92 (holding Russia accountable for the pollution emanating from a steel plant); *Guerra v. Italy*, App. No. 14967/89, 1998-I Eur. Ct. H.R. 210 ¶¶ 56–60 (placing a positive obligation on Italy to prevent pollution from a factory); *López-Ostra v. Spain*, 303-C Eur. Ct. H.R. (ser. A) ¶ 58 (1994) (affirming that Spain had a duty to prevent pollution from a waste treatment plant).

37. See *Fadeyeva*, 2005-IV Eur. Ct. H.R. 257 ¶ 92 (determining that a sufficient nexus existed between Russia and the steel plant's pollution which prevented citizens from enjoying their private lives).

38. See Janneke Gerards, *Pluralism, Deference, and the Margin of Appreciation Doctrine*, 17 EUR. L.J. 80, 85-87 (2010) (comparing the margin of appreciation doctrine to deferential judicial review and recognizing the strong similarity between the two). See generally Steven Greer, *The Interpretation of the European Convention on Human Rights: Universal Principle or Margin of Appreciation?*, 3 U.C. LONDON HUM. RTS. REV. 1, 2–5 (2010) (tracing the introduction and development of the margin of appreciation doctrine within the ECtHR and underscoring its wide applicability today).

39. Compare *X & Y v. Netherlands*, 91 Eur. Ct. H.R. (ser. A) ¶¶ 24–27 (1985) (determining that the Netherlands was not afforded a margin of appreciation for failing to criminalize certain illegal acts that violated the right to private life), with *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (ser. A) ¶ 49 (1976) (providing the first application of the margin of appreciation doctrine by the ECtHR when it determined that the United Kingdom's restrictions on speech were reasonable because they served the Council of Europe's goal of promoting a democratic society).

40. *Fadeyeva*, 2005-IV Eur. Ct. H.R. 257 ¶ 94; see MOWBRAY, *supra* note 32, at 186 (detailing the use of the fair balance test in the ECtHR's jurisprudence). But see *ECHR*, *supra* note 11, art. 8(2) (identifying the legitimate interests of society for which an Article 8 right can be interfered with, such as national security, public safety, economic well-being, prevention of disorder or crime, protection of health

ECtHR has afforded great protection to the rights established in the ECHR, such as the right to a private life, by both imposing positive obligations on states and scrutinizing the validity of each state's actions.⁴¹

III. ANALYSIS

Unlike other authoritarian leaders in the Middle East, Bashar al-Assad has promoted the use of social media in Syria to help a group of pro-Assad hackers intercept communications and track the movements of the Syrian opposition.⁴² While these pro-government hackers are arguably drivers for many human rights violations in Syria, Germany's complicity in Syria's spying tactics violates the ECHR's guarantee of privacy, even though Syria is outside of the territorial confines of the Council of Europe.⁴³ Moreover, the severity with which Syria is violating the right to privacy and its utter disregard for its international obligations helps contextualize the second part of this analysis, i.e., Germany's responsibility for Trovicor's actions.⁴⁴

A. THE EUROPEAN COURT OF HUMAN RIGHTS HAS JURISDICTION OVER TROVICOR'S ACTIONS IN SYRIA UNDER THE STATE AGENT THEORY OF JURISDICTION BECAUSE GERMANY EXERCISES EFFECTIVE CONTROL OVER TROVICOR

Through utilization of Trovicor's technologies, Syria's surveillance capabilities extend beyond mere interception of communications and tracking of citizens' locations.⁴⁵ Because

or morals, or for protection of other rights and freedoms).

41. See generally MOWBRAY, *supra* note 32, at 1–5 (portraying the important role positive obligations have played in European jurisprudence).

42. See Ben Knight, *German Spyware Business Supports Dictators*, DEUTSCHE WELLE (Sept. 19, 2012), <http://www.dw.de/dw/article/0,,16249165,00.html> (pointing out Syria's inclination to use digital weapons against the opposition).

43. See *id.* (detailing the sale of malware by German companies to Syria, along with technology that has the ability to “identify political opponents” according to one of the company's brochures).

44. See *id.* (indicating that the spying has been so severe in Syria, that the EU has realized the increased need to create new export controls for these surveillance technologies).

45. See Vernon Silver & Ben Elgin, *Torture in Bahrain Becomes Routine with Help From Nokia Siemens*, BLOOMBERG NEWS (Aug. 22, 2011), <http://www.bloomberg.com/news/2011-08-22/torture-in-bahrain-becomes-routine->

Trovicor functions as a state agent of Germany, the ECtHR has jurisdiction to hear a complaint related to Trovicor's activities in Syria.⁴⁶ These activities constitute violations of Article 8 of the ECHR both because they arbitrarily interfere with individuals' private lives and private correspondence, and because they indicate that Trovicor's services fulfill a public power function in Syria.⁴⁷

1. Trovicor Is a State Agent Because Trovicor's Actions Are Attributable to Germany

To consider Trovicor a state agent for purposes of ECHR liability, its actions must be attributable to Germany.⁴⁸ Attribution is determined by which state has effective control over the violating entity, based on factors such as whether there is an explicit, legal duty upon the state to have some degree of responsibility for the entity's actions and whether the entity recognizes that the state has

with-help-from-nokia-siemens-networking.html (explaining that Trovicor allows states to intercept nearly all forms of digital transmissions, track individuals' locations through their phones, activate laptop applications without the user's knowledge, and even alter the content of digital communications).

46. See *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1 ¶ 81 (ordering that if a Council of Europe member state has jurisdiction over a private individual, then that member state has a duty to prevent that individual from violating another individual's Convention-protected rights, even while in a foreign area); *Company Overview of Trovicor GmbH*, BLOOMBERG BUSINESSWEEK, <http://investing.businessweek.com/research/stocks/private/snapshot.asp?privcapId=81677726> (last visited Apr. 4, 2013) (explaining that Trovicor is based in Munich, Germany); see also Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, HUMAN RIGHTS COUNCIL, ¶ 6, U.N. Doc. A/HRC/17/31, Annexes 24–25 (Mar. 21, 2011) [hereinafter *Guiding Principles on Business and Human Rights*] (arguing that the need for a judicial and non-judicial remedy to the governance issue of controlling the actions of multinational companies might necessitate such an expansive understanding of jurisdiction in regional human rights instruments).

47. See, e.g., Christian Fuchs, *Implications of Deep Packet Inspection (DPI) Internet Surveillance for Society*, in *THE PRIVACY & SECURITIES – RESEARCH PAPER SERIES 1*, 32 (2012) (putting into perspective the intrusiveness of Trovicor's surveillance technologies, like deep packet inspection, which involves a complete scan of all data and extraction of any relevant information).

48. See *Al-Jedda v. United Kingdom*, App. No. 27021/08, Eur. Ct. H.R. ¶ 85 (2011) (holding that in the case of unlawful detention in Iraq by British armed forces, the United Kingdom could be held liable through Article 1 if the violation of Article 8 could be attributed to the UK).

authority over it.⁴⁹ The determining fact for jurisdictional purposes is whether Germany had the ability to regulate Trovicor at the time that Trovicor entered Syria.⁵⁰

Trovicor, as a German-regulated company, is subject to Germany's control and authority both while operating in Germany and in regards to its business practices abroad.⁵¹ Trovicor is headquartered in Munich, Germany, and is a member of BITKOM, an organization that actively engages in lobbying efforts to change German policies, indicating that Trovicor recognizes its operations are subject to German regulation while in Germany.⁵² Also, given

49. See Kjetil Mujezinovic Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 EUR. J. INT'L L. 509, 522–23 (2008) (discussing the Court's decision in *Behrami*, where it found that the United Nations had ultimate authority and control, a more difficult standard than what is required today). Compare *Cyprus*, 2001-IV Eur. Ct. H.R. 1 ¶ 81 (conveying that when a state has control over a private party and acquiesces to that party's violation of ECHR in a foreign territory, then Article 1 jurisdiction can apply), with *id.* ¶ 82 (finding that the United Nations' official policy against indefinite internment indicated that its attempts to punish the unlawful detention proved the detention was not attributable to the UN). See generally Anne Peters, *The Applicability of the European Convention on Human Rights in Times of Complex Jurisdiction and the Principle of Fundamental Rights Tolerance*, 48 ARCHIV DES VÖLKERRECHTS 1, 19–41 (2010) (identifying the tension between state autonomy and the effective promotion of human rights as a central concern when applying the attribution theory for jurisdictional questions, thus giving rise to the notion of ultimate control).

50. See *Cyprus*, 2001-IV Eur. Ct. H.R. 1 ¶¶ 2–6 (Faud, J., partly dissenting) (noting the importance of the fact in *Loizidou v. Turkey* that Turkey had control over the TRNC at the time that the organization entered Turkey to establish Article 1 jurisdiction because Turkey was a significant cause of the Convention being violated); AUGENSTEIN, *supra* note 34, at 24 (creating a distinction between 'direct extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications' and stressing that it is easier to find ECHR jurisdiction in the latter-type cases).

51. See SIEMENS, ANNUAL REPORT 2011: CREATING SUSTAINABLE CITIES 29 (2011) [hereinafter SIEMENS ANNUAL REPORT], available at http://www.siemens.com/investor/pool/en/investor_relations/siemens_ar_2011.pdf (observing that Siemens AG, of which Trovicor is a subsidiary, is regulated by numerous pieces of German legislation, including the German Stock Corporation Act, the German Corporate Governance Code, and the German Codetermination Act).

52. See *About BITKOM*, BITKOM, http://www.bitkom.org/en/about_bitkom/42620.aspx (last visited Apr. 5, 2013) (outlining the organization's goals to promote strategic ICT-Policy within Germany to benefit its member companies); *Trovicor in Brief*, TROVICOR, <http://trovicor.com/en/company-en.html> (last visited Apr. 4, 2013).

that Trovicor has provided similarly improper surveillance to Bahrain, Germany could have active knowledge of Trovicor's actions, thereby creating an explicit duty for Germany to improve regulations targeting Trovicor.⁵³ Even though the European Union (EU) also maintains the ability to create export controls to regulate companies like Trovicor, the ECtHR has recognized that a state has effective control if an international organization allows the state to exercise comparatively more control over an entity.⁵⁴ In this instance, Germany specifically regulates the dual-use export market and has even more restrictive regulations than the EU regarding these items, demonstrating that Germany exercises comparatively more control over Trovicor than any other state or international entity.⁵⁵

While Germany arguably did not hold as much control over Trovicor when Trovicor began executing its maintenance and service contracts in Syria, Germany's control over Trovicor before it entered Syria sufficiently satisfies the effective control test.⁵⁶ As previously established, Trovicor is subject to German regulations.⁵⁷ The ECtHR has already determined that if a state is responsible for an entity's entry into a foreign territory, the Court has jurisdiction over the state for failure to uphold a positive obligation by controlling the actions

53. See Kim Zetter, *Nokia-Siemens Spy Tools Aid Police Torture in Bahrain*, WIRED (Aug. 23, 2011), <http://www.wired.com/threatlevel/2011/08/nokia-siemens-spy-systems/> (documenting Trovicor's involvement in twelve Middle Eastern and North African states and comparing the similarities between surveillance provided by Trovicor and weapons technologies).

54. Cf. *Al-Jedda v. United Kingdom*, App. No. 27021/08, Eur. Ct. H.R. ¶¶ 83–86 (2011) (determining that the United Kingdom had effective control over its troops who had unlawfully detained an individual, sufficient for jurisdiction, even though the United Nations Security Council authorized the mission in Iraq, because the ECtHR found that the UK had ultimate control over the troops' actions).

55. See ISABELLE MAELCAMP, *US COMMERCIAL SERV., EU EXPORT CONTROL ON DUAL USE ITEMS 4* (2010) (acknowledging that Germany places more restrictive regulations on dual-use exports by supplementing the EU's list of "most sensitive items" with its own list, and that this type of national list is expressly encouraged by Article 4 of the EU Council Regulation 428/2009).

56. See, e.g., *Loizidou v. Turkey*, App. No. 15318/89, 310 Eur. Ct. H.R. (ser. A) ¶ 56 (1996) (affirming the principle that even though Turkey did not exercise direct control of TRNC forces after they entered northern Cyprus, the fact that Turkey had effective overall control of those troops was sufficient for a finding of jurisdiction).

57. See SIEMENS ANNUAL REPORT, *supra* note 51, at 25 (detailing which pieces of German legislation apply to Trovicor).

of that entity.⁵⁸ Thus, Germany's effective authority and control over Trovicor allows the ECtHR to uphold Germany's jurisdiction over Trovicor as a state agent, if Trovicor's actions meet the public powers requirements of jurisdiction.

2. Trovicor's Actions Fulfill the Public Powers Requirement Because Its Surveillance Technology Acts as a Supplement to Law Enforcement, a Traditionally Judicial Function

One means by which the state agent jurisdictional exception applies is when the foreign state allows the agent to operate within its territory, by granting consent, extending an invitation, or demonstrating acquiescence.⁵⁹ Additionally, the agent of a member state, while operating in a foreign territory, must take on what is typically considered a public powers role within that territory, which consists of a major executive or judicial function.⁶⁰

Trovicor's contract with Syria fulfills the invitation requirement under this exception.⁶¹ A shroud of secrecy surrounds the situation, making it difficult to know the exact circumstances; however, reports indicate that Trovicor has signed a contract with Syria.⁶² If similar to

58. See, *Loizidou*, 310 Eur. Ct. H.R. (ser. A) ¶¶ 51–54 (distinguishing between effective control over an area as a grounds for jurisdiction and effective control over an entity within a foreign jurisdiction as a basis to impute ECHR liability on the contracting state responsible for that entity's actions).

59. *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18 ¶ 135 (2011).

60. *Id.*; Ronchi, *supra* note 25, at 4–5 (recognizing that the ECtHR has failed to develop the concept of what constitutes “public powers,” but also mentioning that the ECtHR found the UK's security role in Iraq to fulfill the public powers exception).

61. See *German Firm Sold Surveillance Equipment to Syria*, WORLD TRIBUNE (Apr. 15, 2012), <http://www.worldtribune.com/2012/04/15/german-firm-sold-surveillance-equipment-to-syria/> (detailing the relationship between Germany and Syria in terms of arms supplies and Trovicor's contract with Assad).

62. See *Monitoring the Opposition*, *supra* note 7 (referring to a report by public broadcaster ARD, which states that Trovicor's parent businesses signed a contract with a state-owned Syrian telecommunications company, STE); Andre Master, *Siemens and Syria: What Surveillance Technology Can*, NETZPOLITIK, (Apr. 11, 2012, 1:26 PM), <https://netzpolitik.org/2012/siemens-und-syrien-was-die-uberwachungstechnik-kann/> (claiming that the initial contract signed between Siemens and Syria, which was eventually transferred to Trovicor, was designed to serve a law enforcement purpose); Vernon Silver, *Merchants of Surveillance*, TREASURY & RISK (Dec. 22, 2011), <http://www.treasuryandrisk.com/2011/12/22/merchants-of-surveillance> (reporting that Trovicor's marketing director,

other contracts negotiated by Trovicor, this contract likely contained both sale and maintenance provisions.⁶³ Agreements of this kind, which allow one state's agents to operate in another state, have been used to meet the ECtHR's invitation requirement in the past.⁶⁴

Moreover, Trovicor's provision of law enforcement surveillance technologies and maintenance services signal that Trovicor fulfilled a public powers role within Syria.⁶⁵ The ECtHR most recently used a hybrid test that linked the state agent and effective control exceptions together, finding that attempts to secure the public order are a necessary part of the public power function because they help the rest of a government to function.⁶⁶ On the other hand, less necessary functions like providing supplemental education services are not considered enough to fulfill this exception.⁶⁷ Even though many in the international community recognize Assad's attempts to violently suppress a legitimate opposition, Assad has continuously claimed that surveillance measures are necessary to stop the terrorist actions of opposing forces, invoking concerns about national security and public order.⁶⁸ Therefore,

Fischer-Harrow, refuses to release more information related to its contracts).

63. See Vernon Silver & Ben Elgin, *Torture in Bahrain Becomes Routine With Help From Nokia Siemens*, BLOOMBERG NEWS (Aug. 22, 2011), <http://www.bloomberg.com/news/2011-08-22/torture-in-bahrain-becomes-routine-with-help-from-nokia-siemens-networking.html> (documenting that Trovicor signed a service and maintenance contract with Bahrain).

64. See, e.g., *Gentilhomme v. France*, App. Nos. 48205/99, 48207/99 and 48209/99, Eur. Ct. H.R. (2002) (describing that the ECtHR found jurisdiction when the Algerian Government signed an agreement allowing a French agency to operate schools on Algerian territory).

65. See *Trovicor in Brief*, TROVICOR, <http://trovicor.com/en/company-en.html> (last visited Apr. 5, 2013) (explaining that Trovicor provides monitoring and intelligence services that are used for the purposes of enhancing the work of law enforcement).

66. See *Al-Skeini v. United Kingdom*, App. No. 55721/07, 53 Eur. H.R. Rep. 18 ¶¶ 144–49 (2011) (determining that the UK fulfilled the public powers exception when the Coalitional Provisional Authority declared that the British military would provide for security and administration of Iraq, therefore the Court found the UK's control over its troops to be a controlling fact).

67. See *Gentilhomme*, Eur. Ct. H.R. (holding that the Article 8 evidence was inadmissible).

68. See Alan Cowell, *Syria Orders More Airstrikes and Calls French Recognition of Rebels 'Immoral'*, N.Y. TIMES, Nov. 14, 2012, <http://www.nytimes.com/2012/11/15/world/middleeast/syria-war-developments.html?pagewanted=all> (pointing out that, at the time that this article was written, the six Arab countries of the Gulf Cooperation Council and France had gone as far as recognizing the Syrian opposition coalition as the legitimate government of Syria,

the security function of Trovicor's surveillance technology, by helping to control the population, indicates its use for a public powers function.

Alternatively, in certain instances, under the personal model of jurisdiction, the ECtHR has ruled that the relationship between the state and the private party determines jurisdiction rather than the relationship between the state and the foreign territory.⁶⁹ The ECtHR imposes liability if the state is in a position to change the behavior of the private party.⁷⁰ Thus, the ECtHR may hold Germany liable because it has domestic control over Trovicor and a result of failing to effectively regulate the company is that Trovicor operates unlawfully within Syria.⁷¹ Consequently, not only is Trovicor likely considered a state agent that serves the public power function of providing law enforcement and national security support in Syria, but other innovative legal tests can also be applied by the Court to find jurisdiction.

B. GERMANY IS REQUIRED TO PREVENT TROVICOR FROM COMMITTING HUMAN RIGHTS VIOLATIONS ABROAD BECAUSE THE EUROPEAN CONVENTION ON HUMAN RIGHTS CREATES A POSITIVE OBLIGATION

Germany's positive obligation to protect the rights guaranteed by the ECHR requires it to control the activities of Trovicor because a

while the United States saw it as a legitimate representative of the Syrian people but had not officially recognized it as the government in exile); *see, e.g., Syrian President Tells Envoy Support of 'Terrorists' Must Stop*, CNN (Oct. 21, 2012), <http://www.cnn.com/2012/10/21/world/meast/syria-brahimi-assad-meeting/index.html> (recounting Assad's plea to a UN-Arab League envoy for countries to stop providing arms and other support to the rebel terrorists within his country). *But see* Mohammed Abbas & Alessandra Prentice, *UK Needs More Details Before Any Recognition of Syria Opposition*, REUTERS, Nov. 16, 2012, available at <http://www.reuters.com/article/2012/11/16/us-syria-crisis-opposition-britain-idUSBRE8AF0G220121116> (indicating that, at the time this article was written, the UK had delayed official recognition of the Syrian Opposition Coalition, which was formed in November 2012 in Doha, until more information about the group could be gathered).

69. *See, e.g., Issa v. Turkey*, App. No. 31821/96, 41 Eur. H.R. Rep. 27 ¶ 71 (2004) (focusing on the level of authority and control a state exercised through its agents operating in another state).

70. *See id.* (stressing that a state with control over one of its agents operating abroad may be held accountable for violations of the ECHR committed by that agent).

71. *See id.* (recognizing that liability can be incurred whether or not the state's agent is operating in the foreign territory lawfully or unlawfully).

sufficient nexus exists between Germany and the human rights abuses in Syria.⁷² Thus far, despite these violations of human rights in Syria, Germany has failed to take reasonable measures to prevent Trovicor's complicity in the invasion of privacy rights, thereby violating its responsibilities under the ECHR.⁷³

1. Germany Has a Positive Obligation Under Article 8 to Prevent Trovicor from Selling Surveillance Technologies to Syria Because a Sufficient Nexus Exists Between Germany and the Violations of Privacy

If there is a sufficient nexus between Germany and the surveillance occurring in Syria, Article 8 of the ECHR indicates that Germany has a positive obligation to take reasonable measures to prevent Trovicor from committing human rights abuses.⁷⁴ This nexus helps identify whether Germany could have reasonably been expected to take measures to stop the invasions of privacy of Syrian citizens.⁷⁵ The complex issue of whether a nexus exists, thereby

72. See *Monitoring the Opposition*, *supra* note 7 (underscoring the link between Germany's failed regulatory efforts and Syria's use of torture against those members of the opposition it identifies using Trovicor's technology).

73. Cf. Cindy Cohn & Jillian C. York, "Know Your Customer" Standards for Sales of Surveillance Equipment, ELEC. FRONTIER FOUND. (Oct. 24, 2011), <https://www.eff.org/deeplinks/2011/10/it's-time-know-your-customer-standards-sales-surveillance-equipment> (providing an example of a reasonable measure to prevent export of sensitive dual-use technologies to repressive regimes that calls for a company to avoid selling their products to customers who, following a reasonable investigation to reveal evidence or raise concerns, the company thinks will use those products to violate human rights).

74. See AUGENSTEIN, *supra* note 34, at 6 (observing that under the 'protect, respect, and remedy' framework, when a corporation is close to or owned by a state, or the corporation acts as an agent of the state, the state is liable for the wrongful foreign acts of the corporation); see also *Rotaru v. Romania*, App. No. 28341/95, Eur. Ct. H.R. ¶¶ 41–44 (2000) (upholding a violation of Article 8 when private information is subject to secret surveillance by a government and determining that the Romanian Government failed to take measures to provide effective safeguards against the Romanian Intelligence Services' ability to retrieve this information).

75. See, e.g., *Guiding Principles on Business and Human Rights*, *supra* note 46, Annexes 6–7 (suggesting that the legal relationship, when the actions of a corporation are attributable to a state, can determine whether the state is expected to act and whether there was a breakdown in governance); cf. *Fadeyeva v. Russia*, 2005-IV Eur. Ct. H.R. 257 ¶¶ 89–92 (2005) (recounting when the ECtHR determined that Russia was expected to take reasonable measures to prevent environmental pollution by a steel plant that had previously been owned by the

creating a duty to prevent the actions of the corporation, necessitates that the ECtHR look to certain factors, such as Germany's control over Trovicor, Germany's actual or constructive knowledge of Trovicor's activities, and Trovicor's level of responsibility for Syria's human rights violations.⁷⁶

Although Trovicor is not owned or operated by Germany, the facts that it is headquartered in Munich and that the German Bundestag regulates it indicate that Germany does exercise significant control over the company.⁷⁷ Trovicor was established in 2009 and was founded as a subsidiary of Siemens, a company incorporated in Germany and subject to German regulation.⁷⁸ Siemens began selling surveillance technologies to Syria in 2000 and this practice continued once Trovicor was officially established.⁷⁹ Furthermore, not only does Germany have the ability to regulate the data protection industry, it actively does so through regulations of the exportation of dual-use surveillance technologies.⁸⁰ Similar to *Fadeyeva*, where Russia was held liable for a Russian regulated steel plant's violations of Article 8, Germany has enough control over Trovicor to imply a

state and over which Russia continued to exercise control).

76. See *Fadeyeva*, 2005-IV Eur. Ct. H.R. 257 ¶¶ 89–90 (concentrating on issues of the control Russia had over a steel factory and the responsibility it bore in environmental cases); *Guerra v. Italy*, App. No. 14967/89, 1998-I Eur. Ct. H.R. 210 ¶¶ 57–60 (1998) (concentrating on the knowledge, possessed by the government, of the dangers a town faced from factory emissions that the government did not pass on to the affected population).

77. See *Trovicor in Brief*, *supra* note 65 (evidencing that Trovicor's website lists the location of its headquarters as Munich); cf. *Guiding Principles on Business and Human Rights*, *supra* note 46, Annex 7 (proposing that an effective way to remedy the governance gap when a corporation is headquartered in a specific state is to place responsibility on the state to guarantee that the corporation respects human rights abroad).

78. SIEMENS, ANNUAL REPORT 2011, *supra* note 51, at 25 (listing which acts of the German Bundestag regulate Siemens AG, the parent corporation of Trovicor); *Company Overview of Trovicor GmbH*, *supra* note 46.

79. See *Monitoring the Opposition*, *supra* note 7 (describing how the spin-off company, Trovicor, took over the Voice and Data Recording unit of Nokia Siemens).

80. See *Legislation (Non-Official Translations)*, FED. OFFICE OF ECON. & EXP. CONTROL, http://www.bafa.de/bafa/en/export_control/legislation/index.html (last visited Apr. 5, 2013) (providing links to each of the six major pieces of legislation passed by the Bundestag on the subject of export controls); Knight, *supra* note 42 (referencing new initiatives being put forth by the Left Party and Green Party in Germany to crack down on exportation of dual-use software to totalitarian states).

positive duty by Germany to take reasonable measures to prevent the human rights violations.⁸¹

Furthermore, Germany's awareness of Trovicor's human rights violations reveals that a sufficient nexus exists between Germany and the intrusions into the privacy of Syrian citizens, indicating that Germany not only had constructive knowledge, but also actual knowledge of Trovicor's activities.⁸² Trovicor, through Siemens, has been selling technology to Syria since 2000.⁸³ A member of the German Bundestag has even spoken out against the original contract signed with Syria, evidencing actual knowledge within the German government of the situation in Syria.⁸⁴ Furthermore, these human rights violations are not just limited to Syria: Trovicor sold similar surveillance technologies to other authoritarian regimes, including Bahrain, Egypt, Iran, and Tunisia.⁸⁵ This pattern of sales by Trovicor signals that Germany has, at the very least, constructive knowledge of Trovicor's actions, especially as compared to other instances where the ECtHR found a violation of Article 8 through constructive and actual knowledge.⁸⁶

81. See *Fadeyeva*, 2005-IV Eur. Ct. H.R. 257 ¶ 91 (holding Russia responsible for the environmental violations of private life by the Severstal steel plant because Russia exercised control over the plant but failed to prevent or reduce the pollution that it produced); see also *Guerra*, 1998-I Eur. Ct. H.R. 210 ¶¶ 57, 60 (holding Italy responsible for failing to control the activities of a factory that allowed waste to pollute the Manfredonia area, because the government possessed knowledge of the danger posed by pollution from the plant, but never acted to protect the people of Manfredonia or inform them of the danger).

82. See Knight, *supra* note 42 (reporting that German media had previously revealed the role of companies like Trovicor in the sale of malware to Syria).

83. *Monitoring the Opposition*, *supra* note 7.

84. See Mit Thomas Kausch, *Syria Monitors with Siemens Technology*, FAKT (Apr. 10, 2012, 9:45 PM), <http://www.mdr.de/fakt/siemens106.html> (indicating that Hans-Christian Ströbele declared that the German firms that sold surveillance technology to the Syrian regime, known for torturing regime opponents, were complicit in the regime's crimes).

85. See Trevor Timm, *Spy Tech Companies & Their Authoritarian Customers, Part II: Trovicor and Area SpA*, ELEC. FRONTIER FOUND. (Feb. 21, 2012), <https://www.eff.org/deeplinks/2012/02/spy-tech-companies-their-authoritarian-customers-part-ii-trovicor-and-area-spa> (showing that even after another German entity, Perusa Partners Fund, purchased Trovicor, the company has continued to help dictators in the Middle East and North Africa crack down on their citizens).

86. See, e.g., *Cyprus v. Turkey*, 2001-IV Eur. Ct. H.R. 1 ¶ 296 (2002) (finding a violation of Article 8 because Turkey knew the private lives of Greek Cypriots were being harmed and failed to alter its policy toward Cyprus).

Germany's knowledge of the situation is made even more apparent given the reactions of the EU and Germany itself.⁸⁷ The ECtHR has found positive obligations to prevent violations of the ECHR when public authorities are aware or have knowledge of the continuing violations, even if the public authorities have taken steps to improve the situations.⁸⁸ In this instance, members of the German Bundestag have publicly spoken out against the privacy violations in states to which Trovicor has exported its technologies.⁸⁹ Moreover, European countries and the broader European Parliament have responded by creating stricter export controls for dual-use technologies, such as those exported by Trovicor, and urged member states of the EU to take corrective measures to prevent surveillance technologies from reaching authoritarian regimes.⁹⁰ Thus, Germany had knowledge of both Trovicor's activities in Syria and the severity of human rights violations occurring in Syria, putting Germany in a position to prevent the exportation of these dual-use goods in the first place.

Furthermore, the nature and extent of the human rights abuses, in which Trovicor was complicit, speaks to the nature of the positive

87. See Knight, *supra* note 42 (illustrating the political climate and how minority parties in the Bundestag have called for increased pressure against companies like Trovicor); Valentina Pop, *EU Companies Banned from Selling Spyware to Repressive Regimes*, EU OBSERVER (Oct. 11, 2011, 6:12 PM), <http://euobserver.com/cyber/113791> (describing the negative response from NGOs and the media to dual-use technology being exported to repressive regimes and explaining the European Parliament's desire to be more pro-active in preventing this technology from being spread in the first place).

88. See, e.g., *Fadeyeva v. Russia*, App. No. 55723/00, 2005-IV Eur. Ct. H.R. 257 ¶ 89 (2005) (deciding that Russia had a duty to prevent the environmental pollution of a steel plant because the pollution violated the right to a private life and the degraded quality of the environment was both long-standing and well known).

89. See Tom Burghardt, *Torture Island: Where Offshore Meets the National Surveillance State*, DISSIDENT VOICE (Sept. 5, 2011), <http://dissidentvoice.org/2011/09/torture-island-where-offshore-meets-the-national-surveillance-state/> (drawing attention to comments by a spokesman for the association of federal criminal investigators in Germany who commented on the corruption within Siemens, which allowed Trovicor's technologies to be exported).

90. See Cindy Cohn, *EU Parliament Takes the First Step to Prevent Sales of Surveillance Equipment Used to Violate Human Rights*, ELEC. FRONTIER FOUND. (Oct. 6, 2011) (discussing the passage of an EU resolution in 2011 that bans the sale of surveillance technology that is then used to violate either human rights or democratic principles).

obligation established and the scope of German responsibility.⁹¹ While the ECtHR typically provides a margin of appreciation, similar to the judicial standard of reasonable deference, towards the decision-making of national authorities, the severity of the intrusions on privacy and the extent of Trovicor's involvement in these human rights abuses will greatly diminish the margin of appreciation afforded to Germany.⁹² When the cause of a human rights violation can easily be attributed to a specific corporation, the ECtHR has been willing to hold the state in which the corporation is based responsible because a positive obligation to prevent the violation exists.⁹³ Thus, the ECtHR will likely find Germany responsible for Trovicor's actions given that Germany had control over Trovicor, Germany knew of Trovicor's history of exporting its technologies to authoritarian regimes for surveillance purposes, and Germany knew of Trovicor's complicity in violating the Convention in such an egregious manner.

2. Germany Is Responsible for the Violations of Information Privacy Because Germany Failed to Fulfill Its Responsibility to Prevent Trovicor from Committing Human Rights Abuses

Given that state authorities have actual knowledge of Trovicor's actions, the next step is to compare the margin of appreciation

91. See Timm, *supra* note 85 (shedding light on the capacity of Trovicor's technologies to track and locate individuals which may be allowing the Syrian government to detain and torture its citizens as has reportedly occurred in Bahrain and Tunisia); Frankfurt am Main, *Middle East: German Technology Used Against Democratic Movements*, INT'L SOC'Y FOR HUMAN RIGHTS (Aug. 29, 2011), <http://www.ishr.org/Detailansicht.697+M5e490bfdd7b.0.html> (summarizing the severity of the crackdowns on opposition movements like those in Syria that can be attributed to comprehensive surveillance packages like those provided to Syria by Trovicor).

92. See *The Margin of Appreciation*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp (last visited Apr. 5, 2013) (noting that, given the proportionality doctrine, the margin of appreciation is severely diminished given a high risk that a right codified in the European Convention is being violated). See generally Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 N.Y.U. J. INT'L L. & POL. 843, 843-47 (1999) (providing the historical development of the margin of appreciation doctrine and explaining under which conditions the ECtHR will grant higher levels of deference).

93. See *Fadeyeva v. Russia*, App. No. 55723/00, 2005-IV Eur. Ct. H.R. 257 ¶ 94 (2005) (finding Russia responsible when the source of the environmental pollution in Cherepovets was easily attributable to the Russian steel plant).

afforded to states with the standard of effectiveness. The standard of effectiveness is the requisite degree of protection that needs to be afforded to remedy an ongoing human rights violation.⁹⁴ After accounting for Germany's margin of appreciation, the ECtHR typically looks to a fair balance between the societal interests at stake and the burden imposed on the state to ensure protection of ECHR rights.⁹⁵

First, the ECtHR will determine the standard of effectiveness, otherwise described as the mechanisms ultimately necessary to deter companies such as Trovicor from engaging in agreements to provide their technologies to repressive governments such as Syria.⁹⁶ In this regard, ECtHR judges are afforded the benefit of hindsight.⁹⁷ While German law provides the opportunity for the Bundestag to pass legislation requiring reporting of exports in order to affect political interests and the fulfillment of legal obligations, these laws have failed to implement clear criminal law provisions for committing human rights violations abroad.⁹⁸ In this instance, the standard of

94. See DIMITRIS XENOS, *THE POSITIVE OBLIGATIONS OF THE STATE UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS* 118 (2012) (defining the standard of effectiveness as an attempt to achieve an end and a complete resolution to the human rights abuse).

95. See *López-Ostra v. Spain*, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) ¶¶ 51–58 (1994) (determining that despite the state's margin of appreciation, specifically to promote a positive economic impact, the pollution and nuisance created by the waste-management plant negatively affected the community interests so much that a fair balance was not met between the competing interests); MOWBRAY, *supra* note 32, at 19 (listing factors the Court has considered in determining the "fair balance," including: "the importance of the public interest at stake and the state's margin of appreciation, the rule of law and the practice of the state parties with regard to the question at issue . . . the importance of the right at issue, the requirement to protect the rights of third parties, etc.").

96. See *López-Ostra*, 303-C Eur. Ct. H.R. (ser. A) ¶¶ 46–47, 58 (finding that the municipality's partial shutdown of the plant was not sufficient to cure the third party's violation of Article 8 because the state was required to guarantee a complete end to the violations); XENOS, *supra* note 94, at 106 (identifying that the ECtHR looks to the minimum scope of protection by adding up the different measures necessary to prevent the violation of the rights).

97. XENOS, *supra* note 94, at 118 (noting that judges may review comparative examples of past actions by member states or resolutions to aid their determinations).

98. See Außenwirtschaftsgesetz [AWG] [Foreign Trade Act], May 27, 2009, BGBL. I at 1150, §26 (Ger.) (laying out the reporting requirements for dual-use exports and the potential civil liability arising therefrom); *Export Control*, FED. OFFICE OF ECON. & EXP. CONTROL, http://www.bafa.de/bafa/en/export_control/

effectiveness is relatively high since Germany's control over Trovicor in this situation does not concern a direct extraterritorial action but a domestic action with extraterritorial effect.⁹⁹ The ECtHR recognizes that in certain contexts criminal law provisions are necessary to prevent a third party from violating an individual's right to a private life, despite the wide margin of appreciation afforded to the state.¹⁰⁰ The ECtHR's success depends on criminal laws' ability to create an effective deterrent and prevent future violations of ECHR rights.¹⁰¹ Because Trovicor's technology intrudes into individuals' private lives and leads to detentions, tortures, and disappearances, its technology violates the dignity of individuals; thus, the ECtHR will likely find that by not using criminal law provisions or preventing Trovicor from exporting dual-use technologies, Germany failed both to create an effective deterrent and to bridge the governance gap.¹⁰²

Moreover, the ECtHR is likely to identify other effective methods Germany could have employed to curtail Trovicor from propping up the Assad regime, in order to demonstrate whether the margin of

index.html (last visited Apr. 11, 2013) (recognizing the need to regulate export control technology through the Foreign Trade Act in order to prevent human rights violations). *But see* STEPHAN MÜLLER, OPPENHOFF & PARTNER, EXPORT CONTROL: GERMAN FEDERAL GOVERNMENT ADOPTS AMENDMENT OF THE FOREIGN TRADE ACT (on file with publication) (commenting that the 2012 amendments to the Foreign Trade Act downgraded many criminal offenses to simple regulatory offenses and imposed higher standards on what could constitute a criminal offense).

99. *See* AUGENSTEIN, *supra* note 34, at 43 (discussing that the ECtHR acknowledged a distinction between the two types of extraterritorial actions in *Bankovic*, and that the ECtHR holds domestic actions with an extraterritorial effect to a different standard).

100. *See* X & Y v. Netherlands, App. No/ 8978/80, Eur. Ct. H.R. ¶¶ 24–27 (1985), available at <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57603> (finding that the civil law did not adequately protect a sexually-abused, mentally handicapped minor, nor did it afford her the right to enjoy a private life).

101. *Id.* *But see* Rainer Buerger, *Germany Eases Rules for Dual-Use Exports, Ministry Says*, BLOOMBERG NEWS (Aug. 15, 2012), <http://www.bloomberg.com/news/2012-08-15/germany-eases-rules-for-dual-use-goods-exports-ministry-says.html> (showing that Germany makes the exportation of dual-use weapons a criminal offense because of the dangerous nature of the weapons and the need to deter the exportation of those arms through criminal embargoes).

102. *But see* *Export Control*, *supra* note 98 (indicating that Germany is moving in the opposite direction by relaxing restrictions so that only reckless infringement of embargoes on weapons can be criminalized).

appreciation is wide enough to cover Germany's actions.¹⁰³ The ECtHR looks to the standard of effectiveness, evaluating both the potential risk to individuals and determining available practical measures.¹⁰⁴ The potential risk is broad because a large number of people in foreign countries could be put under surveillance by their government's use of German technology.¹⁰⁵ Moreover, the sophistication of surveillance technologies, which include deep packet inspection technologies that are extremely intrusive, magnifies risk thereby providing the highest harm to individual dignity.¹⁰⁶ Because the potential risk to individuals is so broad, any practical solution needs to start at the source of the problem.¹⁰⁷ While states are afforded a wide margin of appreciation in respect to Article 8, the ECtHR likely will find that Germany could have taken reasonably necessary measures to protect an individual's right to privacy.¹⁰⁸

103. See discussion *infra* Part IV.A (conveying that a know-your-customer standard is a relatively effective method that Germany could have adopted).

104. See XENOS, *supra* note 94, at 109–10 (using the decision in *Onerildiz v. Turkey*, an Article 2 case, to show that the ECtHR first utilized the standard of effectiveness doctrine to determine whether a state failed to fulfill its positive obligation).

105. See Herman Zschiegner, *The Surveillance Market and Its Victims*, BLOOMBERG NEWS (Dec. 20, 2011), <http://www.bloomberg.com/data-visualization/wired-for-repression/> (providing a visual representation that shows that the citizens of Syria, Iran, Bahrain, and Tunisia have already been put at risk by Germany's technology, which is produced by multiple German surveillance firms); see also Jennifer Barker, *EU Parliament Urges Tough Rules for Surveillance Tech Exporters*, TECHWORLD (Oct. 24, 2012), <http://www.techworld.com.au/article/440003/eu-parliament-urges-tough-rules-surveillance-tech-exporters/> (noting that other repressive states seek sophisticated European surveillance technologies to spy on their citizens, including states like Iran, Ethiopia, Sudan, China, Burma, and Cuba).

106. See Fuchs, *supra* note 47, at 31–32 (documenting the impact of Trovicor's deep packet inspection which can record data related to any target, including his or her location, and communications like instant messages and phone conversations).

107. See MOWBRAY, *supra* note 32, at 186–87 (acknowledging that positive obligations often require procedural policy changes by a state in order to effectively remedy the violation); XENOS, *supra* note 94, at 116–18 (detailing practical protection mechanisms found by the ECtHR and explaining that these protections must meet a standard of effectiveness to remedy the current violation and future violations).

108. See *López-Ostra v. Spain*, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) ¶ 55 (1994) (recognizing that positive obligations diminish the margin of appreciation and require states to take reasonably necessary measures to secure those obligations); JEAN-FRANCOIS AKANDJI-KOMBE, POSITIVE OBLIGATIONS

The fair balance test sheds light on whether the state correctly assessed its need to take action given the standard of effectiveness and whether a state is obliged to secure an ECHR-protected right through a positive obligation.¹⁰⁹ The interests for Germany in allowing Trovicor to continue its exportation of surveillance technology without extra restrictions include avoiding the costs to secure monitoring of exports and promoting economic growth from those exports.¹¹⁰ The public costs to monitor exports and to effectively administer stricter export laws are very expensive, procedural endeavors.¹¹¹ Generally, the ECtHR has not shown reluctance in requiring states to institute procedural safeguards, such as information gathering, to guarantee that ECHR rights are not violated.¹¹²

UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A GUIDE TO THE IMPLEMENTATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 36 (2007), available at <http://echr.coe.int/NR/rdonlyres/1B521F61-A636-43F5-AD56-5F26D46A4F55/0/DG2ENHRHAND072007.pdf> (explaining that clear limits exist to a state's margin of appreciation in the context of Article 8 rights); *Guerra v. Italy*, App. No. 14967/89, 1998-I Eur. Ct. H.R. 210 ¶¶ 59–60 (1998) (indicating that if a state were to provide information to the population about the threat to their dignity, then the ECtHR would recognize that the state attempted to mitigate the harm).

109. See MOWBRAY, *supra* note 32, at 186–87 (summarizing that the ECtHR has refused to find positive obligations for social facilities and welfare benefits); see also *Guiding Principles on Business and Human Rights*, *supra* note 46, Annex 11 (noting that one of the biggest challenges posed by the governance gap is the need for states to effectively balance the social benefits of business growth with the need for human rights protection).

110. See EUROPEAN COMM'N, SURVEILLANCE OF INTRA-EURO-AREA COMPETITIVENESS AND IMBALANCES 56 (2010), available at http://ec.europa.eu/economy_finance/publications/european_economy/2010/pdf/ee-2010-1_en.pdf (indicating that much of German economic growth derives from external exports and the ability to stay competitive despite the increasing supply of cheap goods from Asia); U.N. DEV. PROGRAM SOUTH EASTERN & EASTERN EUR. CLEARINGHOUSE FOR THE CONTROL OF SMALL ARMS & LIGHT WEAPONS, INTERNAL COMPLIANCE PROGRAMMES 18–19 (2011), available at http://www.sipri.org/research/armaments/transfers/controlling/research/armaments/transfers/publications/other_publ/other%20publications/Internal%20Compliance%20Programmes.pdf (reciting the administrative monitoring required by Germany to implement the Foreign Trade Law, with regards to export licensing, certification, and other mandatory compliance measures).

111. See Buergin, *supra* note 101 (reporting German intentions to relax restrictions on dual-use exports in order to promote German competitiveness abroad).

112. See XENOS, *supra* note 94, at 115–16 (discussing that the ECtHR often

Lax export control laws directly increase Germany's Gross Domestic Product (GDP) by adding positive value to its balance of payments;¹¹³ however, the economic benefit in question only relates to export of dual-use surveillance technologies, which shows a marginal value of lax controls of these particular exports.¹¹⁴ The other major source of economic gain is encouraging growth and innovation in dual-use goods sectors by broadening the consumer market to foreign states, thereby increasing demand.¹¹⁵ While the surveillance sector in Germany produces high returns, the market is already flooded with fifteen larger companies, indicating that there might not be much opportunity for small and medium-size surveillance firms to grow.¹¹⁶

The societal interests at stake, however, are much greater than the marginal economic benefits that Germany could derive from laxer dual-use export laws.¹¹⁷ This is true because when weighing these competing interests, the ECtHR has typically not allowed purely economic concerns to justify the intrusion into ECHR protected rights.¹¹⁸ Even if the ECtHR imposes a heavy financial burden on the

requires administrative safeguards to be implemented at both a general and a specific level).

113. See generally Paul Krugman, *European Crisis Realities*, N.Y. TIMES KRUGMAN OPINION PAGES BLOG (Feb. 25, 2012, 7:01 AM), <http://krugman.blogs.nytimes.com/2012/02/25/european-crisis-realities/> (showing the integral role that exports played in the development of German competitiveness and the increase in GDP despite the growing European economic crisis).

114. See IAN DAVIS, *THE REGULATION OF ARMS AND DUAL-USE EXPORTS: GERMANY, SWEDEN, AND THE UK 19–22* (2002) (pointing out that export controls on surveillance, which is a subset of regulations on military trade, is merely one tool used in the vast arsenal of trade restrictions and regulations).

115. See *id.* at 161–62, 262 (highlighting that Germany has innovative tracking systems, and that increases in overall sales of dual-use exports translates to higher employment by companies in the exporting state).

116. See Jean Marc Manach, *Spyfiles: Revelations of a Billion-Dollar Mass Surveillance Industry*, OWNI.EU (Dec. 1, 2011), <http://owni.eu/2011/12/01/spyfiles-wikileaks-revelations-of-mass-internet-surveillance/> (portraying the saturation of the surveillance export market with over 133 companies exporting such technologies, fifteen of which were located in Germany).

117. See Fuchs, *supra* note 47, at 32 (detailing the intrusiveness of Trovicor's technologies and the repression that causes violations to individuals' dignity).

118. See *López-Ostra v. Spain*, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) ¶ 55 (1994) (finding the detriment to the enjoyment of private life caused by pollution from a waste treatment plant to outweigh the economic gain that the state received from the functioning of the plant); XENOS, *supra* note 94, at 103 (arguing

state, it tends to give preference to severe deprivation of rights over economic gains.¹¹⁹ Similar to cases already heard by the ECtHR, the Syrian Electronic Army consistently violates Article 8 rights—the rights to a private life and correspondence—through the collection of private information, the interception of correspondence, and the storage of private information.¹²⁰ Due to the immediacy and seriousness of the violations, which include the unlawful interference with private lives and more serious violations directly resulting from Trovicor's technologies, the ECtHR will likely determine that the societal interests at stake are quite grave.¹²¹

Moreover, much harm is done to the European community when entities discredit ECHR rights, because this creates a perception that rights can be violated without adequate justification, thereby increasing the chances of rights violations in the future.¹²²

that the pressing social need of extreme rights violations outweighs the potential economic benefits that a state stands to gain).

119. See *Ledyeva v. Russia*, Eur. Ct. H.R., ¶¶ 9-10 (2006) (holding that the economic benefit of the steel plant was not sufficient to justify a nearly complete deprivation to the right to enjoy private life); *Fadeyeva v. Russia*, App. No. 55723/00, 2005-IV Eur. Ct. H.R. 257 ¶ 101 (2005) (finding a violation of Article 8, despite recognizing that economic benefit of the steel plant to the Vologda area is explicitly considered a legitimate basis under Article 8(2) of the ECHR); XENOS, *supra* note 94, at 103 (comparing social costs to economic benefits).

120. See *Rotaru v. Romania*, App. No. 28341/95, Eur. Ct. H.R. ¶¶ 62-63 (2000) (holding that the collection and storage of private information was grounds for a violation under Article 8); *Malone v. United Kingdom*, App. No. 8691/79, 82 Eur. Ct. H.R. (ser. A) ¶ 80 (1984) (“[A]s far as interception of communications is concerned, the interferences with the applicant’s right under Article 8 (art. 8) to respect for his private life and correspondence . . . were not ‘in accordance with the law.’”).

121. See *Osman v. United Kingdom*, App. No. 23452/94, 1998-VIII Eur. Ct. H.R. 3124 ¶¶ 113-16 (1998) (explaining that seriousness and immediacy of the rights violations directly affects the outcome of the fair balance test); Anita McNaught, *The Business of Detention in Syria*, AL JAZEERA (Aug. 1, 2012), <http://www.aljazeera.com/indepth/features/2012/08/20128184129588523.html> (providing evidence of how surveillance strategies have been directly linked to detention and torture in the city of al-Bab, Syria); cf. BEN WAGNER, EXPORTING CENSORSHIP AND SURVEILLANCE TECHNOLOGY 9, 10, 12, 15 (2012) (documenting the human rights violations in Tunisia created by the use of similar surveillance technologies, such as violations of the freedom of expression and freedom of the press, as well as disappearances that occurred in Egypt).

122. See Sarah Miller, *Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction Under the European Convention*, 20 EUR. J. INT’L L. 1223, 1224-26 (2009) (illustrating the reputational harm for the

Unfortunately, Germany has failed to take the necessary measures to end Trovicor's violations of human rights.¹²³ Accordingly, the ECtHR will likely determine that Germany is not afforded a wide margin of appreciation in this instance and that the fair balance test indicates Germany violated the ECHR by failing to take action to place necessary regulations on dual-export surveillance technologies.

IV. RECOMMENDATIONS

In addition to having the European Court of Human Rights decide a case related to the human rights violations facilitated by Trovicor, other actions could be taken to prevent future commission of such human rights abuses. These solutions would require much international cooperation, but should be implemented as soon as possible to increase protection and prevent other rights violations from occurring in the interim. Broader approaches include strengthening the Global Network Initiative (GNI) or implementing stronger human rights protections through the World Trade Organization (WTO), while a narrower approach might require individual states, such as Germany, to change their export laws.

A. THE GLOBAL NETWORK INITIATIVE MODEL SHOULD BE ADOPTED WITH MORE EFFECTIVE ENFORCEMENT MEASURES

A coalition of ICT-related companies started the GNI to protect Internet freedom and prevent violations of privacy through the voluntary commitment of individual companies.¹²⁴ The GNI has not

legitimacy of human rights and of the ECHR when perceived rights violations, even if they are in a foreign territory, go unaddressed).

123. See Moritz Jaeger, *Germany Proposes Ban on Surveillance Software Exports to Totalitarian Regimes*, ZDNET (Sept. 18, 2012, 3:05 PM), <http://www.zdnet.com/germany-proposes-ban-on-surveillance-software-exports-to-totalitarian-regimes-7000004379/> (reporting that Germany has called for the EU to reform its dual-use export policies instead of taking action on a domestic level); David Meyer, *EU Moves to Stop Surveillance Tech Sales to Despots*, ZDNET (Dec. 8, 2011, 9:01 PM), <http://www.zdnet.com/eu-moves-to-stop-surveillance-tech-sales-to-despots-3040094614/> (indicating that the EU has recognized the leakage of surveillance technologies to authoritarian regimes and has called for all parties involved to take responsibility for this phenomenon).

124. See MINISTRY OF FOREIGN AFFAIRS OF THE NETH., GLOBAL CORPORATE RESPONSIBILITY FOR INTERNET FREEDOM 5 (2011), available at http://www.minbuza.nl/binaries/content/assets/minbuza/en/the_ministry/global-corporate-responsibility---freedom-online.pdf (stating that companies like Google,

been effective, however, because even though major information and communication technology firms have signed onto the voluntary agreement that promotes corporate social responsibility, many other businesses have refused to become members.¹²⁵ Furthermore, even corporations that have signed onto the agreement have failed to create a meaningful change in their decision-making by taking active measures to prevent their technology from falling into the hands of repressive governments.¹²⁶

Instead, states should implement the GNI's model with more effective enforcement, to actually change the behavior of companies and remedy the concerns of a governance gap.¹²⁷ The Council of Europe and the EU have already made efforts to address these corporate abuses by recognizing that it is in the best interest of Europe to place universal human rights above these corporate interests.¹²⁸ The United Nations (UN) has already stated that businesses should be held to a higher standard of corporate social responsibility to guarantee that fundamental rights are not violated.¹²⁹

Microsoft, Yahoo!, Evoca, and Folksam started GNI in order to protect free expression and privacy).

125. See Verne G. Kopytoff, *Sites Like Twitter Absent From Free Speech Pact*, N.Y. TIMES, Mar. 7, 2011, http://www.nytimes.com/2011/03/07/technology/07rights.html?_r=0 (reporting that three years after the launch of GNI, many important players have still refused to sign onto the voluntary pact).

126. See Jillian C. York, *Government Internet Surveillance Starts With Eyes Built in the West*, ELEC. FRONTIER FOUND. (Sept. 2, 2011), <https://www.eff.org/deeplinks/2011/09/government-internet-surveillance-starts-eyes-built> (noting Hillary Clinton's support of the GNI because it establishes a responsibility mechanism for corporations).

127. See Eva Galperin & Rebecca Bowe, *Global Network Initiative Gets an Inside Look at Tech Firms' Human Rights Practices*, ELEC. FRONTIER FOUND. (May 11, 2012), <https://www.eff.org/deeplinks/2012/05/global-network-initiative-gets-inside-look-tech-firms%E2%80%99-human-rights-practices> (recording the benefits of the GNI, such as, establishing senior oversight, communicating human rights issues throughout the organization, and establishing formal mechanisms to review metrics).

128. See ECCJ & AI, *supra* note 16, at 4 (noting that, since 2007, the Council of Europe passed a resolution on corporate social responsibility and that the EU has stressed the need for greater accountability on the part of corporations).

129. See U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM'R, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS: IMPLEMENTING THE UNITED NATIONS "PROTECT, RESPECT AND REMEDY" FRAMEWORK, U.N. Doc. HR/PUB/11/04, at 14 (2011) (highlighting the special role businesses play in society, and the importance of businesses committing to respect human rights).

While the UN's groundwork is helpful to further the cause, a binding, international mechanism that punishes companies for failing to meet the standards outlined is needed in order to effect change in a timely manner.

B. GERMANY SHOULD ADOPT MORE STRINGENT DUAL-USE EXPORT CONTROL REGULATIONS

Given that the GNI has failed to alter the behavior of corporations, binding state laws are needed to materially affect the actions of companies and to account for the governance gap, an option of which has already been discussed before the German Parliament.¹³⁰ In this vein, a German policy that would force companies to affirmatively determine for what purposes and how their customers intend to use their products could be effective at preventing another Trovicor-esque incident from occurring.¹³¹ Such a proposal could include more stringent export control laws that specifically outlaw the sale of surveillance technologies to Syria, to oppressive regimes generally, or to states with overbroad police discretion.¹³² This approach is necessary when voluntary approaches by companies to effectively monitor the activities of their clientele fail.¹³³ Under such a system,

130. See Dixie Hawtin, *Internet Charters and Principles: Trends and Insights*, GLOBAL PARTNERS & ASSOCS., http://www.giswatch.org/sites/default/files/gisw_-_internet_charters_and_principles.pdf (last visited Apr. 5, 2013) (underscoring the ineffectiveness of the Global Network Initiative because this charter is simply a voluntary engagement by companies and fails to have any sort of implementation mechanism); Knight, *supra* note 42 (elaborating on the pressure put on by the German socialist Left Party and the Green Party, both of whom demanded real accountability by these corporations through the creation of stricter laws to regulate the activities and exports of companies like Trovicor).

131. See Cohn & York, *supra* note 73 (conveying how a know-your-customer standard similar to the requirements laid out in the United States' Foreign Corrupt Practices Act could lay the foundation for effective regulation of dual-use exports). *But see* Sari Horwitz & Shyamantha Asokan, *U.S. Probing Use of Surveillance Technology in Syria*, WASH. POST, Nov. 17, 2012, http://www.washingtonpost.com/world/national-security/us-probes-use-of-surveillance-technology-in-syria/2011/11/17/gIQAS1iEVN_story.html (indicating that technology from California-based Blue Coat Systems might have entered Syria, thereby showing that the know-your-customer standard of the Foreign Corrupt Practices Act might not be sufficient to curb the behavior of these companies).

132. *Cf.* 15 C.F.R. § 732 (Supp. 3 2013) (describing the administrative red flag system in the United States that helps prevent exports from getting into the wrong hands).

133. See Cohn & York, *supra* note 73 (documenting the need for regulatory

the human rights record of a country and other country-specific factors can serve as red flags for any company seeking to export surveillance or other dual-use technologies.¹³⁴

More extreme examples of German regulation could include a complete ban on exportation of surveillance technologies to any authoritarian state as a proactive means to help eliminate the risk of aiding human rights abuses.¹³⁵ Any approach focused on German legislation would efficiently remedy the problem without having to deal with concerns about applying the European Convention extraterritorially.¹³⁶ While this comment does not provide an exhaustive list of legislative options available to Germany, the key takeaway is that Germany should develop more stringent export controls that create harsher punishments on companies that facilitate human rights abuses because Germany should seek to avoid ECHR liability for failing to effectively regulate its exports.

C. THE WORLD TRADE ORGANIZATION SHOULD ESTABLISH A
HUMAN RIGHTS-BASED EXCEPTION TO FREE TRADE TO
ENCOURAGE STRICTER EXPORT CONTROLS BY MEMBER STATES

As an organization with a larger number of member states than the Council of Europe, the WTO is in a prime position to prevent future rights violations that could be controlled through international trade.¹³⁷ Currently, the WTO allows states to limit trade if the traded item could hinder the right to life, a principle found in Article 2 of the ECHR.¹³⁸ The WTO does not create trade exceptions for many

approaches given that Nokia Siemens Networks, which owned Trovicor prior to Perusa Partners Fund, had adopted a voluntary Human Rights Policy, but clearly failed to abide by the mandates of that policy when it decided to export these technologies).

134. *Id.*

135. See Knight, *supra* note 42 (focusing on the potential of an EU-wide ban on exporting dual-use technologies to any of these authoritarian states because of the tendency of these states to use these technologies for illegitimate purposes).

136. See *Bankovic v. Belgium*, 2001-XII Eur. Ct. H.R. 333 ¶ 61 (2001).

137. See *Members and Observers*, WTO http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Apr. 5, 2012) (indicating that the WTO currently has 158 members).

138. See General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (1995) (listing the right to life exception to free trade); ECHR, *supra* note 11, art. 2 (codifying a right to life in the ECHR).

other kinds of rights violations, however, including the ECHR's Article 8 right to a private life.¹³⁹

By expanding the GATT exceptions, the WTO could help a responsible state create stricter dual-use export controls, such as a "know-your-customer standard," to avoid expensive litigation costs from states that typically import these dual-use technologies.¹⁴⁰ More importantly, modifying the GATT exceptions would create a new cause of action for people whose rights have been violated to file a formal complaint in front of the WTO, or even in the exporting states' domestic court for failure to adhere to an international treaty.¹⁴¹ These benefits could greatly enhance the reach of extraterritorial human rights claims and create a positive incentive for states to adopt stricter export controls.¹⁴² Thus, expanding the GATT exceptions to include human rights not only would create an international framework for human rights protection in trade, but would also encourage states to adopt stricter trade standards to avoid liability.

V. CONCLUSION

The increased export of Western surveillance technologies to oppressive regimes, such as Assad's regime in Syria, demonstrates the need for stronger restrictions to prevent future violations of universally recognized rights.¹⁴³ Because of the multinational nature

139. See Gudrun Monika Zagel, *WTO & Human Rights: Examining Linkages and Suggesting Convergence*, 2 IDLO VOICES OF DEV. JURISTS PAPER SERIES 3, 12–14 (2005) (defending the implementation of human rights and social clauses in the GATT exceptions to free trade in order to create a clear and non-arbitrary basis for imposing sanctions).

140. See ROBERT E. HUDEC, *DEVELOPING COUNTRIES IN THE GATT/WTO LEGAL SYSTEM* 61 (Joel P. Trachtman ed., 1987) (identifying fear of lawsuits as a legitimate concern for developed states and attributing the rise of pragmatism as an attempt by these developed states to avoid WTO lawsuits lodged by developing states).

141. See Zagel, *supra* note 139, at 12–13 (indicating that a human rights exception to the GATT would increase the overall protection of human rights by placing the burden on complainant states to show the trade restriction is not necessary to achieve the goal of increased human rights protections).

142. See *id.* at 22 (recognizing that an amendment to GATT is necessary to reach broad human rights protection, but that such protection is unlikely to occur in the current political climate).

143. See Timm, *supra* note 85 (recognizing the threat posed to internet freedoms by the increased use of surveillance technologies by repressive regimes and the

of these companies, it is difficult to hold each company responsible; however the ECtHR offers a framework for positive obligations that requires states to prevent human rights abuses by a corporation before they occur. Trovicor's actions fall within Article 1's jurisdiction because of the law enforcement nature of Trovicor's surveillance technology and the justifications given by Assad for using such technology as a means to fight terrorists and promote national security.¹⁴⁴ Moreover, Germany's failure to regulate Trovicor's actions constitutes a failure to fulfill the positive obligation imposed on it under the ECHR.¹⁴⁵ The result of such violations is extremely important, not only because of the arbitrary detentions, torture, and disappearances that result from the invasions on Syrian privacy, but also because the intrusions help break down the opposition and prolong the internecine conflict.

integral part Western technology plays in propping up these complex Syrian surveillance systems).

144. *See supra* Part III.A (exploring the relationship between the concept of preservation of public order and the development of the extraterritoriality principle of ECHR jurisdiction).

145. *See supra* Part III.B (discussing the duty Germany owes to Syrians whose right to private life is being violated and Germany's failure to impose reasonable restrictions on Trovicor).