RELATIONAL HUMAN RIGHTS RESPONSIBILITY

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ABSTRACT

When a private corporation cooperates with States as well as international organizations, and conduct stemming from this cooperation results in international human rights violations, who can be held legally responsible?

This Article dissects systemic deficiencies in the traditionally state-centric human rights regime and challenges its inadequacies when dealing with contemporary forms of transnational cooperative governance. Transnational cooperative governance refers to modes of cooperation in which States, and different non-State actors work together in addressing transnational concerns that cannot be adequately regulated by any one of these actors alone.

Using border management cooperation between HawkEye 360, the European Union, and its Member States as an illustration, this

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Article argues that in situations of cooperative governance—involving private corporations, international organizations, and States—legal responsibility for unlawful human rights conduct under the contemporary human rights regime cannot be apportioned effectively among the implicated parties. The diffusion of unlawful conduct between the implicated parties obfuscates whether primary human rights violations have occurred and how—if at all—secondary rules apply. This makes it hard to establish which actors committed a wrong capable of triggering an obligation of reparations for individual victims under international human rights law. For this reason, individual victims are ultimately left without an effective judicial remedy.

To eliminate this gap in responsibility, the Article advances "Relational Human Rights Responsibility" as an alternative or complementary approach to the international human rights regime in apportioning responsibility between actors involved in transnational cooperative governance. This theoretically grounded but ultimately policy- and litigation-oriented alternative is applicable beyond the sphere of border management and designed to safeguard the relevance of international human rights law for other forms of transnational cooperative governance implicating private transnational corporations, international organizations, and States.

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INTRODUCTION

HawkEye 360 is a US-based commercial company which was contracted by the European Union ("EU") to facilitate the EU's border management.[1] Through data sources made available by its commercial satellites, HawkEye 360 enables EU authorities to prevent asylum applicants from reaching European shores to ask for asylum.[2] HawkEye 360 provides EU authorities with access to location-data of asylum applicants at the very onset of their perilous journey, including on high seas and land areas of third countries.[3] In turn, this allows for the EU and its Member States to transmit this location-data to third countries, which can subsequently push- and pull individuals back to their points of departure, much faster than previously possible.[4] While to date Frontex has held that its contract with HawkEye 360 constitutes a pilot project and has not resulted in push- or pullbacks, it has also underscored that "[d]isclosing information regarding the technical equipment deployed in the operational area by Frontex and Member States would be tantamount to disclosing the exact type and capabilities of the

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[1] *See* Contract Award Notice, Poland-Warsaw: Satellite Radio Frequency Emitter Detection for Maritime Situational Awareness, 2019/S 244-5999045 (Dec. 18, 2019); Tenders Electronic Daily, Satellite Radio Frequency Emitter Detection for Situational Awareness (Sept. 9, 2020) [hereinafter Renewal of Contract] (announcing a renewal of the framework contract not subject to a public tender procedure, while keeping the details of this framework contract and its subsequent award confidential); s*ee generally* Matthias Monroy, *Maritime Surveillance: Spy Satellites in Frontex Operation*, SEC. ARCHITECTURES EU (June 26, 2022), https://digit.site36.net/2022/06/26/maritime-surveillance-spy-satellites-in-frontex-operation/ [https://perma.cc/UZ38-YXTL] (discussing these contracts).

[2] *See Space: The Final Frontier of Europe's Migrant Surveillance*, PRIVA. INT'L (July 26, 2021), https://privacyinternational.org/news-analysis/4601/space-final-frontier-europes-migrant-surveillance [https://perma.cc/6RFC-8RLL].

[3] *See id.*; *see also* Frontex's Use of Spy Satellites: Question for Written Answer to the Commission, Eur. PARL. DOC. E-002739/2022 (July 26, 2022), (MEP Özlem Demirel raising questions about contracts awarded by Frontex that provide for the use of space surveillance).

[4] *See* Joyce De Coninck, *Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?*, 24 GER. L. J. 342, 342-363 (2023) (analyzing how such push- and pullbacks are similarly effectuated through drone technology used in EU naval military operations); *see also Satellite and Aerial Surveillance for Migration: A Tech Primer*, PRIV. INT'L (July 21, 2021), https://privacyinternational.org/explainer/4595/satellite-and-aerial-surveillance-migration-tech-primer [https://perma.cc/HZ7R-3NE5] (discussing the state use of satellite and aerial surveillance as it relates to the migration sector).

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equipment. Releasing such information could benefit criminal networks . . . ."[5]

If such operations result in individuals being pushed or pulled back to unsafe countries without an assessment of their asylum claim, and to locations where they are documented as being routinely subjected to death, sexual violence, torture, or enslavement, the question of human rights responsibility arises. Which entity should be held responsible for the return of individual victims to an unsafe third country? HawkEye 360 for providing the location-data, the EU, or its Member States for making use of such data, or a configuration of these actors for their respective contributions to the harmful outcome? Despite unmistakable and concurrent involvement of private corporations, the EU, and its Member States, holding these entities legally responsible for their involvement under the contemporary human rights regime appears implausible, because of complications arising from "transnational cooperative governance."

In this Article, "transnational cooperative governance" refers to situations in which States and different non-State actors ("NSAs") cooperate in addressing transnational concerns that cannot be adequately regulated by any one of these actors alone. Globalization and the blurring of territorial jurisdictional boundaries through digitalization, mass migratory movements, and global environmental challenges, are but a few factors contributing to the rise of transnational cooperative governance. These factors have prompted a reshuffling of regulatory power, in which NSAs are increasingly endowed with powers that were previously exclusive to states. In other words, transnational cooperative governance is characterized by a muddling of public and private powers across territorial borders. Yet the manner in which these powers are reshuffled and reallocated do not follow one single trend and instead oscillate between variations of intergovernmentalism, supranationalism, and hybridization of governance.[6] This ensuing

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[5] E-mail from Frontex Press Office to Redacted by Priv. Int'l (June 9, 2021, 13:42:48 CST), https://privacyinternational.org/sites/default/files/2021-07/PI%20Frontex%20Request%20for%20Comment%20re%20Satellite.pdf [https://perma.cc/EU7A-825Q].

[6] Intergovernmentalism and supranationalism do not account for the trend where regulatory powers are outsourced by States and international organizations to private actors and the concomitant blurring of the public/private regulatory divide. *See* Benedict Kingsbury, *Global Administrative Law in the Institutional Practice of Global Regulatory Governance*, 3 WORLD BANK LEGAL REV. 3, 3-33 (2012); Benedict

patchwork of cooperative governance intended to tackle transnational concerns, in which States and NSAs share regulatory powers to varying degrees and intensities, inevitably affect the human rights and freedoms of individual persons. In turn, this prompts the question of how such rights are protected and safeguarded, and by which actor. In other words, is the—traditionally state-centric—human rights framework sufficiently adaptable to account for the multimorphism in transnational cooperative governance? Can the traditionally state-centric human rights regime effectively attribute human rights responsibility in cases of cooperative governance? Or, alternatively, is the human rights regime not sufficiently equipped to deal with instances of transnational cooperative governance that give rise to one single harm, due to conduct and responsibility being diffused across various regulatory actors? And more importantly, what are the implications of transnational cooperative governance on access to an effective remedy for individual victims?

Border management in the EU is illustrative of how instances of cooperative governance may detrimentally affect human rights protection and deprive individual litigants of access to an effective remedy.[7] EU border management is a shared competence between

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Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMPORARY PROBLEMS 15, 22 (2005).

[7] For example, Operation Sophia resulted in *de facto* push and pull-backs in cooperation with the Libyan Coast Guard ("LYCG") in violation of the non-refoulement principle. This was achieved by severing physical contact with individual TCNs in distressed vessels and the use of aerial surveillance, the transmission of coordinates to the LYCG, and the training of the LYCG. These practices evidenced a significant focus on the externalization of border and migration management, in favor of a consensual containment policy as opposed the claimed objective of dismantling smuggling and trafficking networks. Concerning *inter alia* aerial surveillance, *see* OMER SHATZ & JUAN BRANCO, COMMUNICATION TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT PURSUANT TO THE ARTICLE 15 OF THE ROME STATUTE 64-88 (2019); *EU/Italy/Libya: Disputes Over Rescues Put Lives at Risk,* HUM. RTS. WATCH (July 25, 2018), https://www.hrw.org/news/2018/07/25/eu/italy/libya-disputes-over-rescues-put-lives-risk [https://perma.cc/4TVE-HQCJ]; Zach Campbell, *Europe's Deadly Migration Strategy*, POLITICO (Feb. 28, 2019), https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/ [https://perma.cc/82QL-T9QW]. For scholarship on the matter, *see* Violeta Moreno-Lax, *Chronology and Conceptualization of "Integrated Border Management": The "Embodied Border" Paradigm*, *in* ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER EU LAW 27–41 (Paul Craig & Gráinne de Búrca eds., 2017) (describing how the "four-tier access control model" maps the movement of TCN-protection seekers and seeks to regulate their movement by first imposing measures that control migratory movements in third countries, second via border checks at the external border of

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the EU as an international (*sui generis*) organization in its own right, and its Member States. Consequently, to implement the EU's border management policy (intended to ensure an internal EU space without borders) cooperation is required between the Member States and the EU—as separate actors—for the securitization of the common external border. On the one hand, this shared power in border management is partially enforced through the EU's Border and Coast Guard ("Frontex"), which wields significant regulatory powers in the securitization of the common external border and coordinates the efforts of individual Member States. On the other hand, the EU Member States retain partial control in border management, particularly in making concrete determinations of admission and return of individuals at their respective borders. In addition, these actors increasingly rely on private transnational corporations for the acquisition and use of technology to facilitate and expedite the EU's border management.

The 2020 agreement between Frontex and the US-based company HawkEye 360 is an example of such cooperative governance between an international organization (the EU), States, and a private corporation.[8] The contract awarded by Frontex to the US-based leading commercial corporation allowed the EU and its Member States to gain access to four sources of surveillance data derived from satellites owned by HawkEye 360, which is specialized in geospatial analysis.[9] Access to this data is intended to enhance maritime and situational awareness for Frontex and, in turn, the EU's Member States, supposedly to facilitate and improve border management. However, the legality of this enhanced awareness and border management hinges on whether the EU's border management can be considered as compliant with internal and international human right standards. Aerial and satellite surveillance is increasingly relied on by Frontex in cooperation with

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the European Union, third by exercising control measures within the Union, and finally by executing expulsions of individuals that do not meet the conditions for entry and/or stay in the Union); *see also* Mariagiulia Giuffré & Violeta Moreno-Lax, *The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Migratory Flows*, *in* RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 82, 85-90 (Satvinder Singh Juss ed., 2019); Daniel Ghezelbash et al., *Securitization of Search and Rescue at Sea: The Response to Boat Migration in the Mediterranean and Offshore Australia,* 67 INT'L & COMPAR. L. Q. 315, 334 (2018).

[8] *See* Renewal of Contract, *supra* note 1.

[9] *About: Revolutionizing RF Analytics*, HAWKEYE 360 (last visited Nov. 16, 2023), https://www.he360.com/about-us-rf-analytics/#top [https://perma.cc/ERK4-ECDK].

EU Member States to transmit the location data of third country nationals ("TCNs") seeking international protection to the Libyan Coast Guard. The EU NAVFORMED Operation Sophia and its successor Operation Irini provide ample evidence of these practices.[10] In exchange for collaboration with the EU, the Libyan Coast Guard subsequently pulls and pushes these individuals back to Libyan territory where it has been widely documented that these individuals are subjected to a wide array of abuses ranging from torture, enslavement, sexual violence and/or death.[11]

Leaving aside the political salience of questions concerning efficient border management, the practice stemming from Operation Sophia and its successor Operation Irini is irreconcilable with the essence of the non-refoulement principle, which is anchored in international, regional, and domestic human rights law.[12] The non-

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[10] *See* SHATZ & BRANCO, *supra* note 7; *infra* note 88; *see generally* EUROMED AND STATEWATCH, EUROPE'S TECHNO BORDERS (2023), https://www.statewatch.org/media/3964/europe-techno-borders-sw-emr-7-23.pdf [https://perma.cc/77ZA-VJVR] (on the EU's "techno-borders").

[11] *See supra* note 7.

[12] There are subtle nuances to the non-refoulement principle. *See* Convention relating to the Status of Refugees art. 33, Apr. 22, 1954, 189 U.N.T.S. 150 [hereinafter the Refugee Convention] ("No Contracting State shall expel or return . . . a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."); *cf. with* Charter of Fundamental Rights of the European Union arts. 51-54, 2012 O.J. (C326) [hereinafter CFR] *and* Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 4, 1950, ETS 5 [hereinafter ECHR]. The prohibition of refoulement under the Refugee Convention is not based upon the prohibition of torture or inhuman treatment, but rather limited to those individuals who are considered refugees in line with Article 1(A)(2) of the Refugee Convention. This protection is accorded to anyone who fears persecution pursuant to one (or more) of the five grounds enumerated in Article 1. Further, according to Article 33, non-refoulement may not be invoked when there are reasonable grounds to believe that the person concerned constitutes a danger to the security of the residing state. This exclusion distinguishes the Refugee Convention from the broader protection accorded against refoulement under the ECHR, the Convention against Torture, the International Covenant on Civil and Political Rights. As a result, the CFR pursues absolute protection against refoulement. This suggests that protection under the Refugee Convention is generally more limited than the protection under the aforementioned human rights treaties, as can explicitly and implicitly be read in cases by the Strasbourg Court case law itself. *But see* FANNY DE WECK, NON-REFOULEMENT UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE UN CONVENTION AGAINST TORTURE – THE ASSESSMENT OF INDIVIDUAL COMPLAINTS BY THE EUROPEAN COURT OF HUMAN RIGHTS UNDER ARTICLE 3 ECHR AND THE UNITED NATIONS COMMITTEE AGAINST TORTURE UNDER ARTICLE 3 CAT 47 (2017) (arguing that the difference in protection standards is not very pronounced, and certain forms of persecution protected by the Refugee Convention may not reach the severity threshold to trigger the non-refoulement

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refoulement principle holds that individuals seeking international protection must have their claim for international protection processed to ensure that they are not returned to a country where they are at risk of being subjected to a significant level of ill-treatment that meets the severity threshold to trigger the non-refoulement principle.[13] Yet through the use of aerial and satellite surveillance data generated by drones and satellites, TCNs are prevented from seeking and asking international protection. Instead, they are returned to states that civil society organizations, courts, and tribunals have repeatedly acknowledged as unsafe. Multiple applications have already been lodged with the International Criminal Court in an attempt to prosecute this conduct as crimes against humanity.[14]

The cooperation between Frontex, EU Member States, and HawkEye 360 is illustrative of three-pronged cooperative governance: the EU's border management is implemented by (1) EU Member States who contribute to (2) Frontex Operations and EU border management policy (3) as supported technology procured by private corporations, such as HawkEye 360. This three-dimensional form of cooperative governance subsequently facilitates returns of individuals to third countries (such as Libya) in violation of the internationally, regionally, and domestically recognized prohibition on refoulement. In other words, individuals are prevented from

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prohibition; *see also* EMAN HAMDAN, THE PRINCIPLE OF NON-REFOULEMENT UNDER THE ECHR AND THE UN CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT 23-24, 27-28, 38, 67 (2016) (pointing out that the protection afforded under the Convention Against Torture is limited to acts of torture, whereas the protection against refoulement afforded under the ECHR encompasses protection against torture, as well as cruel, inhuman and degrading treatment or punishment; *see also* ROBERTA MUNGIANU, FRONTEX AND NON-REFOULEMENT – THE INTERNATIONAL RESPONSIBILITY OF THE EU 100-102 (Laurence Gormley & Jo Shaw eds., 2016) (highlighting the overwhelming number of signatory states to the Refugee Convention and the human rights treaties that implicitly or explicitly protect non-refoulement; observing that the customary nature of non-refoulement is exhibited in the compliance of States who are specially affected by the principle but *not* bound by the Refugee Convention).

13 *See*, *e.g.*, DE WECK, *supra* note 12, at 1-3.

14 *See* SHATZ & BRANCO, supra note 7, at 107; *See*, *e.g.*, EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, THE INTERNATIONAL FEDERATION FOR HUMAN RIGHTS & LAWYERS FOR JUSTICE IN LIBYA, ARTICLE 15 COMMUNICATION TO THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT (2021); EUROPEAN CENTER FOR CONSTITUTIONAL AND HUMAN RIGHTS, ECCHR'S 2022 COMMUNICATION TO THE INTERNATIONAL CRIMINAL COURT ON CRIMES AGAINST MIGRANTS AND REFUGEES IN THE CONTEXT OF THE SITUATION IN LIBYA – INTERCEPTIONS AT SEA AS A CRIME AGAINST HUMANITY (three separate communications to the Office of the Prosecutor of the ICC alleging crimes committed against migrants) (2022).

escaping the territorial waters of Libya, and thus cannot lodge requests for international protection, in direct violation of the non-refoulement principle.

The current regulatory framework leaves open the question of which actor will incur responsibility and how for facilitating and/or contributing to a situation in which the individual right to *non-refoulement* principle may be violated. Simply put, there are actors (Frontex, the EU Member States, and the US-based company HawkEye 360) complicit in generating harms towards individuals through their cooperation in the violation of a binding rule of non-refoulement. Despite this, there is no framework in place to assign responsibility other than the traditionally state-centric human rights regime. Cooperative governance between the EU Member States, Frontex, and HawkEye 360 diffuses conduct and responsibility across the three actors and prevents individual claimants from accessing an effective remedy. In turn, this obstructs the potential to hold the EU, its Member States, and/or HawkEye 360 responsible for violations of the internationally recognized non-refoulement principle. In reflecting a responsibility-remedy gap, the traditionally state-centric human rights regime thus appears ill-equipped to deal with these forms of cooperative governance.

This responsibility-remedy gap also resurfaces outside of the realm of border management and on an international scale. Consider the ongoing human rights and environmental issues arising for local communities affected by extractive industries and trade in conflict minerals. Such operations necessarily implicate private international corporations, as well as States that provide the former with the requisite authorizations to conduct extractive works. Similarly, the trade competences enjoyed by international organizations such as the EU add a level of indeterminacy and complexity to the respect of human rights by States engaged in trade relations with third countries.[15] In all these domains, cooperative governance is determined by a dynamic between an international organization, States, and private corporations. Time and again, the question of which actors incurs what type of responsibility for contributing to human rights violations lacks a definitive answer.

Three-pronged constellations of cooperative governance involving private corporations, international organizations, and States raise even more complicated questions about apportioning

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[15] *See* JAN WOUTERS & MICHAL OVÁDEK, THE EUROPEAN UNION AND HUMAN RIGHTS: ANALYSIS, CASES, AND MATERIALS 663 (2021).

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legal responsibility for human rights violations. What all these scenarios have in common is that, despite the experienced harm—collective or individual—by claimants, the three-pronged convoluted cooperation between States and NSAs prevents—or at least complicates—the apportioning of wrongful conduct to implicated actors. In turn, the inability to decisively identify those responsible for human rights violations prevents access to an effective remedy for the affected claimants. The responsibility-remedy gap stemming from such cooperative governance warrants asking whether the traditionally state-centric human rights regime—including the developments *vis-à-vis* NSAs—is still appropriate in safeguarding human rights effectively and, if not, how the regime's shortcomings should be reconceptualized to ensure that human rights remain practical and effective, as opposed to theoretical and illusory. This *status quo* concerning the human rights responsibility of NSAs raises the question of whether modes of cooperative governance are deliberately and precisely deployed to avoid triggering human rights responsibility and ensuing obligations.

This Article identifies the reasons for the responsibility-remedy gap in constellations of transnational cooperative governance and introduces a novel approach—relational human rights responsibility—that is designed to hold private corporations, international organizations, and States legally responsible for their conduct.

The Article relies on the "prototypical case principle" to relay the responsibility-remedy gap flowing from transnational cooperative governance. Ran Hirschl explains that reliance on the prototypical case is warranted insofar as the case study can "feature as many key characteristics as possible."[16] The cooperation between the EU, its Member States, and private corporations providing technology to expedite and facilitate the EU's Integrated Border Management ("IBM") policy showcases the three-pronged transnational cooperative governance that is under scrutiny in this Article. These examples are prototypical, as all actors involved are bound by (international) human rights norms to a certain degree, yet through their cooperative conduct, counterintuitively contribute to (potential) human rights violations *vis-à-vis* individual claimants. Accordingly, given the integrated and supranational nature of the

[16] RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 224, 256 (2014).

EU, and its advanced human rights framework which applies directly to its Member States and indirectly to the companies which are contracted thereby, the difficulties associated with establishing responsibility in this scenario will likely resurface for other forms of transnational cooperative governance as well.

The Article complements the vast business and human right literature,[17] as well as the scholarship on the responsibility of international organizations, which tackles unlawful conduct of a broad range of NSAs from different perspectives.[18] In contrast to most existing work, this Article does not address accountability generally, but instead analyses legal responsibility for unlawful conduct stemming specifically from transnational cooperative conduct.

Numerous scholarly works have been written critiquing other components of the traditional human rights responsibility regime, which fall outside the remit of the present work.[19] This Article is specifically geared towards unveiling and remedying only some of the limitations of the traditionally state-centric human rights regime. The Article hence complements existing scholarship and addresses its critics by recalling that flaws in the contemporary state-centric human rights regime do not invalidate its objective or demand its erasure. Conversely, and in line with the famous human rights adage, human rights must not be theoretical and illusory, but must instead be practical and effective.[20] In turn, this warrants a reconceptualized approach to human rights responsibility, intended to safeguard the essence of those universal, indivisible, and interrelated rights in a world of increased transnational cooperative governance, where the state is no longer the sole guarantor thereof.

The Article proceeds as follows: Part I addresses the rise of NSAs in the international human rights law landscape and the response and consequences flowing from these developments. Part II deconstructs the conditions to establish human rights responsibility

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17 *See* discussion *infra* Section II.a; *see also* Surya Deva et al., *Business and Human Rights Scholarship: Past Trends and Future Directions*, 4 BUS. HUM. RTS J. 201, 205-212 (2019) (discussing new thematic directions for future BHJR scholarship).

18 *See* discussion *infra* Section II.b.

19 *See, e.g.*, SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); GRÁINNE DE BÚRCA, REFRAMING HUMAN RIGHTS IN A TURBULENT ERA (both arguing for a reformation of the human rights movement in the current political and social context of neoliberalism, inequality, and illiberalism) (2021).

20 *See, e.g.*, N.D. v. Spain, App. No. 8675/15, ¶ 171 (Feb. 13, 2020), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-201353%22]} [https://perma.cc/H8PN-2UXR]; HAMDAN, *supra* note 12, at 17-18.

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from an international and regional EU angle. Part III addresses the rise of transnational cooperative governance in an EU border management setting. Finally, Part IV argues that the traditionally state-centric human rights regime is no longer adequate in addressing human rights violations, particularly when such violations are the result of transnational cooperative governance. To remedy this problem, an alternative and complementary model of human rights responsibility—relational human rights responsibility—is advanced, which builds on the separate and siloed strands of scholarship concerning responsibility of NSAs.

I. NON-STATE ACTORS IN INTERNATIONAL HUMAN RIGHTS LAW

This Part elaborates on the rise of NSAs in the international arena, the subsequent impact such NSAs have had on human rights, and some of the reactions this has prompted within the sphere of international human rights law. Following a discussion of the types of regulatory and legislative reactions prompted by the increased visibility and enhanced powers of (transnational) businesses and international organizations generally, transnational cooperative governance is introduced. Transnational cooperative governance in this Article does not point to problematic human rights conduct by a business or problematic human rights conduct by an international organization. Instead, it points to the situation whereby these actors cooperate with each other, as well as with states, and this cooperation gives rise to human rights harms. In other words, it doesn't look at the human rights responsibilities of businesses and that of international organizations independently of each other, but instead looks at the question of responsibility when they cooperate, including with states. It complexifies the responsibility of NSAs by recognizing that frequently, human rights harms do not emanate from one of these actors alone, but rather result from the complex interactions between states, international organizations, and businesses. This section concludes by pointing out several obstacles that must be carefully considered to remedy the human rights responsibility-remedy gap that has developed due to increased recourse to transnational cooperative governance.

a. The Rise of New Regulatory Actors in International Law

Philip Alston famously implied that the terminological dichotomy between States and NSAs subordinates the governance role of the latter to the former and questioned whether this dichotomy adequately portrays the human rights role increasingly taken up by NSAs.[21] He noted that "[m]aking space in the legal regime to take account of the role of non-State actors is one of the biggest and most critical challenges facing international law today."[22] His prophetic words echoed by many[23] have not missed their mark, as evidenced by the continuous human rights challenges against international organizations and transnational businesses alike. Comprehensively mapping the unlawful human rights practices of NSAs goes beyond the remit of this contribution since, more so now than ever, NSAs are powerful regulatory players. They have adopted a dual role of being significant human rights guarantors, while simultaneously wielding significant power capable of detrimentally impacting human rights. Think for example of multinationals in the textile, clothing and footwear sectors giving rise to fast fashion at the expense of labor rights, children's rights, health rights and women's rights.[24] By voluntarily setting human rights standards or being (in-)directly affected by international trade agreements, NSAs become potential guarantors of fundamental rights and retain the capacity to disregard human rights on large scale *vis-à-vis* their employees. Similarly, the oil extraction sector may rely on human rights-conditional authorization for extraction purposes, while at the same time be responsible for human rights violations of communities displaced because of such extraction. These human rights issues involving transnational businesses resurface, among others, in the construction, agro-chemical, and electronics sector.

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[21] Philip Alston, *The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 3-6 (Philip Alston ed., 2005).

[22] *Id.*

[23] *See* ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS 1-3 (2006); JAMES SUMMERS & ALEX GOUGH, NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS 1-12 (2018).

[24] Justine Nolan, *Regulating Human Rights in the Textile Sector: Smoke and Mirrors*, *in* RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS 291, 307 (Axel Marx et al. eds., 2022).

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The EU is a particularly noteworthy example of how an international organization may also fulfill this dual role. The EU is the first *sui generis* international organization that has adopted its very own legally binding *internal* human right catalogue, which exists alongside international human rights instruments with quasi-identical rights. The Charter of Fundamental Rights ("CFR") is inspired by the common constitutional traditions of EU Member States, as well as by the International Bill of Human Rights and relevant international and regional human rights treaties.[25] Considered as one of the constitutional instruments of the EU, the CFR binds both the EU Member States and the EU's institutions, bodies, offices, and agencies to protect, respect and fulfill the rights enshrined therein.[26] Furthering its role as a human rights guarantor, the EU underscores that it is founded on "the rule of law and respect for human rights"[27] and requires adherence thereto by candidate EU Member States, while still imposing a financial human rights conditionality on its Member States. This is done by streamlining the human rights provisions in the EU's internal legislation. Respect for human rights has likewise been streamlined into the EU's external relations, including in its trade agreements with third countries and its Common Foreign and Security Policy.

Despite this commitment to human rights adherence internally and in its external relations, the EU has been and continues to be subject to consistent accusations of having contributed to human rights violations in the enactment of its IBM policy. These accusations culminated in multiple applications brought before the International Criminal Court alleging EU responsibility for crimes against humanity for its border management policy, as well as a number of complaints before the EU's own Court of Justice. [28] To date, however, the EU has not yet been legally held responsible for

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[25] *See* Consolidated Version of the Treaty on the Functioning of the European Union arts. 2, 6, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU]; CFR, *supra* note 12, arts. 51-54.

[26] CFR, *supra* note 12, art. 51.

[27] *See* Consolidated Version of the Treaty on European Union art. 2, May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU].

[28] *See* SHATZ & BRANCO, *supra* note 7, at 107. *See also* Case T-31/18, Izuzquiza v. Frontex, 2019 E.C.R. ECLI:EU:T:2019:815; Case T-675/20, Leonardo SpA v. Frontex, 2022 E.C.R. ECLI:EU:T:2022:870; Case T-205/22, Naass v. Frontex, 2022 E.C.R. ECLI:EU:T:2022; Case T-282/21, SS v. Frontex, 2022 E.C.R. ECLI:EU:T:2022; Case T-600/22, ST v. Frontex, 2022 E.C.R. ECLI:EU:T:2022; Case T-600/21, WS v. Frontex, 2023 E.C.R. ECLI:EU:T:2023:492; Case T-136/22, Hamoudi v. Frontex, 2022 E.C.R. ECLI:EU:T:2022.

having contributed to human rights violations in the enactment of its border management policy. Why is that? One could argue there is simply not enough evidence to hold the EU legally responsible. This is hardly tenable, however, in light of the mounting evidence implicating the EU's agencies in clear-cut human rights violations stemming from individuals being sent back to and retained in third countries where they are routinely subjected to torture and other forms of cruel, degrading and inhumane treatment—if not death.

Instead, this Article advances the argument that the absence of responsibility is largely due to the transnational cooperative governance that characterizes EU border management and the inadequacy of the contemporary human rights regime in allocating responsibility in such scenarios. In other words, the cooperation between the EU, the Member States, and private companies to ensure the EU's border management creates a problem of "many hands," which the contemporary human rights regime never foresaw and thus cannot accommodate.

b. The Responsibility-Remedy Gap

The human rights regime initially sought to regulate the relationship between the individual and the State, granting the individual certain basic and inalienable rights that could be enforced *vis-à-vis* the State and function as a limitation to its power. What it did not foresee and regulate was the relationship between the individual and a (transnational) private company, as it also did not foresee and regulate the relationship between the individual and international organizations. These two tangential approaches to human rights responsibility came later and developed divergently.[29] But crucially, even the laudable developments in business and human rights did not foresee or accommodate situations in which all three actors would cooperate and give rise to human rights harms together. In turn, the absence of any meaningful developments in this field has allowed for human rights violations to occur at the hands of States, international organizations, and private businesses—all of which are bound by human rights to varying degrees—while leaving individual victims without access to remedy.

[29] *See* discussion *infra* Section II.a.

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In the field of business and human rights, a wide range of regulatory and legal initiatives have emerged in response to the human rights issues that stem from the conduct of transnational corporations.[30] These initiatives include, among others, voluntary reporting, streamlined due diligences obligations, and internal complaint procedures.[31] Additionally, soft law guidelines and principles were developed, some of which have slowly hardened.[32] Similarly, with respect to international organizations—such as the EU—there is an increased visibility of human rights in their relations with other public actors, as well as in their internal workings. Dismayingly, one of the main critiques of these developments (for businesses and international organizations alike) is that they remain largely ineffective and unenforceable.[33] But to assess ineffectiveness and unenforceability, it is crucial to understand the objectives behind these developments. And while there are many, the critique of ineffectiveness and unenforceability is particularly relevant when considering individual claims by victims against these actors. In other words, these developments have proven fairly ineffective and unenforceable in ensuring the right to an effective remedy for individual victims. This is not necessarily surprising. By and large the increased visibility of human rights and human rights parlance adopted by businesses and international organizations alike pursue different objectives than the traditional state-centric human rights regime. Whereas human rights were traditionally intended to provide individuals with actionable claims *vis-à-vis* their governments, these more recent developments appear *less* rights-based. Instead, the human rights regime has undergone a shift from a rights-based approach towards a governance regime, expanding on the human rights toolbox and the types of actors that are tasked with ensuring human rights protections.

This development is not inherently problematic. What is problematic however, is that the shift from a rights-based approach to a human rights governance-regime has not gone hand in hand with corresponding rights-based safeguards.[34] The increased duty-

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30 *See generally* Axel Marx et al., *Introduction to the Research Handbook on Global Governance, Business and Human Rights*, *in* RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS 1-13 (Axel Marx et al. eds., 2022) (discussing business and human rights initiatives).

31 *Id.*

32 *Id.* at 18.

33 *Id.* at 13-19.

34 *See* discussion *infra* Part II.

holders and the expanded human rights toolbox (guidelines, reporting, due diligence, internal grievance mechanisms) which characterize the developing human rights landscape appear to facilitate human rights awareness, but at the same time undermine access to an effective remedy for aggrieved individuals. It is not problematic to acknowledge the rise of new regulatory actors who impact human rights. However, it *is* problematic not to recognize that these actors cooperate in a transnational manner, especially because transnational cooperative governance triggers multiple human rights legal regimes. Domestic torts, for instance, apply to businesses and private actors, while *public* liability and human rights norms apply to States. As different legal regimes remain misaligned, implicated actors find it easier to avoid responsibility, and people are ultimately left without access to an effective remedy.

To understand how this responsibility-remedy gap developed and how responsibility may be and/or should be apportioned between State and NSAs, it is important to first understand how international, regional, and domestic human rights regimes responded to the rise of these distinct NSAs.

II. NOVEL BUT MISALIGNED APPROACHES TO HUMAN RIGHTS RESPONSIBILITY

Mindful of the fact that human rights commitments are understood as international obligations, the Article adopts the traditional divide between primary norms and secondary rules in the field of international responsibility. Primary norms refer to the (international and regional) human rights standards and obligations that bind duty-bearers, and which they must respect, protect, and fulfill. They are considered standards of conduct and directed at the duty-bearers. Secondary rules refer to the rules that determine when a violation of the primary rules has occurred, and the conditions under which remedies may be provided. These rules are considered standards of review and are directed at the adjudicators that apply these rules. Crucially, in the realm of human rights, these primary and secondary rules have been traditionally and overwhelmingly developed to govern the relationship between individual right-holders and States which exercise territorial jurisdiction over said individuals. This limits the efficacy of these rules in holding NSAs responsible for human rights violations.

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Questions on the responsibility of NSAs are not new and date back to as early as 1949, when the International Court of Justice ("ICJ") broached the topic of international responsibility of international organizations in its *Reparations* advisory opinion. In its opinion, the ICJ famously clarified that international organizations as subjects of international law are "bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[35] Leaving aside the daunting question of when an international organization and/or private business may be considered a subject of international law, the ICJ went on to hold that "[t]he subjects of law in any legal system are not necessarily identical in nature or in the extent of their rights, and their nature depends on the needs of the community."[36] Thus, already the ICJ conceded that NSAs and States may be subject to different legal regimes under international (human rights) law.

In fact, the edited volume delivered by Alston in 2005 addressed the precise question of the normative differences between State and NSAs in the realm of human rights responsibility.[37] In his introductory remarks to this volume, Alston critiques the state-centric one-dimensionality of the international human rights regime and calls for a reconceptualized way of thinking about human rights responsibility to capture the role of NSAs more adequately. His analysis at the time appears to question the desirability of primary human rights rules for NSAs as such, and to a lesser degree, the nature of such obligations, as well as their scope. In other words, it is questioned whether it is desirable to have legally binding human rights obligations for NSAs, whether such obligations should be different for corporations than for States, and whether such human rights obligations should be limited to the direct and indirect spheres of influence of the NSAs.[38] On the desirability of human rights obligations of NSAs generally, and businesses specifically,

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[35] *See* Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶ 37 (Dec. 20); *see also* Olivier De Schutter, *Human Rights and the Rise of International Organizations: The Logic of Sliding Scales in Law of International Responsibility*, *in* ACCOUNTABILITY FOR HUMAN RIGHTS VIOLATIONS BY INTERNATIONAL ORGANIZATIONS 55-56 (Jan Wouters et al. eds., 2010) (addressing the issues of imposing human rights obligations on international organizations).

[36] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

[37] Alston, *supra* note 21, at 6.

[38] *Id.* at 19-25.

Alston notes the dangers of overregulation and excessive human rights limitations on the competitive advantage of companies.[39] Finally, he remarks a recurring question at the time concerning the (receding) dominant regulatory role of the State in light of the rise of NSAs. Here, Alston notes the difference between incorporating NSAs in the *analytical* framework on NSA responsibility versus imposing *normative* obligations on NSAs.[40]

This Article does not question whether the State is still the dominant actor under international law, or its potentially receding role in light of the rise of NSAs. In situations of transnational cooperative governance specifically, the dominance of State actors over NSAs or vice versa only truly bears relevance in the determination of responsibility and ensuing remedies. States and NSAs now work together instead of independently of each other, consistently interacting and muddling the private/public divide, and militating away from siloed responsibilities. This study does not question this development. Instead, any reconceptualized international human rights regime should reflect this dynamic and be mindful of the ultimate objective of human rights protection to safeguard individuals' rights. As Tomuschat notes, while States may be the key actors in adherence to human rights, the traditionally state-centrist international human rights regime would be doomed to fail if it only made space for such actors.[41]

Following this trend, the question of whether NSAs *should* be bound by (international) human rights norms has become outdated. The EU, for example, is now bound to human rights norms by virtue of its internal CFR. Meanwhile, private corporations are subject to an ever-growing body of soft-law norms and hard-law instruments that stipulate requirements under international human rights law.

The foregoing underscores the widespread consensus on the need to consider primary and secondary human rights rules for NSAs but falls short of investigating how this consensus could and should translate into responsibility in practice, particularly when NSAs cooperate, including with States. Instead—as demonstrated by ongoing developments in the realm of business and human rights and the corporate social responsibility (see *supra*)—the need for primary rules gave rise to voluntary codes of conduct, as well as soft

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[39] *Id.*

[40] *Id.*

[41] *Id. See also* CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (1st ed. 2003).

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law norms and principles for businesses, with only limited focus on how and when such primary rules would be considered violated and capable of triggering responsibility and ensuing remedies according to *secondary* rules.

Conversely, the rise of international organizations as influential regulatory powers occurred somewhat slower and prompted an analytical framework for their international responsibility in 2011 with the International Law Commission's Articles on the Responsibility of International Organizations ("ARIO"). The ARIO encompass *secondary* rules, and there are significantly less developments concerning *primary* rules for international organizations.

In sum, the business and human rights regime appears more focused on primary rules, whereas the international organizations and human rights regime appears more geared towards the development of secondary rules, yet neither regime focus on both primary norms and secondary rules, and neither were developed in a manner that aligns these responsibility regimes with each other and that of State responsibility for human rights.

a. Business and Human Rights

Developments in the field of business and human rights are categorized semi-sequentially by Deva in three eras: (1) the business or human rights era; (2) the business *and* human rights era; and (3) the business *of* human rights era.[42] The largest developments happened and continue to happen in this second era, in which Deva distinguishes four time periods.[43] In this first period, spanning from 1974–1992, the debate on human rights and businesses was dominated by the question of whether businesses should enjoy rights according to developed countries or instead bear responsibilities according to developing countries.[44] In the subsequent time period from 1998–2004, the debate largely centered around the question of whether there should be voluntary primary

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[42] *See* Surya Deva, *From "Business or Human Rights" to "Business and Human Rights": What Next?*, *in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 1 (Surya Deva & David Birchall eds., 2020).

[43] *Id.* at 3.

[44] *Id.*

norms or binding primary human rights norms for businesses.[45] These debates gave rise to the non-binding Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises.[46]

In the following time period, spanning from 2005–2011, the Ruggie Principles[47] were developed. The Ruggie Principles are characteristic of the business and human rights approach and can be broken down into three sections, which systematically introduce foundational principles for each section, followed up by a set of concretized operational principles. These principles focus first and foremost on the obligations of *States* to ensure compliance by businesses with human rights commitments, underscoring the state-centrism in the development of primary human rights norms for businesses. The second set of principles address *corporate* responsibility to respect human rights. Under this heading, the foundational principles hold that businesses "should respect human rights" by refraining from infringing upon human rights and addressing (*ex-ante* and *ex post*) the adverse effects of human rights violations. The Ruggie Principles clarify that businesses should heed the International Bill of Human Rights, as well as relevant International Labor Organization conventions, and that these Principles apply to businesses regardless of their size, form, or nature. The foundational principles under Section II of the Ruggie Principles are concretized in operational norms. These norms require *inter alia* commitment to human rights, communicated vis-à-vis an informed, publicly available company policy; human rights due diligence; the assessment of actual or potential adverse effects of company endeavors; and effective follow-up action to address adverse impact, both as means to track concerns and remediate those adversely effected. Finally, Section III of the Ruggie Principles

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[45] *Id.* at 4.

[46] Subcommission on the Promotion and Protection of Human Rights, Working Group on the Working Methods and Activities of Transnational Corporations, *Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: Draft Norms / Submitted by the Working Group on the Working Methods and Activities of Transnational Corporations Pursuant to Resolution 2002/8* 2002/8, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003).

[47] John Ruggie (Special Representative of the Secretary-General on 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*, U.N. Doc. A/HRC/8/5 (Apr. 7, 2008) [hereinafter Draft Treaty on Business and Human Rights].

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again shifts the obligation to States, specifically their duty to ensure access to an effective (judicial and non-judicial) remedy within their jurisdiction and territory.[48]

Two imperative observations must be made when analyzing the Ruggie Principles. At first glance, the distinction between Ruggie's foundational and operational principles suggests that the primary norms attached to corporate responsibilities (regardless of whether binding or not) are quite vague and indeterminate. What does it mean when businesses are required to "avoid causing or contributing to adverse human rights impacts through their own activities and address such impacts when they occur" and "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products, or services by their business relationships . . . "? When is something considered an "adverse human rights impact"? When can a business considered to be contributing to a violation of a human rights norm? What are the preventative measures that should be taken by businesses to mitigate and prevent contributing to or causing human rights violations? These questions concern both the scope of the primary human rights norms vis-à-vis businesses, as well as the secondary norms to establish responsibility vis-à-vis businesses.

More importantly, the rather vague and indeterminate formulation of these principles unveils a common misconception about human rights law, which forms the undercurrent for much of the debate concerning NSAs and human rights today. An abstract commitment to respect human rights (as embodied in the Ruggie Principles) does not reveal much about the justiciability of the obligations to be borne by the duty-holder that give credence to this abstract commitment. How does the abstract commitment to not commit violations of the right to life, for example, translate into actionable and legally enforceable obligations to conduct safety screenings of employment standards in subsidiary companies abroad? What is the legally enforceable obligation on HawkEye 360 to ensure that the data provided to Frontex through its satellites is not used in a manner that could facilitate non-refoulement violations?

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[48] It is notable that the Ruggie Principles already made an implicit distinction between extra-territorial and territorial jurisdiction, which is relevant in determining the application of human rights obligations to duty-holders. The Ruggie Principles thus suggest that amorphous NSAs and businesses in particular would not necessarily conduct themselves within the confines of territorial boundaries.

The vagueness of the Ruggie Principles should of course not be exaggerated, as they set out to be no more than principles that may be applied to an extremely heterogenous set of businesses, written at a time when scholars debated whether businesses should even be bound by primary human rights norms. Still, the indeterminacy of the Ruggie Principles underscores that they do not create new positive law in the form of concrete and enforceable primary norm obligations. The lack of concretization contributes directly to the lack of their enforcement. The Ruggie Principles were undoubtedly a necessary first step in conceptualizing, signaling, and understanding the human rights role of businesses—as was the non-binding Universal Declaration of Human Rights for States. However, as Deva rightfully notes, this abstract commitment is unenforceable insofar as no legally binding obligations or corresponding provisions on access to remedies have been developed.[49]

Secondly, the Ruggie Principles suggest that a "common but differentiated" approach should be adopted in delineating the scope of the primary (human rights) norm obligations, mindful of the form, functionality, and size of businesses. Specifically, Principle 14 holds that "the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts." While on the face this suggestion is sensical, a deeper understanding of how a concretized primary norm results in responsibility for its violation according to the secondary norms evidences the difficulties of working with the common but differentiated responsibilities of businesses. While it may make sense to differentiate primary norm obligations in achieving abstract human rights commitments between States, international organizations, and businesses,[50] it is questionable whether further distinction in the primary human rights norms between businesses themselves is a workable approach. Particularly when assessing human rights compliance in a transnational context, it may be too demanding to identify and map the manifold concrete human rights obligations applicable to different types of businesses. Additionally, in may be too burdensome for domestic, regional, and international human rights bodies to first consider the type of business under

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[49] *See* Deva, Deva, *From "Business or Human Rights" to "Business and Human Rights"*, *supra* note 42, at 10-11.

[50] *See infra* Section II.b.

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scrutiny, before ruling on whether the specific obligations that attach to such types of business have been violated. Arguably, such an approach would likely lead to fragmentation between jurisdictions on how courts and tribunals assess the respect for human rights by businesses, which in turn could lead to a race to the bottom in terms of overall human rights protection. So, the question that has only been partially answered but must really be asked with respect to the primary human rights norms applicable to businesses is whether it is desirable to have finite and universally applicable human rights norms for businesses, differentiated norms for different businesses, or a combination of both: For the sake of completeness, it is notable that the lacking top-down enforcement of human rights obligations for businesses did not prevent the development of internal mechanisms to assess human rights compliance. Such internal mechanisms may include the aforementioned codes of conduct, but also internal complaint and review mechanisms.

The final time period in Deva's categorization spans from 2014 until now and is characterized by the endeavor to develop legally binding primary human rights obligations for businesses.[51] These developments have translated into the Third Revised Draft of the Binding Treaty on Business and Human Rights.[52] Yet it immediately becomes evident that all operative provisions of the Draft Treaty are directed at States rather than at the businesses in their own right.

While the argument is not that States have or have not remained the primary human rights guarantors and/or the dominant subjects of international law, indirectly imposing requirements on businesses through States contributes to the responsibility-remedy gap. One of the most notable issues observed in scholarship on the topic of business and human rights appears to be the lacking enforcement of the Ruggie Principles and other soft law norms.[53] This is not to say that there hasn't been a "hardening" of some of

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[51] *See* Deva, *From "Business or Human Rights" to "Business and Human Rights"*, *supra* note 42, at 4.

[52] *See* Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights, Chairmanship Third Revised Draft, Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises (Aug. 17, 2021).

[53] *See* DALIA PALOMBO, BUSINESS AND HUMAN RIGHTS: THE OBLIGATIONS OF EUROPEAN HOME STATES 12 (2020); Deva, *From "Business or Human Rights" to "Business and Human Rights"*, *supra* note 42, at 10-11.

these soft law norms.[54] The point instead is that this selected hardening has not (yet) resulted in an upheaval in the soft law characterization of the business and human rights field.[55] Palomba and Deva note that this is likely due to the costs associated with human rights compliance. There exist on the one hand *ex ante* costs to prevent human rights violations and to streamline human rights standards into company policy and operation. On the other hand, we see potential costs associated to remedying human rights violations as a result of unlawful business conduct.[56]

The lacking legal enforceability of human rights norms for businesses on an international level has not deterred domestic and regional initiatives aimed at regulating the human rights impact of businesses, of which one of the most notable examples is undoubtedly the US Alien Tort Statute ("ATS").[57] However, a 2021 U.S. Supreme Court decision ruled in favor of the U.S.-based Nestlé and Cargill, concluding that on child trafficking claims could not trigger a human rights responsibility because the companies' financing decisions were made in the United States.[58] This ruling advanced an even more conditional understanding and application of the ATS. The ruling was based, in part, on the reasoning that "general corporate activity" or "mere corporate presence" in the United States was not enough to trigger its (human rights) responsibility for unlawful activities conducted and happening abroad under the ATS.[59] Furthermore, to date, debate persists on what can be considered unlawful conduct, and what level of connection between a cause of action and the United States is "sufficient" to trigger the ATS.[60]

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54 *See* Regulation 2017/821, of the European Parliament and of the Council of 17 May 2017 on the Laying Down Supply Chain Due Diligence Obligations for Union Importers of Tin, Tantalum and Tungsten, Their Ores, and Gold Originating from Conflict-Affected and High-Risk Areas, 2017 O.J. (L 130) 1; Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, ¶ 1502, 124 Stat. 1376, 2213-18 (on conflict minerals).

55 *See* Ioana Cismas & Sarah Macrory, *The Business and Human Rights Regime Under International Law: Remedy Without Law?*, *in* NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS: CREATION, EVOLUTION, AND ENFORCEMENT 222, 233-35 (James Summers & Alex Gough eds., 2018).

56 *See* PALOMBO, *supra* note 53; Deva, *From "Business or Human Rights" to "Business and Human Rights"*, *supra* note 42.

57 *See* 28 U.S.C. § 1350 (1948).

58 *See* Nestlé USA, Inc. v. Doe, 141 S. Ct. 1931, 1937 (2021).

59 *Id.*

60 *Id.*

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As is, the ATS is only triggered form norms that are "specific, universal, and obligatory."[61] Accordingly, only a limited number of human rights norms have triggered the ATS, whereas other norms (e.g., right to life, right to health) were considered too indeterminate to trigger corporate liability. Crucially, the type of norms that would trigger liability under the ATS are determined by their customary nature. Counterintuitively however, customary international law is determined by reference to *State* practice. Making the primary norm obligations of *businesses* dependent on primary norm obligations of *States* embodies an evident disconnect that prevents the ATS from being a viable avenue to hold businesses legally responsible for their contributions to human rights violations abroad. Bearing in mind these caveats to the application of the ATS, it appears that its scope is actually quite limited.[62] Again, applied to the question of whether the provision of data by HawkEye 360 to Frontex and the EU at large, as well as its Member States, it is questionable whether this would be considered a sufficient connection to make this domestic U.S. regime applicable.

The rationale behind a strict and limited approach to the human rights responsibility of businesses is partially informed by its potential costs and the disincentivizing effect it may have on economic growth. Yet a siloed cost-benefit analysis and a subsequent conditional approach to the enforcement of human rights on businesses neglect the very essence of what prompted the development of primary human rights norms in the first place: to ensure that human rights protections are not obliterated simply on account of the emergence of new regulatory (non-State) actors. Particularly where transnational cooperative governance is at stake, the inability to hold businesses to account for their contributions to human rights violations—due to economic considerations—means that one out of three potential avenues of redress in transnational cooperative governance for individual victims is already significantly constrained or unavailable for the benefit of shareholder profit maximization and economic (State) growth. The absence of concrete and justiciable human rights obligations for businesses and the near-total absence of secondary rules which clarify *how* such concretized obligations can be enforced, contributes

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[61] *Id.* at 1938.

[62] *See generally* Alien Tort Statute Clarification Act, S. 4155, 177th Cong. (May 5, 2022) (introducing clarifications to the Alien Tort Statute).

to the lacking effectiveness of human right protections in the field of business and human rights.

b. International Organizations and Human Rights

In determining whether and how the EU, as an international organization in its own right, can incur legal responsibility for its contribution to a human rights violation in the implementation of IBM, insight is needed into the applicable responsibility (human rights) regimes to international organizations. Much like the business and human rights movement, earlier scholarship and practice on the (human rights) responsibility of international organizations questioned the subjecthood of international organizations and their ability to be human rights duty-holders.[63] This discussion was intimately tied to how transnational cooperation affected the human rights obligations of signatory States through supranational and intergovernmental organizations. Another recurring question at the time concerned the sources of human rights obligations, which could theoretically bind international organizations. Yet at the time, the latter point—unlike the business and human rights movement—did not prompt in-depth analyses on the desirability and subsequent scope of primary rules.

Arguably, the less rigorous scrutiny on developing primary rules of international organizations can be tied to the relatively recent recourse to international organizations as a means to facilitate transnational cooperation between States. As a result, precedent to date remains limited.[64] Nevertheless, the recent exponential growth of international organizations and their regulatory roles prompted the International Law Commission, under direction of appointed

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[63] *See*, *e.g.*, JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW 43-50 (explaining the development of domestic and international legal personality of international organizations) (2009); James Crawford, *The System of International Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 17 (James Crawford et al. eds., 2015); Alain Pellet, *The Definition of Responsibility in International Law*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 3 (James Crawford et al. eds., 2015).

[64] *See* CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 385 (2d ed. 2005) (discussing the earliest systematic work on the responsibility of international organizations dating back to 1950, shortly after the ICJ's advisory opinion in *Reparation*, and subsequent only to haphazard and indirect references to the topic in earlier writings).

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Special Rapporteur Giorgio Gaja, to start work on this very—albeit at a later stage than similar developments on business and human rights. Interestingly, unlike the business and human rights movement, Special Rapporteur Gaja did not focus on determining the desirability and subsequent scope of *primary* (human rights) norms. Instead, the group focused on the development of *secondary* rules, which would help determine when responsibility would arise for international organizations that violate (undefined and undetermined) primary norms.

The work conducted by Special Rapporteur Gaja gave rise to the Draft ARIO[65] in 2011, which in the present study is used as the analytical framework to assess the responsibility of the EU in the enactment of IBM. These rules determine how responsibility is established for international organizations. They are thus defined as secondary rules (the so-called "standard of review') as opposed to primary rules containing the duties and legal obligations by which an international organization may be bound,.[66] The ARIO contain both general international rules to establish responsibility of international organizations (*lex generalis*) and additionally recognize that such organizations may develop rules specific to international organizations that govern their international responsibility (*lex specialis*).[67] By including reference to both the *lex generalis* as well as the *lex specialis*, the ARIO—currently also the only available non-binding holistic set of rules on the responsibility of international organizations—provide an all-encompassing framework to determine the means and methods by which international organizations generally, and the EU specifically, may be held responsible for violations of international human rights law. In what follows, these secondary norms will be scrutinized. Before proceeding however, it is crucial to underline that the rules set forth in the ARIO are functionally comparable to its counterparts under EU law (jurisdiction, attribution, breach of an EU obligation,

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[65] International Law Commission, *Draft Articles on the Responsibility of International Organizations*, U.N. Doc. A/66/10 (May 30, 2011) [hereinafter ARIO].

[66] *Id.*, gen. cmt. 3; *see* NIKOLAOS VOULGARIS, ALLOCATING INTERNATIONAL RESPONSIBILITY BETWEEN MEMBER STATES AND INTERNATIONAL ORGANIZATIONS 98 (2019); VLADYSLAV LANOVOY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY 10-11 (2016) (advising against overstating the dichotomy between primary norms and secondary rules, since the rules concerning indirect, joint, or shared responsibility are considered as constituting "meta-primary" rules, whereas the ARIO rules are arguably of a primary nature).

[67] *See* ARIO, *supra* note 65, art. 64.

causation). Yet terminological divergence does arise and, at times, the EU's liability framework adopts stricter qualifications for these conditions to be met. Where such divergence gives rise to a notable difference in both liability frameworks, this is highlighted.

The ARIO identify the constitutive elements required to establish responsibility, both when an international organization has acted independently and when the international organization has engaged in tandem with another state or organization.[68] To determine whether the EU can be held legally responsible for any unlawful human rights conduct within the context of IBM, it is necessary to assess both the default regime encompassed in the ARIO, as well as the EU-specific responsibility framework.[69]

The *lex generalis* concerning the responsibility of international organizations does not necessarily prevail over the general default ARIO provisions, nor do such rules nullify the more generalized regime.[70] Furthermore, the ARIO recall that "[t]he responsible international organization may not rely on its rules as justification for failure to comply with its obligations,"[71] entailing that internal

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[68] *Id.* arts. 6-13, 14-19.

[69] Responsibility is distinct from available legal fora to enforce responsibility and ensuing rights to reparation. The latter falls outside the scope of this Article.

[70] *See* ARIO, *supra* note 65, cmt. 1 to art. 64, cmt. 9 to art. 10; Giorgio Gaja (Special Rapporteur on the Responsibility of International Organizations), *Eighth Rep. on the Responsibility of International Organizations*, U.N. Doc. A/CN.4/640, (Mar. 14, 2011) ¶¶ 114-17; Giorgio Gaja (Special Rapporteur on the Responsibility of International Organizations), *Seventh Rep. on the Responsibility of International Organizations*, U.N. Doc. A/CN.4/610 (Mar. 27, 2009) ¶¶ 121-24; Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-Contained Regimes in International Law*, 17 EUR. J. INT. L. 495, 505-519 (2006).

[71] *See* ARIO, *supra* note 65, art. 50 (clarifying that entitlement to invoke the responsibility of an international organization "is without prejudice to the entitlement that a person or entity other than a State or an international organization may have to invoke the international responsibility of an international organization"); *see also id.*, cmt. 2, art. 50 (reasoning that the ARIO's reference to States and international organizations as potentially aggrieved parties does not exclude other persons' entitlement to reparations stemming from the international responsibility of international organizations); *id.* art 32(2), cmt. 3 to art. 10 (expressly referencing "any other subject of international law" to whom international obligations are owed; Giorgio Gaja, *Articles on the Responsibility of International Organizations*, AUDIOVISUAL LIBRARY INT'L L. 2 (Dec. 9, 2011) ("[T]he purpose of these 'without prejudice' provisions is to convey that the articles are not intended to exclude any such entitlement."); STIAN ØBY JOHANSEN, THE HUMAN RIGHTS ACCOUNTABILITY MECHANISMS OF INTERNATIONAL ORGANIZATIONS 35-37 (2020) on the legal status of individuals); *See generally* ANNE PETERS, BEYOND HUMAN RIGHTS – THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (2016) (tracking and analyzing the increasing role of individuals, rather than States, in international law and how this has impacted the development of international law in modern world).

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rules of the organization cannot be invoked as a means to circumvent international responsibility vis-à-vis third parties.[72] Hence, insofar as the *lex specialis* does not provide for a self-contained responsibility framework, recourse may be had to the more general—residual[73]—legal framework embodied by the ARIO.[74] According to ARIO provisions, then, international organizations can be held *independently* responsible for conduct engaged in without any cooperation by other actors[75] or may incur *shared* responsibility for actions taken together with Member States,[76] when the latter operate in their own capacity.

An assessment of the international and regional regimes on the responsibility for human rights violations reveals that the conditions

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[72] See ARIO, *supra* note 65, cmt. 1 to art. 32 ("[A]n international organization cannot invoke its rules in order to justify non-compliance with its obligations under international law entailed by the commission of an internationally wrongful act."); *but see id.* cmt. 3 to art. 32 (recalling that an organization's internal rules organization may affect the internal division of responsibility between the organization and its members); *see also* Gaja, *Eighth Rep. on the Responsibility of International Organizations*, supra note 70, at 3.

[73] Simma & Pulkowski, *supra* note 70, at 495, 505-519, 516 (noting that the availability of recourse to the more general rules on State responsibility is in part affected by whether a universalist or a particularistic perspective on international law is adopted, and highlighting that generalized rules enshrined in the ARIO are less relevant because from "a public international law perspective, the EC legal system remains a subsystem of international law," and EU law "depends on the consent of the Union's sovereign [M]ember [S]tates").

[74] United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. ¶ 86 (May 24) (holding that the specialized secondary rule regime embodied in the Vienna Convention on the Diplomatic Relations constitutes a self-contained regime because it provides both the obligations binding upon states and the legal consequences attached to non-compliance therewith). *But see* James Crawford, *Articles on Responsibility of States for Internationally Wrongful Acts*, AUDIOVISUAL LIBRARY INT'L L. 2 (2012) (expressing reluctance to explicitly address the delineation and determination of self-contained systems of law); *see also* Bruno Simma & Dirk Pulkowski, *Leges Specialis and Self-Contained Regimes*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY, 143, 144-145 (James Crawford et al. eds., 2010); Simma & Pulkowski, *supra* note 70, at 494.

[75] *See* ARIO, *supra* note 65, arts. 6-13.

[76] The scenarios enumerated in Articles 14 through 17 of the ARIO, which consider conduct by international organizations in relation to unlawful acts by states or other international organizations, will be referred to interchangeably as situations resulting in shared, indirect, derivative, and joint responsibility. The terminological variations have no bearing on the fact that all of the envisaged scenarios describe situations in which conduct by the international organization contributed (together with the complicit State(s)) sufficiently to the single harmful outcome and warrants apportioning of responsibility between the complicit actors. Scholarship is not steadfast on terminology in this particular area of international law, which underscores the ambiguity surrounding the notions of shared responsibility in international law.

to establish such responsibility are largely analogous, if not identical, for States and international organizations.[77] For responsibility to arise, there must be (1) an adjudicatory jurisdiction; (2) unlawful human rights conduct that is (2) attributable to the duty-bearer and (3) a causal connection between the conduct and the experienced human rights violation.[78] Generally speaking, when these four conditions are met, responsibility for human rights violations may arise under the international responsibility framework—comprised of the ARIO and the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts ("ARSIWA")—as well as under certain regional responsibility regimes.[79]

In addition, the international analytical frameworks to establish responsibility—the so-called secondary norms encompassed in ARSIWA and ARIO—also provide rules of responsibility for situations of *shared* conduct between international organizations and States. In addition to the four basic conditions to establish responsibility, the ARSIWA and ARIO recognize scenarios in which an international organization and States may share responsibility for unlawful conduct if the co-perpetrator (1) acted with knowledge of the violation; and (2) was bound by the same human rights obligation as its co-perpetrator. Absent these conditions, shared responsibility will not be established. Yet the perceived simplicity of these conditions does not reveal much about their ambiguity when applied in practice, as explained below.

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[77] *See* ARIO, *supra* note 65, arts. 14-17.

[78] Compared to enforcement and legislative jurisdiction, adjudicatory jurisdiction operates at different points of the continuum intended to establish responsibility. Per adjudicatory jurisdiction, human rights obligations govern the disputed circumstances and thus trigger the applicability of the primary and subsequent primary norms. This is different from legislative and enforcement jurisdiction, which operate within the context of the secondary norms and help determine whether a particular line of conduct can or cannot be attributed to the duty-bearer(s) implicated in the disputed circumstances.

[79] Although the ECtHR does not always mention these conditions explicitly, it assesses these conditions when deciding whether a violation of the ECHR has occurred. Under the EU framework, the ECJ is generally explicit in assessing these conditions when an action for damages has been lodged, including for any purported human rights violations of the CFR.

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i. Conditions for Independent Responsibility

1. Adjudicatory Jurisdiction

To establish human rights responsibility for an actor under international law, it must first be demonstrated that the relevant human rights obligations were binding upon the actor. Human rights instruments govern the relationship between a State and individuals within the territorial jurisdiction of that State. Regional human rights courts have repeatedly held, in line with their corresponding human rights instruments, that States "shall secure to everyone within their jurisdiction" the rights and freedoms they seek to protect.[80] The European Court of Human Rights ("ECtHR") has a particularly well-developed doctrine of adjudicatory jurisdiction. Per this doctrine, the obligations stemming from the European Convention of Human Rights ("ECHR") are essentially territorial.[81] Over time, however, the ECtHR has acknowledged—as have other regional and international human rights adjudicatory bodies—that extra-territorial jurisdiction may arise in three exceptional circumstances.[82] The limited circumstances in which

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[80] N.D. and N.T. v. Spain, App. No. 8675/15 & 8679/15, ¶ 109 (Feb. 13, 2020), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-201353%22]} [https://perma.cc/H8PN-2UXR] (prescribing (1) the jurisdiction to prescribe; (2) the jurisdiction to enforce; and (3) adjudicatory jurisdiction as the types of jurisdiction recognized under public international law, which inspires jurisdiction under Article 1 of the ECHR); *see also* Marko Milanovic, *Jurisdiction and Responsibility*, *in* THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW 99 (Anne van Aaken & Iulia Motoc eds., 2018); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES – LAW, PRINCIPLES AND POLICY 23-26 (2011).

[81] *See N.D.*, App. No. 8675/15, ¶ 103; Banković v. Belgium, App. No. 52207/99, ¶ 59 (Dec. 12, 2001), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-22099&filename=BANKOVI%C4%86%20AND%20OTHERS%20v.%20BELGIUM%20AND%20OTHERS.docx&logEvent=False (presuming that jurisdiction is established throughout all of a State's territory and will only be rebutted when a State is prevented from exercising authority over it); *see also* Assanidze v. Georgia, App No. 71503/01, ¶¶ 137-39 (Apr. 8, 2004); Ilaşcu v. Moldova, App. No. 48787/99, ¶¶ 312-13, 333 (July 8, 2004).

[82] Banković, App. No. 52207/99, ¶ 61 (noting that jurisdiction is determined by territory and will only extend extra-territorially in (highly) exceptional cases). *But see* Issa v. Turkey, App. No. 31821/96, ¶¶ 70-71 (Nov. 16, 2004), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-67460&filename=CASE%20OF%20ISSA%20AND%20OTHERS%20v.%20TURKEY.docx&logEvent=False (holding that a State may be liable for actions violating

extra-territorial jurisdiction may arise were recently recalled by the ECtHR in *Güzelyurtlu and others v. Cyprus and Turkey*[83] and reaffirmed in *Hanan v. Germany*.[84] Based on the precedent set by these cases, extra-territorial jurisdiction may be established on a case-by-case basis[85] where a State's acts give rise to legal effects outside the respective territory of the State, thus amounting to state-agent control.[86] Extra-territorial jurisdiction may also arise where a State holds spatial effective control over a territory abroad,[87]

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human rights of individuals under its authority and control, albeit outside of its state territory); *cf. with* Al-Skeini v. the U.K., App. No. 55721/07, ¶¶ 130-42 (July 7, 2011), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]} [https://perma.cc/633D-BUV7] (holding "*jurisdictional competence under Article 1 is primarily territorial*" but in exceptional circumstances may result in extra-territorial applicability of the ECHR to safeguard ECHR rights, namely where there is "state agent authority or control" or "effective control over an area"); Hirsi Jamaa v. Italy, App. No. 27765/09, ¶¶ 76-82 (Feb. 23, 2012), https://hudoc.echr.coe.int/eng?i=001-109231 [https://perma.cc/GNE7-TM2W] (reaffirming the ECHR's applicability to border management measures taken on high seas and on-board Italian military vessels); Jaloud v. The Netherlands, App. No. 47708/08, ¶ 152 (Nov. 20, 2014), https://hudoc.echr.coe.int/eng?i=001-148367 [https://perma.cc/9HKC-2386] (concluding that the conduct performed "under the command and direct supervision of" a State agent is sufficient to establish extra-territorial jurisdiction); *see* generally, Milanovic, *Jurisdiction and Responsibility*, *supra* note 80, at 99-103 (discussing a more expansive interpretation of jurisdiction for the purpose of triggering the ECHR).

[83] Güzelyurtlu v. Cyprus, App. No. 36925/07, ¶¶ 178-87 (Jan. 29, 2019), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-189781%22]} [https://perma.cc/TT49-944T].

[84] Hanan v. Germany, App. No. 4871/16, ¶¶ 132-45 (Feb. 16, 2021), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-208279%22]}[https://perma.cc/F5D9-PMV9]; *see generally* Milanovic, *Jurisdiction and Responsibility*, *supra* note 80 (outlining various forms of extra-territorial jurisdiction); Seunghwan Kim, *Non-Refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, 30 LEIDEN J. INT'L L. 1, 49 (2017).

[85] *See N.D.*, App. No. 8675/15, ¶¶ 102-11.

[86] *See Güzelyurtlu*, App. No. 36925/07, ¶ 180; Jaloud v. The Netherlands, App. No. 47708/08, ¶ 152 (Nov. 20, 2014), https://hudoc.echr.coe.int/eng?i=001-148367 [https://perma.cc/9HKC-2386]; Hirsi Jamaa v. Italy, App. No. 27765/09, ¶ 127 (Feb. 23, 2012), https://hudoc.echr.coe.int/eng?i=001-109231 [https://perma.cc/GNE7-TM2W]; Al-Skeini v. the UK, App. No. 55721/07, ¶¶ 136, 149-50 (July 7, 2011), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]} [https://perma.cc/633D-BUV7]; *see also* Milanovic, *Jurisdiction and Responsibility*, *supra* note 80, at 173, 188 (interchangeably referring to State-agent control as "personal jurisdiction").

[87] *See* M.N. v. Belgium, App. No. 3599/18, ¶ 103 (Mar. 5, 2020), https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22m.n%20and%20others%20belgium%22],%22documentcollectionid2%22:[%22DECISIONS%22],%22itemid%22:[%22001-202468%22]} [https://perma.cc/U8PR-DM5Z].

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whether through occupation or by registering vessels under its authority or flag.[88] Spatial effective control may indirectly be established even in the absence of a State's influence over the policies and acts of a subordinate local administration if the latter "survives as a result of the Contracting State's military and other support."[89] Finally, where such "*clear jurisdictional link*" has *not* been established, extra-territorial jurisdiction may nevertheless arise due to the "*existence of special features*."[90] The ECtHR has held that it is not required to define such special features in the abstract. Instead, the existence of such special features is to be assessed on a case-by-case basis.[91]

The ECtHR's caselaw on extra-territorial jurisdiction is ironically applied to a lesser degree within the EU. The EU's own CFR does not contain a jurisdictional clause *territorially* limiting its application to the territory of the EU Member States. Hence, the question must be asked: in what way is the CFR limited in its applicability to the Member States and the EU, if not territorially? Milanovic notes that human rights treaties lacking an explicit clause delineating territorial applicability can be interpreted as either entirely limited, or entirely unlimited. In addition, he advances the argument that a third, albeit more integrated approach is possible, whereby a distinction is made in the positive and negative human rights obligations that are applicable extra-territorially.

True to the assertion made by Milanovic that there is no need for a "one-size-fits-all" approach to human rights treaties—which holds particularly true given the heterogeneity across various

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[88] *See Güzelyurtlu*, ¶ 179; Medvedyev v. France, App. No. 3394/03, ¶ 64 (Mar. 29, 2010), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97979%22]} [https://perma.cc/V38J-S4KJ] (confirming that military coercive action on high seas may trigger jurisdiction and thus the extraterritorial application of the ECHR).

[89] *Güzelyurtlu*, App. No. 36925/07, ¶ 179.

[90] *Hanan*, App. No. 4871/16, ¶¶ 132-36; *see Güzelyurtlu*, App. No. 36925/07, ¶¶ 182-87 (suggesting that special features that trigger extra-territorial jurisdiction are not limited to situations of armed conflict and may also arise in other cases such as medical negligence); *cf* Gray v. Germany, App No. 49278/09 (May 22, 2014), https://hudoc.echr.coe.int/eng#{%22display%22:[2],%22languageisocode%22:[%22ENG%22],%22appno%22:[%2249278/09%22],%22itemid%22:[%22001-144123%22]} [https://perma.cc/UW2T-7788] (medical negligence dispute triggering extra-territorial jurisdiction).

[91] *See Hanan*, App. No. 4871/16, ¶ 136; *Güzelyurtlu*, ¶ 190 (examining whether a Member State has initiated investigations into possible violations of human rights abroad *by virtue of domestic law,* with the caveat that the mere initiating of investigations will not necessarily be enough to trigger extra-territorial jurisdiction).

international organizations—it would be incorrect to assume that the CFR does not encompass any EU-specific provisions clarifying its jurisdictional applicability. The jurisdictional limitations for the Charter are spread out across the Charter itself and consist of rights-specific limitations, as well as overarching jurisdictional provisions.[92] The latter provisions are often referred to as the horizontal clauses that precondition the Charter's application.

These EU and CFR specific jurisdictional rules directly derive from the constitutional dynamic between the EU and Member States, particularly from the division of their competences. In fact, the drafting history of these articles support a narrow interpretation of jurisdiction, limiting the applicability of the Charter to matters falling "within the scope of application of EU law."[93] Article 51(1) of the CFR likewise holds that the CFR provisions "are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law." This provision has sparked quite some debate, concerning the reference to the "institutions, bodies, offices and agencies of the Union", as well as the reference which holds that Member States are bound by the Charter "only when they are implementing Union law". Both limbs of Article 51 (1) of the CFR have given rise to a number of questions and a number of cases that clarify its scope.[94]

The obligation of Member States to respect and protect the CFR "only when they are implementing Union law" has resulted in a number of cases that attempt to clarify *when* a Member State implements Union law. Contrary to the drafting history, these cases appear to favor a broad interpretation of Article 51. The terminological insertion of the word "only" evidences the initial reluctance of Member States to be bound by the CFR for matters that fall outside the scope of EU legislation and points to a restrictive

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92 *See* CFR, *supra* note 12, arts. 51-54.

93 Case C-617/10, Åklagaren v. Åkerberg Fransson, ECLI:EU:C:2013:105, ¶¶ 20-21 (Feb. 26, 2013); *see* also CFR, *supra* note 12, arts. 51.

94 CFR, *supra* note 12, art. 51; *see also* Explanations Relating to the Charter of Fundamental Rights, 2007 O.J. (C 303), 32 ("[T]he expression 'bodies, offices and agencies' is commonly used in the Treaties to refer to all the authorities set up by the Treaties or by secondary legislation."). *But cf. with* De Coninck, *supra* note 4 (agreeing that the CFR binds a broad list of entities set up under EU law but highlighting that the CFR does not provide clarity to the question of the enforceability against CFSP agencies or EU naval missions such as the EUNAVFOR MED Operation Sophia or its successor, EUNAVFOR MED Operation Irini, which may escape judicial review).

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reading of Article 51(1). This means that for Member States, the CFR does not contain self-standing rights. Instead, these rights can only be invoked together with provisions of EU law. Curiously, the European Court of Justice ("ECJ") does not appear to be inclined to follow a restrictive reading of jurisdiction. In the seminal case of *Åkerberg Fransson*, for instance, the ECJ held that mixed cases concerning both national measures and matters falling within the scope of EU law trigger the CFR.[95] Further, in *NS v. Secretary of State*, the ECJ concluded that despite Member States' discretion to adopt national measures, these policies exist within a larger Union framework and fall under the ambit of Article 51.[96] The ECJ later clarified these cases in *TSN*.[97]

In addition to Article 51, Article 52(3) of the CFR requires that the ECtHR and its caselaw function as a normative baseline for the corresponding rights established in the CFR and the ECHR, meaning the rights in the CFR can never fall below the minimum standards set by the ECHR and the ECtHR. Finally, Article 53 holds that nothing therein

> shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States[']constitutions.[98]

This provision reiterates that in the interpretation and applicability of the CFR, its reconcilability with international human rights agreements and domestic constitutional instruments must be duly considered.

What do these rules on adjudicatory jurisdiction mean for transnational cooperative governance? Typically, adjudicatory jurisdiction for human rights obligations is territorial and state-centric. Therefore, the adjudicatory jurisdictional rules for NSAs are overwhelmingly missing: no clearly-defined and all-encompassing

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[95] *Åkerberg Fransson*, Case C-617/10, ¶¶ 20-21.

[96] Case C-411/10, N.S. v. Sec'y State, ECLI:EU:C:2011:865, ¶68 (Dec. 21, 2011).

[97] Case C-609/19, BNP Paribas Personal Finance SA v. VE, ECLI:EU:C:2021:469, ¶42 (June 10, 2021) (recalling the scenarios in which a Member State can be considered to be implementing Union law).

[98] *See* CFR, supra note 12, art. 53.

rules exist to address extra-territorial jurisdictional issues that arise from the human rights obligations of NSAs. As an exception to this jurisdictional ambiguity, the CFR provides that the EU is bound by its internal human rights provisions without any territorial limitations. This seems to point to a broader understanding of jurisdiction than the territorial jurisdictional limitation that typically applies to States. However, a number of additional provisions in the CFR prevent an expansive reading of adjudicatory jurisdiction under the EU framework.

Consequently, to date, the application of human rights provisions to States is primarily territorial and remains largely undefined for NSAs. Where extra-territorial jurisdictional tests for the application of human rights have been developed for States, international organizations, and private corporations, these tests remain extremely narrow and exceptional. It is clear that in the absence of coherent adjudicatory jurisdictional rules, it is difficult to prevail on a claim that NSAs incur any human rights responsibility having contributed to a human rights violation.

2. *Attribution*

For an international *sui generis* organization such as the EU to be held independently responsible for violations of human rights, two cumulative conditions must be met. First, the questionable human rights conduct—which may constitute either an act or omission[99]—must be attributable to the organization.[100] Second, the conduct must constitute a violation of an international obligation by which that organization was bound. When looking beyond the deceptive simplicity of these two conditions, it is quickly unveiled that structural issues lay at the heart of both conditions, which frustrate clear and consistent determinations of responsibility for human rights violations.

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[99] ARIO, *supra* note 65, art. 2.

[100] *Id.*, cmt. 2 to art. 5 (acknowledging that it is possible for international organizations to be held responsible "when conduct is not attributable to that international organization," such as in a joint action between an international organization and States or international organizations); *see* Report of the International Law Commission to the General Assembly, 58 U.N. GAOR Supp. No. 10, at 45, U.N. Doc. A/58/10 (2003); ANDRÉS DELGADO CASTELEIRO, THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION – FROM COMPETENCE TO NORMATIVE CONTROL 63-64 (2016).

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Attribution will be established according to a number of tests. An act or an omission may be attributed to the organization to the extent that the act was perpetrated by an agent or organ of the organization.[101] Alternatively, conduct may be attributed to an organization insofar as the individual or entity responsible for the conduct was placed "at the disposal of the organization."[102] Conduct may also be attributed to the organization "if the organ or agent acts in an official capacity and within the overall functions of that organization, even if the conduct exceeds the authority of that organ or agent or contravenes instructions."[103] Finally, conduct may be attributed to the organization if is acknowledged by the organization as being its own.[104] However, most of these tests can be applied in a strict or lenient manner, with no definitive standard to determine when a particular attribution test applies. For example, various courts have applied both a narrower "effective control" and a broader "ultimate control" standard to Article 7 of the ARIO.[105]

The test of attribution to determine responsibility thus depends primarily on the discretion of the court and, in turn, on the applicable legal regime. A domestic court of an EU Member State may apply a standard that advises against responsibility, such as the "ultimate normative control" test militating in favor of EU responsibility, whereas the EU's Court of Justice may apply the "effective control" test, militating in favor of State responsibility. Where courts apply different tests of attribution, one cumulative condition to establish responsibility will *not* be met, meaning that neither the implicated State, nor the EU will be held responsible, thereby eliminating access to an *effective* remedy for victims of such cooperative governance.

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101 ARIO, *supra* note 65, art. 6.

102 *Id.* art. 7.

103 *Id.* art. 8.

104 *Id.* art. 9.

105 *See* Behrami v. Fr. & Saramati v. Fr., App. No. 71412/01 & App no. 78166/01, ¶ 140 (May 2, 2007), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-2745%22]} [https://perma.cc/V82Z-PFS9]; *see also* Al Jedda v. U.K., App. No. 27021/08, ¶ 84 (July 7, 2011), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105612%22]} [https://perma.cc/4J8L-E6AL].

3. Breach of an International Obligation

For international responsibility to arise, Article 4 of the ARIO requires a breach of an international obligation that can be attributed to an entity. A breach of international law may occur "regardless of the origin or character of the obligation concerned."[106] The reference in Article 10 of the ARIO to the "origin or character" of the obligation entails that the obligation be deduced from "a customary rule of international law, by a treaty or by a general principle applicable within the international legal order . . . ."[107] In other words, obligations may arise under any subject of international law,[108] irrespective of the classification and nature of the primary norm.[109]

International obligations may likewise be deduced from the rules of the international organization, which include "the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization."[110] Concerning this last point, Special Rapporteur Gaja observes that not *all* rules of the organization necessarily qualify as international obligations, as practice is divided on the matter.[111] Certain authors have rejected the proposition that rules of the organization generate international obligations entirely,[112] whereas others have adopted a more nuanced approach, asserting that the rules of the organization may encompass international obligations depending on the source and subject matter of such rules.[113] The ARIO do not purport to settle the matter.[114]

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106 ARIO, *supra* note 65, art. 10.

107 *Id.*, cmt. 2 to art. 10.

108 *Id.*, cmt. 3 to art. 10.

109 *Id.*, cmt. 2 to art. 10.

110 *Id.*, art. 2(b), cmt. 4 to art. 10.

111 *See* Giorgio Gaja (Special Rapporteur on the Responsibility of International Organizations), *Third Rep. on the Responsibility of International Organizations*, U.N. Doc. A/CN.4/553 (May 13, 2005), ¶¶ 15-19; *see also* Gaja, *Seventh Rep. on the Responsibility of International Organizations*, *supra* note 70, ¶¶ 40-41.

112 *See* Gaja, *Third Rep. on the Responsibility of International Organizations, supra* note 111, ¶ 19.

113 *See* ARIO, *supra* note 65, cmt. 5 to Article 10; Gaja, *Third Rep. on the Responsibility of International Organizations, supra* note 111, ¶¶ 21-22 (pointing at ICJ jurisprudence that rules of the organization effectively encompass international obligations while acknowledging that these rules do not inherently hold true for international organizations other than the U.N.).

114 *See* ARIO, *supra* note 65, cmt. 7 to art. 10.

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However, for the purpose of the present study on the EU and in line with the commentaries to Article 10 of the ARIO, the EU's CFR reaffirms international human rights norms in parallel to other international human rights treaties.[115] As such, the CFR contains international obligations that are binding both upon the Member States, as well as the EU.[116] This is in accordance with the observations made by the Special Rapporteur in the *travaux préparatoires* where he held that the ARIO apply "to the extent that these rules have kept the character of rules of international law."[117] Hence, in light of the symbiosis of the Charter with international human rights treaties, it can be considered that the CFR contains internationally recognized human rights obligations.[118]

Crucially, the ARIO provisions have been transposed *verbatim* from ARSIWA with the sole adaptation being the addressees of the international obligations (as opposed to States). This peculiarity warrants two observations.

First, according to the *travaux préparatoires*, adherence to primary law obligations may be difficult where obligations require positive action by the organization, which in certain cases can only be achieved through (majority) voting procedures.[119] In this respect, political considerations may deter adherence to positive obligations.[120] Notably, however, the absence of political will in adhering to international *positive* obligations is not a prerogative of

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115 *See* CFR, *supra* note 12, art. 53; *see also* Allan Rosas, *The Charter and Universal Human Rights Instruments*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1685-1686 (Steve Peers et al. eds., 2014) (asserting that the Charter provides for additional fundamental rights that are not protected under the traditional international human rights covenants and instruments); Sionaidh Douglas-Scott, *The European Union and Fundamental Rights*, *in* 1 OXFORD PRINCIPLES OF EUROPEAN UNION LAW 383, 387, 391, 395 (Robert Schütze & Takis Tridimas eds., 2018); CFR, *supra* note 12, arts. 13, 16, 27.

116 *See* CFR, *supra* note 12, art. 51 ("The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law."); Douglas-Scott, *supra* note 115, at 387 ("The Charter is an internal set of rules that legally binds the EU . . . . This applies both within the EU and to its external relations.").

117 *See* Gaja, *Third Rep. on the Responsibility of International Organizations, supra* note 111, ¶ 22.

118 *See* CFR, *supra* note 12, art. 53; *see also* Rosas, *supra* note 115, at 1685-86.

119 *See* Gaja, *Third Rep. on the Responsibility of International Organizations, supra* note 111, ¶ 8; Gaja, *Seventh Rep on the Responsibility of International Organizations*, *supra* note 70, ¶ 43.

120 *See* Gaja, *Third Rep. on the Responsibility of International Organizations, supra* note 111, ¶ 8.

or an issue exclusively associated with international organizations.[121] States are similarly confronted with political pushback but not exonerated from their international obligations, nor should they be.[122] Indeed, it would be "strange to assume that international organizations cannot possess obligations to take positive actions."[123] This is raised here because of the highly political and sensitive nature of the EU's IBM, which has effectively and significantly left its mark on adherence to positive human rights obligations.

A second observation in the preparatory works is the implicit and fleeting reference by the Special Rapporteur to the "common but differentiated responsibilities" of States and international organizations in fulfilling international obligations. While the notion of "common but differentiated responsibilities" is anchored in international environmental law, the underlying meaning of the norm is transposable *in casu* and unveils the most rudimentary argument of this Article. In the preparatory works, Special Rapporteur Gaja observes that it is not necessary to identify the various types of obligations that may arise for international organizations in achieving their international obligations. Yet he notes that within a European Union context, Member States are at the helm of the implementation of EU measures, so divergent obligations may exist.[124] This is indicative—if nothing else—of the fact that different obligations for States, international organisations, and businesses may be required in the fulfilment of the objectives of a given primary human rights norm. Applied to primary human rights obligations (at stake in the present study), the transposition of "common but differentiated responsibilities" *in casu* suggests that although Member States and international organizations may be bound by the same international primary human rights rules as an *abstract commitment*, the *means* of achieving these commitments (namely, the concrete and judiciable legal obligations stemming from those abstract commitments) may differ. This contention may appear self-evident on account of the functional speciality of international organizations and is (implicitly) supported in

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121 *See id.*, ¶ 9.

122 *See id.*, ¶¶ 9-10.

123 *Id.*

124 *See id.*, ¶¶ 14-15 (further recalling that even if Member States are not the duty-bearers of a particular obligation, the duty of sincere cooperation may still bind them to facilitating the EU's adherence to that obligation.

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doctrine,[125] but nevertheless deserves some thought in the present analysis.

Recalling the statement by the ICJ in its Advisory Opinion on *the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* "international organizations are subjects of international law and, as such, are bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."[126] Applied specifically to the EU, the EU becomes bound by the general rules of international law, including customary human rights law, general principles of EU law, and its constituent treaties, as well as any other agreement to which it is a party. Further, the rules of the organization may arguably encompass a number of international obligations depending on their content and subject.[127] While this provides ample breeding ground to identify international obligations *in the abstract*, these sources are tainted by a very significant and systemic deficiency, particularly in the field of human rights. These abstract commitments fail to identify precisely how international organizations—constrained practically and functionally by their specific mandate—can comply with these obligations. Simply worded, commitment to an abstract human rights commitment does not reveal much on compliance.

This concern is indeed of particular relevance with respect to the protection of human rights, as international organizations are not typically the addressees of, or parties to, international human rights instruments. The EU for example—besides having bound itself to the CFR directly and the ECHR indirectly—is not a contracting party to any international human rights treaties of a general nature, with the exception of the UN Convention on the Rights of Persons with Disabilities.[128] Traditionally, human rights instruments have regulated the relationship between the States exercising jurisdiction and the individuals under the States' jurisdiction. International human rights instruments have not been developed with international organizations in mind as the duty-bearers of their obligations. Instead, such treaties and instruments specifically

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[125] *See* Christiane Ahlborn, *To Share or Not to Share? The Allocation of Responsibility Between International Organizations and Their Member States,* 88 DIE FRIEDENS-WARTE 44, 52-53 (2013).

[126] Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, 1980 I.C.J. Rep. 73, ¶ 37 (Dec. 20), ¶ 37.

[127] *See supra* Part II.

[128] *See* Rosas, *supra* note 115, at 1687.

identify States as the duty-bearers. Nevertheless, the EU is now bound by these same obligations.

Precisely at this point, a nuance is elemental. The very simple, albeit extremely crucial question must be posed: whether and how is it even desirable to transpose *verbatim* the concrete legal obligations of the primary human rights norms that are addressed to States, to international organizations? While the objectives of the international human rights obligations in the abstract are common and transversally applicable, the concrete requirements to meet these abstract human rights obligations must be assessed in light of the nature of the duty-holder. On the one hand, it cannot be claimed that an international organization has the same means at its disposal to achieve and fulfil the positive obligations that have been developed under international human rights law vis-à-vis signatory States. Should the organization then be bound by those positive obligations that presuppose the availability of such means? On the other hand, international organizations, such as the EU in particular, do have other powers and measures at their disposal that Member States do not have, which may steer State conduct in a direction that may ultimately result in human rights violations. Should the content of the primary norm not be considered then, in light of these peculiarities that characterize international organizations?

It remains difficult, if not impossible, to contend that the positive and negative obligations, which are both procedural and substantive in nature under the Charter and broader international human rights law, should be analogous for Member States, the EU, and private corporations alike. The mere fact that the EU has legal personality, is a subject of international law, and bound by the international human rights principles embodied in the Charter and customary international law, neither clarifies the contours of its obligations, nor does it clarify the concrete rights that can be invoked by an individual against the EU.[129] Particularly in the field of human rights law, the enforceable negative, positive, procedural and substantive obligations have almost exclusively been interpreted, enacted and applied vis-à-vis States—the traditional duty-bearers of such obligations—and not a highly integrated international organization such as the EU. In the ICJ's advisory opinion on the *Reparation for Injuries Suffered in the Service of the United Nations*, it

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[129] *See* CASTELEIRO, *supra* note 100, at 14; *see also* Pierre Klein, *Responsibility*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 1034-35 (Jacob Katz Cogan et al. eds., 2016); KLABBERS, *supra* note 63, at 284.

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was held that "the subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights" and "the legal personality and rights and duties (of an international organization are not) the same as those of a state."[130]

The question must thus be raised whether it is even possible to simply transplant the concrete obligations stemming from the human rights standards that are applicable to Member States to the EU. In the preparatory works, the Special Rapporteur implicitly hints at potentially imposing "obligations of means" on international organizations to ensure respect for primary rules.[131] This could translate to a due diligence obligation on the EU to ensure that human rights are respected in the enactment of EU measures through its own bodies and its Member States. In fact, it could even be considered that a duty of care is inherent to the human rights framework. The argument is made here however, that this is currently not sufficiently constitutionally embedded within the positive and negative obligations that apply to the EU. In any event, under the current framework, the determination of the scope of positive and negative human rights obligations binding upon the EU is left overwhelmingly to ad hoc post-facto appraisals, undermining legal certainty, legitimate expectations, and the effective protection of human rights. If the positive and negative human rights obligations binding on the EU remain obscure and nebulous and without explicit constitutional foundations, how can an individual claimant successfully direct claims at the EU for the neglect of those obligations in a manner that meets the requirements of the rule of law? In fact, this lacking clarity militates against the very requirement under the EU's constitutional doctrine of direct effect, which demands that a rule be sufficiently clear and precise to be justiciable for individual claimants.

Leaving determinations of responsibility vis-à-vis European Union to ad hoc findings of the ECJ (and where possible, other adjudicatory mechanisms) poses a significant risk to the principles

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130 Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 179 (Apr. 11); *see also* Alain Pellet, *International Organizations Are Definitely Not States. Cursory Remarks on the ILC Articles on the Responsibility of International Organizations*, *in* RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS – ESSAYS IN MEMORY OF SIR IAN BROWNLIE 46 (Maurizio Ragazzi ed., 2013).

131 *See* Gaja, *Third Rep. on the Responsibility of International Organizations, supra* note 111, ¶¶ 14-15 (recalling that even if Member States are not the duty-bearers of a particular international obligation, they may still be bound to facilitate EU adherence through the duty of sincere cooperation).

of legal certainty, to parties' legitimate expectations, and to the protection of human rights, which lay at the basis of the rule of law based EU order. Looking at the formulation of Article 51 of the CFR suggests that the CFR's concrete obligations arose in the drafting process. According to Article 51, Member States, the EU, and EU agencies are held to "respect the rights, observe the principles and promote the application thereof in accordance with their respective powers . . . ."[132] Although this generalized approach implicitly acknowledges the *sui generis* nature and functional speciality of the EU, it does not identify how the EU can meet its abstract commitments to human rights through actionable legal obligations under the CFR and international human rights law generally. In view of the legal fog which taints the responsibility landscape, it is hard—if not impossible—to determine to what extent the EU has committed a breach of its primary human rights norms. This uncertainty again diminishes the access of an individual to an effective remedy in the transnational cooperative governance context.

4. Conditions for Shared Responsibility

In addition to independent responsibility of the international organization, the ARIO anticipate scenarios where international organizations work together in joint actions or operations, with Member States and other international organizations. Such responsibility is defined by Lanovoy as a responsibility for a *separate* wrongful act, which constitutes a "separate trigger of responsibility (fait générateur) from the principal wrongful act it facilitates."[133] Accordingly, the responsibility does not arise for the principal wrongful act that is committed by the primary wrongdoer, but instead for the conduct facilitating the primary wrongful act.[134] The ARIO encompass this type of shared responsibility, codifying existing custom and progressive development of international law.[135] The ARIO provisions were developed to prevent an

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132 CFR, *supra* note 12, art. 51.

133 LANOVOY, *supra* note 66, at 4.

134 *See id.*, at 5; ARIO, supra note 65, arts. 14-18.

135 LANOVOY, *supra* note 66, at 6, 9 (building upon the seminal works of Andreas Felder, Helmut Aust and Miles Jackson to reason that the principle of complicity holds validity as a source of international law even though its diverging and ambiguous application impair determinations of custom); *see e.g.*, MILES

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international organization from circumventing an international obligations "by availing itself of the separate legal personality of its members, whether States or other international organizations."[136] In addition, addressing such forms of concerted action from a multi-actor involvement perspective ensures that the burden of responsibility does not rest solely upon the shoulders of individual actors via determinations of independent responsibility, which Nollkaemper notes as problematic for two reasons.[137]

First, independent responsibility in a multi-actor context does not sufficiently take into consideration the diffusion of responsibility.[138] The diffusion of responsibility across various actors may disincentivize complicit actors from acting in accordance with human rights norms in light of the fact that diffusion of responsibility hampers definitively allocating responsibility.[139] Second, from the perspective of the victim, independent responsibility is not a suitable mechanism for reparations stemming from multi-actor unlawful conduct, as it may be difficult to penetrate the diffused responsibility identify the correct perpetrator(s) that caused harm.[140] In line with these concerns, Nollkaemper concludes that "[i]f cooperative conduct in transnational law enforcement cannot be reduced to conduct of individual participating actors, responsibility needs to connect to the relationship between the individual actors. Individualizing responsibility may miss the point."[141] By adopting provisions on shared responsibility, these concerns may—in part—be avoided *in theory*. The argument inherent to this entire study is exactly that: a relational account of responsibility is crucial, particularly in cases of transnational cooperative governance, at risk of otherwise facilitating scenarios in which all complicit actors evade

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JACKSON, COMPLICITY IN INTERNATIONAL LAW (2015); HELMUT AUST, COMPLICITY AND THE LAW OF STATE RESPONSIBILITY (2011); ANDREAS FELDER, DIE BEIHILFE IM RECHT DER VÖLKERRECHTLICHEN STAATENVERANTWORTLICKHEID (2007) (three seminal works on state and individual complicity in international law).

136 Gaja, *Seventh Rep. on the Responsibility of International Organizations*, *supra* note 70, at 83, ¶ 47.

137 André Nollkaemper, *Shared Responsibility for Human Rights Violations: A Relational Account*, *in* HUMAN RIGHTS AND THE DARK SIDE OF GLOBALISATION – TRANSNATIONAL LAW ENFORCEMENT AND MIGRATION CONTROL 27, 29-30 (Thomas Gammeltoft-Hansen & Jens Vedsted-Hansen eds., 2017).

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*, at 31.

responsibility to the detriment of the right to an effective remedy for individual victims.

The provisions on shared responsibility under the ARIO do not consider the primary and separate responsibility of the implicated states or international organizations,[142] but rather the indirect or secondary responsibility of an international organization for its involvement in *facilitating* the primary breach of an international obligation.[143] Scholarship and practice interchangeably refer to such situations as resulting in secondary and ancillary,[144] complicit,[145] derivative,[146] indirect,[147] shared,[148] relational[149] or joint[150] responsibility.[151] As Lanovoy notes, although subtle differences may exist in the terminology, these notions ultimately refer to situations where the responsibility of an international organization is considered for having facilitated a wrongful act by the principal wrongdoer.[152]

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142 Giorgio Gaja (Special Rapporteur on the Responsibility of International Organizations), *Fourth Rep on the Responsibility of International Organizations*, U.N. Doc. A/CN.4/564, (Apr. 12, 2006) at 114-115, ¶ 54.

143 ARIO, *supra* note 65, gen. cmt. 2 to Chapter IV.

144 *See* ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY 215-30 (2017); JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 395-434 (2013).

145 *See* LANOVOY, *supra* note 66; JACKSON, *supra* note 135.

146 *See* LANOVOY, *supra* note 66, at 10 (using derivative responsibility to denote that responsibility for international organizations would arise only after the principal wrongdoer's responsibility is established).

147 *See* VOULGARIS *supra* note 66, at 90.

148 *See* André Nollkaemper & Ilias Plakokefalos, *The Practice of Shared Responsibility: A Framework for Analysis*, *in* THE PRACTICE OF SHARED RESPONSIBILITY IN INTERNATIONAL LAW 1-11 (2017).

149 *See* Nollkaemper, *supra* note 137, at 27-52.

150 *See* Matthias Hartwig, *International Organizations or Institutions, Responsibility and Liability*, *in* MAX PLANCK ENCYCLOPAEDIA IN PUBLIC INTERNATIONAL LAW ¶ 25 (Rüdiger Wolfrum ed., 2011).

151 For the purpose of completeness, it is relevant to mention that Lanovoy makes the argument that this type of responsibility should not necessarily be construed as being "derivative" in nature for a number of reasons. Construing a derivative responsibility for the international organization diminishes the gradation of involvement, the nature of the involvement, and the potential remedial consequences associated to this responsibility. It may also shift the primary burden of responsibility upon the primary actor (such as the State), while (partially) absolving the complicit actor—*in casu* the international organization. Mindful of this, Lanovoy argues in favor of referring to this form of responsibility as shared or joint. *See* LANOVOY, *supra* note 66, at 10-11.

152 LANOVOY, *supra* note 66, at 4, 10. *But see* Nollkaemper & Plakokefalos, *supra* note 148, at 3 (expanding the scope and definition of shared responsibility to contexts where a "*multiplicity of actors contributes to a single harmful outcome, and legal responsibility for this harmful outcome is distributed among more than one of the*

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Much like in the cases of independent responsibility for international organizations, this second form of responsibility is plagued by limited practice.[153] However, the common thread concerning shared responsibility, is that it considers the responsibility of an international organization for its *fait générateur* – facilitating a violation of an international obligation binding upon the primary actor.[154] The ARIO explain that this type of responsibility will arise when the international organization is responsible for aiding or assisting,[155] directing or controlling,[156] or coercing[157] a signatory State's unlawful conduct. Responsibility also arises where an international organization circumvents an obligation by addressing the decisions and authorizations of Signatory States.[158] Such responsibility is thus premised not on the primary international rule that is breached by a State or international organization, but rather on the *causal conduct* by the international organization that *facilitates* this primary rule violation of the international obligation by the primary actor.[159]

A second overarching issue with the provisions on joint responsibility in the ARIO is their underdeveloped state, and the limited scope of these provisions. While this was—and to a certain extent still is—understandable in light of the ARIO's limited practice, recent developments have demonstrated that the identified variations of joint responsibility were only in an embryonic phase

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contributing actors"); *see generally* André Nollkaemper, *Joint Responsibility Between the EU and Member States for Non-Performance of Obligations Under Multilateral Environmental Agreements*, *in* THE EXTERNAL ENVIRONMENTAL POLICY OF THE EUROPEAN UNION – EU AND INTERNATIONAL LAW PERSPECTIVES 330 (Elisa Morgera ed., 2012) (referencing composite acts by different actors that result in one undivided injury, joint (unlawful) acts between the Member States and the EU that also result in one undivided injury, and any other dynamic that results in one undivided injury; arguing that the attribution issues that arise under *individual* responsibility remain applicable to joint responsibility).

153 ARIO, *supra* note 65, gen. cmt. 1 to Chapter IV (explaining that adjudicatory bodies have not assessed joint or complicit responsibility because they lacked jurisdiction *rationae personae*, particularly in human rights cases); *see also* ARIO, *supra* note 65, gen. cmt. 4 to Chapter IV (referencing caselaw); *see also* LANOVOY, *supra* note 66, at 13 (highlighting that State practice is scant for responsibility because a cognitive and thus subjective element is added in determining responsibility, making it harder to identify than objective responsibility).

154 LANOVOY, *supra* note 66, at 4.

155 ARIO, *supra* note 65, art. 14.

156 *Id.* art. 15.

157 *Id.* art. 16.

158 *Id.* art. 157; *see also id.*, gen. cmt. 1 to Chapter IV.

159 *Id.* gen. cmt. 2 to Chapter IV.

when incorporated in the ARIO. An analysis of the topic would, thus, not be complete without including partially doctrinal developments since then. These developments paved the path to the 2020 Guiding Principles on Shared Responsibility in International Law ("Guiding Principles").[160] The Guiding Principles adopt a broader approach to shared responsibility.[161] Nollkaemper defends this broader approach, arguing that it does not limit shared responsibility to the "the individual actor that influences or is influenced by another actor, but rather the relationship, or the collectivity of actors who participate in the concerted action" as it is the "relationship that influences the action of individual participants."[162] Accordingly, the degree and intensity of the relationship will determine which actor(s) should be held responsible and to what extent.[163]

Despite the recent developments on the topic, joint responsibility for international human rights violations remains underexplored and much ambiguity persists as to the precise scope and implications of such responsibility.[164] Nevertheless, common across the various conceptualizations of joint responsibility is the implication of multiple actors on the one hand (interdependent conduct) and a single harmful outcome on the other hand (interdependent outcome).[165] The interdependent conduct must have—causally or not—resulted in an interdependent outcome that could not have been achieved by one party alone and that resulted in a single harmful result amounting to a violation of an (international human rights) obligation borne by one or more of the parties involved. Building on this limited practice,[166] Nollkaemper identifies three main forms of shared responsibility: (1) concurrent

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160 André Nollkaemper et al., *Guiding Principles on Shared Responsibility in International Law*, 31 EUR. J. INT. L. 15, 15-72 (2020).

161 *See id.* at 20-22 (contrasting the Guiding Principles, which broadly identify shared responsibility and focus on the international responsibility of non-State actors, with ARIO provisions that favor the individual right to invoke the international responsibility of an international organization).

162 Nollkaemper, *supra* note 137, at 32.

163 *Id.*

164 *See* Gaja, *Third Rep. on the Responsibility of International Organizations, supra* note 111, ¶¶ 13-14, 28-29 (finding inspiration for joint responsibility in domestic legislation). *But see* Nollkaemper, *supra* note 137, at 27-52 (analyzing joint responsibility despite highlighting the absence of State practice on this matter).

165 *See* Nollkaemper, *supra* note 137, at 31-34; Nollkaemper & Plakokefalos, *supra* note 148, at 3; Ahlborn, *supra* note 125, at 55.

166 Nollkaemper, *supra* note 137, at 32.

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responsibility; (2) cumulative responsibility; and (3) joint responsibility for one single wrongful act.[167] While the third form presupposes joint responsibility stemming from a *single* wrongful act, the former two variations refer to scenarios of multiple wrongful acts by multiple actors that result in a single harmful result.[168] The provisions of shared responsibility in the ARIO fall within this second category of joint responsibility as discussed below.

There are two conditions for shared responsibility to arise under the ARIO framework that are particularly problematic. In order to incur responsibility, it would have to be demonstrated that the international organization acted with *knowing intent*, and it would have to be demonstrated that the complicit actors were bound by the same obligation (the so-called *opposability condition*). Yet, the ARIO fail to elaborate on the standard that must be met to create shared responsibility. When can knowing intent be considered to be established, particularly concerning the EU, to facilitate cooperation between States? Who bears the burden of proof, and what is the applicable standard? Concerning the opposability condition, and drawing from the earlier discussion, it is unclear whether the opposability condition demands that the international organization and the implicated State be bound by the same abstract human rights commitment, or instead by the same concretized negative and positive obligations which give flesh to the bones of the abstract human rights commitments. If the latter, the opposability condition cannot be met until the primary norms have been clarified by the implicated international organization.

This ambiguity under the ARIO is not remedied by an EU *lex specialis,* as the latter does not establish any definitive additional or clarificatory rules on shared responsibility. Bearing in mind this ambiguity and the absence of practice on the responsibility of international organizations, the ARIO and EU framework on responsibility for international organizations consequently do not yet provide a comprehensive set of primary norms and secondary rules capable of capturing the role of international organizations in violating human rights. Bringing this back to the case study of transnational cooperative governance under scrutiny, this means that in addition to the problematic access to recourse from an implicated private corporation such as HawkEye 360, individual

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[167] *See* Nollkaemper et al., *supra* note 160, at 23-26; Nollkaemper, *supra* note 137, at 38-39.

[168] *Id.*

litigants will also find it problematic to address their concerns and seek reparations from the EU.

c. Interim Conclusions: The Perennial State-Centrism Objection

The objective of this study is to unveil the difficulties associated with holding complicit actors responsible for their contributions to human rights violations when engaged in transnational cooperative governance. The foregoing analysis unveils a number of unresolved issues inherent in these two strands on responsibility.

Concerning businesses, analyses on human rights responsibility have traditionally focused on determining the desirability, scope and limitations of primary human rights rules and obligations for businesses. Fewer analyses have been devoted to the determination of secondary rules, which would explain how and when a business could incur responsibility. An inverse trend is noticeable concerning the responsibility of international organizations. This approach has been predominantly concerned with the development of secondary rules. While there is explicit acknowledgement that international organizations may be bound by primary human rights rules, this has generally not yet—much like in business and human rights—translated in concrete legal obligations for international organizations. However, as argued, the developed primary rules for businesses and the developed secondary rules for international organizations remain overwhelmingly vague and are ultimately misaligned when applied to situations of transnational cooperative governance, where their conduct cannot be meaningfully disjointed from each other. For these rules to become judicially actionable and provide individuals with access to an effective remedy, primary *and* secondary rules for NSAs would have to be developed with more nuance in a manner that is cognizant of how these NSAs cooperate together and with States.

To date, the question of NSA responsibility overwhelmingly approaches human rights responsibility in a siloed, disaggregated and actor-specific manner. When the responsibility of private corporations is under scrutiny, this is generally investigated in a manner that sheds light only and exclusively on those private corporations. These analyses do not consider the responsibility of such corporations *in relation* to the responsibility of complicit States and other NSAs. Accordingly, for transnational cooperative governance, primary and secondary rules will likely be insufficient

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to establish responsibility for implicated private business, international organizations, and/or State(s).

As the modes of responsibility for different States and NSAs are not considered holistically and relationally, one of the objectives of developing human rights obligations for NSAs may be missed altogether: individual claimants may not be able to obtain recourse from *any* of the implicated actors. As already indicated, the lacking clarity on primary norms and secondary rules for both businesses and international organizations problematize access to an effective remedy for individual applicants.

Moreover, the siloed and indeterminate understanding of NSA responsibility entails subordination to the rules governing State responsibility for human rights violations. To date, State responsibility remains the primary source of responsibility for human rights violations. This lack of alignment and the segregated approach to NSA responsibility, which is subordinate to State responsibility, further facilitates situations where transnational cooperative governance entails that none of the actors are effectively being held responsible for human rights violations—including States. Naturally, State responsibility remains an avenue for legal redress, and no real responsibility-remedy gap arises due transnational cooperative governance. Consider the following, however:

With regards to adjudicatory jurisdiction to establish state responsibility, a shift from territorial to extra-territorial jurisdiction is noticeable but cannot be overstated, as extra-territorial application of human rights norms is a strictly construed exception to the traditional rule of territorial jurisdiction. A strict conceptualization of extra-territorial jurisdiction is needed to prevent courts from exercising near-universal jurisdiction over human rights norms, a reality to which signatory States did not agree when ratifying human rights instruments. After all, the contemporary international human rights regime remains predicated on a State driven, territorial conceptualization of jurisdiction. One could argue that the human rights responsibility of NSAs is not constrained by territorial boundaries in the same manner. Yet this same fear of near-universal jurisdiction resurfaces in these NSA approaches. Accordingly, implicated NSAs increasingly take measures that limit any responsibility to an understanding of jurisdiction that is overwhelmingly State-centric and territorial. In 2021, the U.S. Supreme Court held that mere corporate presence is insufficient to prove a connection to the United States and prevail on a cause of

action. Similarly, international organizations take measures to limit jurisdiction to the traditional State-centric limitations. Although the EU as a highly advanced and integrated international organization is not constrained by territorial jurisdiction under the CFR, it actively engages in methods to avoid jurisdiction. The EU, for instance, evades territorial *and* extra-territorial jurisdiction by moving towards satellite imaging and detection in its border management.

Furthermore, multiple attribution tests exist to establish responsibility under the international and EU framework on responsibility, including the normative control test, the competence test, and the operational control test. These tests determine whether unlawful conduct should be attributed to the complicit State or the implicated organization. Crucially, all three tests have a stricter variant and a broader variant. Recall, however, that there are currently no clearly defined and overarching secondary rules—and thus tests for attribution—for businesses, and no standards exist to determine which test shall prevail in a given set of circumstances, leaving it entirely up to courts on an international, regional, and domestic level to determine. haphazardly and in an *ex-post* manner, which test applies. Hence, even when attempting to establish State responsibility, claimants have no guarantee that the State-centric regime on responsibility will be effective, as much will depend on the test applied for attribution.[169]

To reiterate, primary human rights norms have been traditionally interpreted, enacted, and applied to States as the primary duty-bearers of such obligations. One may argue that this condition to establish State responsibility would likely pose the least difficulties for individual claimants. Yet it must be recalled that in Europe, recourse is frequently had to the "equivalent protection" doctrine. This doctrine entails that insofar signatory States are implementing measures from the EU, a substantive assessment of their human rights compliance will not occur as the EU provides a functionally equivalent level of human rights protection under its own judicial mechanism.

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[169] *See* Joyce De Coninck, Catch-22 in the Law of Responsibility of International Organizations: Systemic Deficiencies in the EU Responsibility Paradigm for Unlawful Human Rights Conduct in Integrated Border Management (2021) (Ph.D. dissertation, Ghent University), at 168-170, https://biblio.ugent.be/publication/8721431 [https://perma.cc/4BNQ-7UC2] (discussing the impact of the lack of a definitive attribution test on court rulings made in a single jurisdiction, taking examples from *Mukeshimana-Ngulinzira and others v. Belgium*, and Mothers of *Srebrenica Association v. Netherlands*).

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In summary, the absence of clearly defined and enforceable primary and secondary rules for businesses and international organizations make NSAs unlikely contenders to hold responsible for human rights violations. While NSAs do increasingly have due diligence obligations, voluntary codes of conducts, and internal review procedures, the effectiveness of these internal alternatives has been questioned. This leaves victims with the possibility of directing their grievances against States. However, in cases of *transnational* cooperative governance, there is frequently an extraterritorial element at play that cannot be caught by the state-centric conceptualization of jurisdiction. Presupposing that one could overcome the hurdle of jurisdiction, it would then have to be demonstrated that the unlawful conduct can be attributed to an implicated State. However, the diffused and convoluted conduct shared between the State, the private corporation, and the international organization (*in casu* the EU), complicate the test that should apply, leaving the matter to discretionary courts in the absence of a definitive standard. Finally, presupposing that the obstacles of jurisdiction *and* attribution can be overcome, an individual applicant would then have to find a legal forum willing to disregard the equivalent protection doctrine,[170] in the interest of holding the State primarily responsible for unlawful conduct that was the result of cooperation between three different actors.

The siloed approach to responsibility prevents access to an *effective* remedy and unveils loopholes and shortcomings, particularly in cases of transnational cooperative governance. It would be nonsensical however, to disavow the human rights regime altogether on account of these shortcomings, when so many laudable developments have been made in reinvigorating its effectiveness. Rather than simply critiquing and disregarding the validity of international human rights law, this Article argues in favor of unveiling one of the most overlooked questions of human rights protection, scrutinizing the pitfalls, and offering instead a reconceptualized and relational approach to it. After illustrating these theoretical arguments through the lens of the EU's cooperation with HawkEye 360, the Article presents an alternative way forward.

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170 *See infra* p. 40.

III. COOPERATIVE GOVERNANCE AND THE RESPONSIBILITY-REMEDY GAP

The subsequent paragraphs address the responsibility-remedy gap that is created through the increased recourse to transnational cooperative governance on the one hand, and the lack of a holistic and reconceptualized human rights responsibility mechanism to facilitate such governance on the other. In demonstrating this responsibility-remedy gap, reference is made to the EU's Operation Sophia and Irini, which make use of drones in the Mediterranean to facilitate push- and pullbacks of TCNs to Libya, as well as the EU's recent contract with HawkEye 360, which likewise facilitates such push- and pullbacks through satellite geospatial analysis. These examples demonstrate how transnational cooperative governance allows for a situation that transcends the traditionally state-centric human rights regime to the detriment of access to an effective remedy by individual right-holders. The recourse to transnational cooperative governance creates a scenario in which all complicit actors are likely to evade responsibility.

a. EU Cooperative Governance: Integrated Border Management

EU policy on borders, asylum, and migration has incrementally transformed into a security-centric policy.[171] This shift is evidenced *inter alia* by the EU's IBM framework.[172] IBM is inspired by the "four-

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[171] *See* Mariagiulia Giuffré & Violeta Moreno-Lax, *The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows*, *in* RESEARCH HANDBOOK ON INTERNATIONAL REFUGEE LAW 82, 82-108 (Satvinder Singh Juss ed., 2019); Arantza Gomez Arana & Scarlett McArdle, *The EU and the Migration Crisis: Reinforcing a Security-Based Approach to Migration*, *in* CONSTITUTIONALISING THE EXTERNAL DIMENSIONS OF EU MIGRATION POLICIES IN TIMES IN CRISIS – LEGALITY, RULE OF LAW AND FUNDAMENTAL RIGHTS RECONSIDERED 272, 272-73 (Sergio Carrera et al. eds., 2019); VIOLETA MORENO-LAX, ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER EU LAW 27-41 (2017); Violeta Moreno-Lax, *The EU Humanitarian Border and the Securitization of Human Rights: The "Rescue-Through-Interdiction/Rescue-Without-Protection" Paradigm*, 56 J. COMMON MKT. STUD. 119, 120 (2017); Maarten den Heijer, Europe *Beyond its Borders: Refugee and Human Rights Protection in Extraterritorial Immigration Control*, *in* EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES 169, 172-173 (Bernard Ryan & Valsamis Mitsilegas eds., 2010).

[172] Regulation 2019/1896, of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and Repealing

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tier access control model'[173] and refers to EU measures implemented at every juncture of the individual's trajectory to reach the EU external border, irrespective of the underlying cause for migration. IBM is considered as a "necessary corollary to the free movement of persons within the Union and is a fundamental component of an area of freedom, security and justice."[174] IBM maps TCNs' movement from the point of departure of the country of origin (or transit) and seeks to regulate their movement by (1) imposing measures to control migratory movements in third countries; (2) using border checks outside the EU external border, in cooperation with neighboring third countries; (3) exercising control measures at the EU external border, as well as within the EU; and (4) deporting individuals that do not meet the conditions for entry and/or stay in the EU.[175] IBM's first tier encompasses measures taken in cooperation with third countries concerning border control, such as visa requirements. Such measures are implemented to discourage individuals from attempting to reach the EU's external border by mandating them to obtain prior authorization *before* embarking upon travel to the EU.[176] IBM's second phase concerns measures taken *throughout* a TCN's journey before reaching the EU, including operational action taken at sea, to prevent irregular movement and/or entry. An example of such operational action is the recently terminated EU naval mission, EUNAVFOR MED Operation Sophia, and its successor EUNAVFOR MED Operation Irini. This phase may also require cooperation with third countries. IBM's third includes measures taken upon a TCN's *arrival* at the EU's external border, while the fourth and final tier refers to the measures taken to return and readmit a TCN to third countries.

IBM has prompted the expansion and diversification of the traditional functions of a territorial border. Initially, the management of the territorial border functioned as a means to verify whether an individual has met the formalities and conditions to be

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Regulations, art. 3, 2019 O.J. (L295/1) [hereinafter EBCG Regulation 2019] (outlining the EU's Integrated Border Management policy).

173 *Id.*, Recital 11; Moreno-Lax, *supra* note 171, at 27-41.

174 EBCG Regulation 2019, *supra* note 172, Recital 1.

175 Moreno-Lax, *supra* note 171, at 27-41; den Heijer, *supra* note 171, at 173-74.

176 *See* den Heijer, *supra* note 171, at 170; Evelien Brouwer, *Extraterritorial Migration Control and Human Rights: Preserving the Responsibility of the EU and Its Member States*, *in* EXTRATERRITORIAL IMMIGRATION CONTROL: LEGAL CHALLENGES 199 (Bernard Ryan & Valsamis Mitsilegas eds., 2010).

granted entry into a particular country.[177] Instead, EU IBM now pursues a wide array of objectives, including but not limited to preventing irregular entry into EU territory and the combatting of smuggling and preventing cross-border crime.[178] However, the multi-functionality of the EU's border management has a number of implications. Firstly, as posited by den Heijer, this shift in the traditional conceptualization of border control has resulted in the multiplicity of borders, as borders are no longer "stable and univocal," but instead, "multiple," shifting in meaning and function, as a result of which "[t]he border is no longer limited to a State's territorial boundary, but is being exported, such that a person may experience a foreign border while still within the territory of his own country."[179]

Second, due to the geographical externalization of the territorial border to the territory of third states in accordance with tier 1 and 2 of IBM, responsibility for TCNs has also shifted outwards. By shifting the EU border outwards into high seas, as well as into the territories of third states, EU policy has severed the jurisdictional nexus that typically triggers the applicability of human rights safeguards. Simply put, by preventing entry into EU territory, the EU and its Member States are arguably not responsible for protecting and safeguarding the human rights of individual protection-seekers, as they do not fall within the territorial jurisdiction of either.[180] This facilitates a dichotomous situation whereby the EU pursues fundamental rights protection for TCNs in theory yet outsources the burden for such protection (in the field of IBM) to other actors, particularly third states—all of which complicate the question of the EU's responsibility for its contribution to human rights violations in this field.

The question of the EU's legal responsibility for engaging in unlawful human rights conduct in its implementation of IBM is intimately connected to the TNCs' right to an effective remedy.[181]

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177 Brouwer, *supra* note 176, at 199.

178 EBCG Regulation 2019, *supra* note 172, Recital 1 ("The aim is to manage the crossing of the external borders efficiently and address migratory challenges and potential future threats at those borders, thereby contributing to addressing serious crime with a cross-border dimension and ensuring a high level of internal security within the Union."); Brouwer, *supra* note 176, at 199.

179 den Heijer, *supra* note 171, at 170.

180 *See* sources cited *supra* note 82.

181 The right to an effective remedy as understood in the relation between a State and the individual is required to be "prompt, accessible and capable of offering a reasonable prospect of success." The explanations to the CFR note that

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Indeed, legal remedies cannot be obtained by these victims without first establishing responsibility. To ensure an effective remedy and ensuing reparations, a TCN is required to enforce primary and secondary rules before a court of law or tribunal.[182] But who shall these primary and secondary rules be enforced against when parts of IBM rely on an intangible cooperation between the EU, its Member States, and private international corporations?

b. HawkEye 360

In 2019, Frontex— the EU's Border and Coast Guard— awarded a contract to the US-based company HawkEye 360 without going through the regular EU tender procedure. This contract was subsequently renewed *without* a tender procedure, albeit Frontex keeps the details of this latest award confidential, so it is uncertain (though likely) that the award was renewed for HawkEye 360.

HawkEye 360 specializes in geospatial data analysis through the use of its satellites, which—with the help of artificial intelligence—

Article 47 concerning the right to an effective remedy provides more extensive protection than the analogous right under Article 13 of the ECHR, as it extends to all freedoms and rights under EU law and is not limited *ratione materiae* to the CFR. Neither the CFR nor the ECHR provide a definition of the right to an effective remedy but rather assert that a number of factors must be considered. *See e.g.*, M.S.S. v. Belgium, App. No. 30696/09, ¶¶ 290-93 (Jan. 21, 2011) https://hudoc.echr.coe.int/eng?i=001-103050 [https://perma.cc/V6W5-FRJ8] (holding that there was no effective domestic remedy because of the failure to properly examine the applicant's asylum request due to the fact that Greek asylum law is not applied in fact as well as inherent shortcomings in the asylum procedure at large and individual examination); Batı and Others v. Turkey, App. Nos. 33097/96 and 57834/00 (June 3, 2004), https://hudoc.echr.coe.int/?i=001-61805 [https://perma.cc/LWG5-YV62] (concluding that Article 13 imperatively requires (1) independent and rigorous scrutiny and (2) a particularly prompt response by a national authority considering the irreversible nature of the damage that may result if the risk of torture or ill-treatment materializes); Čonka v. Belgium, App. No. 51564/99, ¶¶ 81-83 (Feb. 5, 2002), https://hudoc.echr.coe.int/?i=001-60026 [https://perma.cc/9DVP-DWCC] (requiring that the person concerned have access to a remedy with automatic suspensive effect); *see also* CARLA FERSTMAN, INTERNATIONAL ORGANIZATIONS AND THE FIGHT FOR ACCOUNTABILITY: THE REMEDIES AND REPARATIONS GAP 75-76 (2017). For an extensive discussion on the need for remedies against the unlawful conduct of international organizations, *see generally* KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS PAGE (2009) (analyzing existing legal recourse against wrongful acts by international organizations within the current international legal framework and arguing that there is a heightened imperative for such accountability).

182 *See* DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW 10-27 (2015) (concerning remedies for human rights violations).

facilitate automated risk analyses of ships while increasing situational awareness of the area under surveillance. Through its contract with HawkEye 360, Frontex requested access to four different sources of data, which would allow it to increase its situational awareness in the Mediterranean. While aerial surveillance is not problematic as such, it becomes problematic in light of the non-refoulement principle under international and regional human rights law when such location data is shared with the Libyan Coast Guard, which push- and pull individuals back onto Libyan territory.[183] Although Frontex confirmed in 2021 that the location data it had acquired through its contract with HawkEye 360 had (to date) not been shared with third countries, it is not unthinkable that this is the direction in which Frontex is headed, as such precedent already exists in EU IBM. Moreover, transparency requests on these measures have been repeatedly rejected, preventing any effective scrutiny of the chain of command.[184]

Terminated CSDP military operation EUNAVFOR MED Sophia (Operation Sophia)[185] is an example of how the EU has shared location data obtained by unmanned drones covering the high seas in the Mediterranean.[186] This operation sparked much controversy

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[183] *See generally* Judith Sunderland & Lorenzo Pezzani, *Airborne Complicity: Frontex Aerial Surveillance Enables Abuse,* HUM. RTS. WATCH (Dec. 12, 2022), https://www.hrw.org/video-photos/interactive/2022/12/08/airborne-complicity-frontex-aerial-surveillance-enables-abuse [https://perma.cc/PMU5-6QXT] (describing how Frontex conducts aerial surveillance of migrants attempting to reach Europe via the Mediterranean Sea and subsequently provides this information to Libyan authorities so that the migrants can be intercepted before reaching Europe, resulting in pushbacks and the potential return of these asylum-seekers to States in which they would face persecution, thus breaching the obligation against refoulement).

[184] *Id.*

[185] Council Decision (CFSP) 2015/972 of 22 June 2015, Launching the European Union Military Operation in the Southern Central Mediterranean, 2015 O.J. (L157/51); Council Decision (CFSP) 2015/778 of 18 May 2015, on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED), 2015 O.J. (L122/31).

[186] Operation Sophia has recently been terminated in its entirety, and its mandate has been incorporated into the CSDP mission EUNAVFOR MED Operation Irini ("Operation Irini"). The objective of this new mission is the implementation of the UN arms embargo on Libya. Operation Irini has also taken over the former Operation Sophia tasks of conducting information gathering and aerial surveillance to control irregular migratory flows and the countering of human smuggling and trafficking in the area. Therefore, the considerations on aerial surveillance and resulting *de facto* push- and pull-backs similarly apply to Operation Irini. *See* Council Decision (CFSP) 2020/472 of 31 March 2020, on a

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due to the human rights implications it had on individual TCNs, but has yet to give rise to any legal review concerning the damage resulting therefrom.[187] Specifically, within this operation, the EU made use (and continues to do so through its successor Operation Irini[188]) of aerial surveillance through unmanned drones, to locate and transmit location coordinates of individuals trying to reach Europe in the Mediterranean to the Libyan Coast Guard. These individuals are subsequently pulled back to Libyan territory, where they are subject to a wide array of well-documented human rights abuses.

In other words, the EU's IBM policy, as effectuated through Operation Sophia and Irini, facilitate contactless control and containment of individuals trying to request asylum or subsidiary protection in the European Union. This drone-instigated data-sharing between the EU and the Libyan Coastguard prevents individuals from leaving Libya, both by facilitating push- and pullbacks by the Libyan Coast Guard, and by containing them in Libya altogether. All the while, any physical contact between EU authorities and TCNs is severed and prevented, thus minimizing the chances of establishing extra-territorial human rights jurisdiction, which would otherwise trigger human rights obligations. While there are no concrete and legally enforceable human rights obligations that are seemingly violated by the EU and Member States in adopting these measures, it is extremely questionable whether this practice is in conformity with their respective human rights commitments to adhere to non-refoulement.

By relying on a US-based company to provide access to location data, facilitated through satellite imagining, a third actor is being added to the cooperative governance in the EU's border

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European Union Military Operation in the Mediterranean (EUNAVFOR MED IRINI), 2020 O.J. (L101/4).

187 The limited case law precedent may be attributed to the fact that use is made of the Athena mechanism (which has individual legal personality) and/or amicable alternative dispute mechanisms. *See generally* Joni Heliskoski, *Responsibility and Liability for CSDP Operations*, *in* RESEARCH HANDBOOK ON THE EU'S COMMON FOREIGN AND SECURITY POLICY 132, 136-142 (Steven Blockmans & Panos Koutrakos eds., 2018) (describing the problematic approaches to attributing conduct to the EU itself for unlawful conduct by a Member State); *see* Joyce De Coninck, *Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?*, 24 GERMAN L. J. 342, 342-63 (2023) (explaining why this operation has not given rise to legal review).

188 Council Decision (CFSP) 2020/472 of 31 March 2020, on a European Union Military Operation in the Mediterranean (EUNAVFOR MED IRINI), 2020 O.J. (L101/4).

management. Member States provide the necessary border guards to Frontex, Frontex executes and coordinates the EU's IBM, and HawkEye 360 provides access to the necessary data sources on a continuous basis, allowing the EU's external border management to be further outsourced to Libya.

c. Identifying the Legal Responsibility Gap in Practice

In the event that location data is made available through HawkEye 360 satellites to Frontex, which subsequently relays this information to the Libyan Coastguard, which subsequently enacts a pull-back operation, individuals are prevented from accessing the European Union to request international protection and possibly from leaving Libyan territory altogether.

Such practices stand in stark contrast with the customary *non-refoulment* norm, which holds that individuals shall not be returned to a State where they run the risk of being subjected to significant ill-treatment. Two observations are in order here. First, Libya has been repeatedly condemned as an unsafe third country by international, regional, and domestic courts and tribunals. Second, it is internationally recognized that the reference to "return" of individuals according to the non-refoulement principle is to be understood in its broadest sense. Hence, not just "returning" an individual in a strict sense will trigger the non-refoulement principle: measures of *non-entrée* will likewise trigger its application.[189]

Measures of data-sharing which result in push- and pull-backs to Libya contravene the abstract commitment to respect the non-refoulement principle, and will be experienced as a violation thereof by the victim. But is it likely that this will translate into an actionable legal claim for the individual? The foregoing analysis suggests that it would not be likely.

First and foremost, by moving away from the use of drones in the airspace of the Mediterranean and instead effectuating aerial surveillance through satellites in space, the EU and Frontex have managed to erode any jurisdictional ties under the contemporary human rights regime. Under the current doctrines on extra-territorial jurisdiction, it is untenable to argue that any spatial effective control is being exercised through this aerial surveillance

[189] *N.D.*, App. No. 8675/15 & 8679/15, ¶ 185.

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and warranting extra-territorial jurisdiction. Similarly, no state-agent control can be established, as any exercise of physical control is severed. Finally, the "special features doctrine" as a means to establish extra-territorial jurisdiction has not (yet) developed in this direction. Currently, it *may* be triggered insofar by virtue of domestic law a State has initiated a procedure to investigate any possible own wrongdoings under its human rights obligations. The sheer distance and indeterminate involvement of Member States and Frontex deter extra-territorial jurisdiction. In addition to this considerable jurisdictional hurdle, it needs be recalled that under EU and international human rights law, there is a significant absence of secondary rules establishing (extra-territorial) jurisdiction for businesses, capable of rendering the full scope of European human rights provisions enforceable.

Second, the question of attribution would have to be overcome. As hinted at previously, much will depend on which attribution test is applied. But additionally, it would first have to be decided what the problematic conduct is that would need to be attributed: the transfer of location data from HawkEye to Frontex? The data transfer from Frontex to third parties such as the Libyan Coast Guard?[190] The provision of manpower by Member States to Frontex to facilitate its operations? Not only will any court be confronted with multiple potential tests of attribution, but also, without any definitive standards, the attribution test and subsequent questions of responsibility will likely be determined by what is construed as the unlawful conduct. Again, it is crucial to underscore that no such overarching rules have been established for businesses, making it unlikely to—absent any *ex ante* human rights obligations imposed on HawkEye 360—attribute problematic conduct to the latter. In the best but unlikely scenario, unlawful conduct may be attributed to Member States. This will be difficult to argue however, as it is unlikely that Member States will be considered as an organ of the EU (normative control attribution test), or that they have the necessary competence to engage in data-sharing (competence attribution test) effectuated through Frontex, or that they have operational effective control, or ultimate normative control (operational control test). Accordingly, it becomes unlikely that the

[190] It may be possible to establish violations of data processing rules under EU law. However, this is not the question at stake in the current Article. This Article rather investigates whether the EU can be held responsible under international or EU human rights law human rights law for the EU's contributions to violations of the non-refoulement principle.

existing attribution tests that have been applied haphazardly will identify the State as being responsible for the unlawful conduct.

Next, the question arises whether there has been a violation of an international obligation. Although the abstract commitment to the non-refoulement principle may be considered violated given that location-data sharing facilitates the illegal returns of individuals to Libya, it is unclear whether a concrete positive procedural or substantive human rights obligation has effectively been violated by *any* of the implicated actors. Recall that human rights and their subsequent positive and negative obligations have been traditionally enacted, interpreted, and applied with States as the duty-bearers in mind. The developments in the realm of business and human rights, as well as the field of international organizations and human rights, and the primary norms by which these NSAs are bound generally lack sufficient clarity to be legally enforceable. Moreover, it is questionable whether the mere transmission of location-data would be sufficient under current positive human rights law to trigger violations of the non-refoulement principle. It could trigger violations of data processing rules under EU law—but that does not address the question of the EU's responsibility under human rights law more generally. One could argue that both NSAs are under precautionary obligations to prevent and mitigate human rights violations. But even on this level, it is unclear whether there's a prescribed standard to hold that such a preventative obligation has been violated. Again, victims will be left with States as potential defendants in their quest for an effective remedy. This raises the question whether States have conducted themselves in violation of the positive and negative obligations by which they are bound. As the individuals concerned are being prevented from even leaving Libyan territory and territorial waters, or are immediately pulled-back without any contact with EU authorities authorized to trigger extra-territorial jurisdiction, it will be difficult to contend that the Member States have engaged in any wrongdoing under their positive and negative non-refoulement obligations.

That leaves the rights-holder with the option of relying on the conditions of shared responsibility. As has been elaborated upon, however, the requirements to establish a knowing intent and opposability have not been clarified. Without the primary and secondary rules elaborating upon how these norms of shared responsibility operate, access to an effective remedy will be problematic at best.

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IV. MOVING FORWARD: RELATIONAL HUMAN RIGHTS RESPONSIBILITY

On the basis of the foregoing systematic analysis of the issues that arise in establishing human rights responsibility for implicated States, the EU, and private corporations, an alternative approach to human rights responsibility for transnational cooperative governance can be developed. This part introduces "Relational Human Rights Responsibility" as an alternative and complementary model. With this model, the emphasis is placed on the cooperation between the various actors in perpetrating human rights harms to ensure the victim access to an effective remedy. In addressing human rights responsibility for modes of transnational cooperative governance in a holistic manner and according to the contributions of each actor, access to an effective remedy for victims can be ensured.

a. Setting the Scene

While initially more focus was on developing primary human rights norms for businesses, scholarship and practice primarily focused more on the development of secondary rules on the responsibility of international organizations. However, these developments have not yet come to full fruition and arguably the primary norms and secondary rules for both types of NSAs lack sufficient precision to function as legally actionable for individuals who fall victim to unlawful conduct by NSAs. Although internal mechanisms are increasingly taking the forefront as a way to monitor human rights adherence by NSAs, the momentum for external human rights responsibility is picking up speed. The need for a reconceptualized approach to the human rights responsibility of NSAs is aggravated by the fact that situations of transnational cooperative governance increasingly prevent complicit actors from incurring human rights responsibility for unlawful conduct, thereby depriving individuals from access to an effective remedy.

The "responsibility-remedy" gap that arises from such transnational cooperative governance may in part be due to the lacking alignment between responsibility regimes of States, international organizations, and private corporations. To date, practice and scholarship have been largely devoted to discerning the

primary and secondary human rights norms of these different actors in a siloed manner. These separate approaches fail to fully grasp that these actors overwhelmingly rely on each other and stand in relation to each other when attempting to tackle common objectives. In turn, their contributions to a given line of conduct may thus all contribute to a single human rights harm. By developing responsibility mechanisms that lack alignment and are not reflective of the relational dynamic between States, international organizations, and private corporations, access to an effective remedy for individual claimants is under jeopardy, as all of the conditions that must be met for the responsibility to arise were developed in a siloed, State-centric manner. A relational regime of human rights responsibility may solve this issue and ensure that legal redress can be obtained from the various complicit actors for their contributions to the unlawful conduct. Relational human rights responsibility would ensure that the primary and secondary norms governing responsibility of these actors are aligned, ensuring that responsibility of the separate actors would not be significantly curtailed or obliterated altogether.

The main issues that arise in allocating responsibility to complicit actors in transnational cooperative governance relates to (1) state-centric conceptualizations of the conditions governing responsibility for States and NSAs; (2) a disconnect between abstract human rights commitments and ensuing legally actionable obligations; and (3) the subordination of NSA responsibility to State responsibility.

A reconceptualization of the traditionally State-centric human rights regime must take the objective of ensuring individual rights as an uncontestable *point de départ*. Hence, the objective of relational responsibility is characterized by the objective to allocate responsibility and ensure the effectiveness of human rights of individuals (in cases of transnational cooperative governance) on the one hand, while bearing in mind the considerations that currently result in the non-enforceability of NSA responsibility on the other.

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b. A Relational Regime

i. Primary Norms

Much like vital organs in the human body bear different responsibilities in keeping the body healthy and alive, States, international organizations, and private corporations increasingly fulfill different—but equally crucial roles—in safeguarding the essence of human rights. In adhering to the abstract commitment to respect human rights, which is universal across the various State actors and NSAs, primary and secondary rules and specific legal obligations should reflect the functional differences that characterize the complicit actors. Accordingly, the primary norms that apply to businesses and international organizations alike are identical with regards to the abstract commitment but differ with regards to the concrete legal obligations stemming therefrom.

The first steps in this direction have been taken both in the business and human rights movement and, more recently, in the approach to the human rights responsibility of international organizations. With regards to the latter, the Draft Treaty on Business and Human Rights (the "Draft Treaty")—building on earlier soft-law instruments—would impose legally binding obligations on private corporations to safeguard human rights. Similarly, the EU's trade toolbox and measures such as the EU Regulation on Conflict Minerals impose binding human rights obligations on private corporations. The EU's CFR is another example of how international organizations are increasingly bound to international and regional human rights obligations.

What both developments are missing however, is more specificity. The business and human rights approach is more developed that its counterpart and envisages concrete obligations such as due diligence, certification, impact assessments and review mechanisms. Upon closer inspection, however, these concretized obligations remain relatively open-ended. For example, as a negative obligation, the Draft Treaty suggests businesses to refrain from "causing or contributing to adverse human rights impacts . . . and address such impacts when they occur."[191] Yet both the causality and contributory tests remain undefined, as does the understanding of what constitutes "adverse human rights impacts."

[191] Draft Treaty on Business and Human Rights, *supra* note 47, at 4.

Similarly, it is unclear what type of measures are to be taken by companies in addressing such detrimental impacts: must companies foresee in compensation and, if so, according to which procedures? Though less developed, the same objections exist for international organizations. The EU, for example, is the first supranational international organization to be bound by an extensive and internationally-inspired catalogue of human rights. Yet these provisions are almost entirely copy and pasted from State-centric human rights instruments, with only limited consideration of the functional difference that distinguishes the EU from its Members. Concretely, what are the implications of the EU being bound by the right to asylum in Article 18 of the CFR? What are the positive and negative duties that the EU has in discharging this right?

From the primary rule perspective, a relational human rights regime would complement the negative and positive obligations that have been developed for States, with "common but differentiated" obligations for businesses and international organizations (*in casu* the EU). The recurring objection here is of course that it is inconceivable to identify and enumerate all positive human rights obligations *ex ante*, particularly given the non-static nature of competence division and powers between the various actors engaged in transnational cooperative governance. A caveat is necessary in response to this objection. Spelling out primary norm obligations to ensure that the abstract commitment to human rights is respected does not mean that all concretized primary rules obligations should be defined in a static and overly detailed manner. Instead, this relational approach proposes to work with closed-finite procedural rules and open, standard-setting substantive human rights obligations.

For example, the EU could be bound by the:

- *Negative substantive obligation (open-ended)* not to aid and assist human rights violations of any kind through its border management measures abroad. Aid and assistance could then be preemptively defined as the provision of financial assistance without verification, the absence of due diligence, and the absence of annual human rights impact assessments to monitor the legitimacy of the funding.
- The concomitant *positive procedural obligation (closed-finite)* could be to impose an internal complaint mechanism, which would require halting funding and/or aborting missions that violate human rights. This is reminiscent of the Frontex internal complaint mechanism and the duty on behalf of the

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> Frontex Executive Director to abort Frontex missions on those grounds. However, this approach is not yet streamlined into the EU's human rights regime more generally and has only developed in such detail by Frontex on account of the increasingly louder cries for its responsibility.

Such obligations differ from the highly concretized primary human rights obligations of States but would nevertheless contribute—much like different organs contribute to the overall health of the body—to ensuring the abstract and effective commitment to human rights. Similarly, businesses in the EU could be subjected to a pre-determined set of open-ended substantive obligations (regardless of their size, form, or nature), as well as a set of procedural finite obligations. If these obligations and their modalities were to be developed *ex ante* as a means of human rights governance, this ensures that the three types of actors engaged in transnational cooperative governance would have "common but differentiated" obligations in achieving the same abstract commitment. In turn, it is far more likely that individual victims will retain access to an effective remedy against all three actors, albeit for different contributions to the single human rights harm stemming from transnational cooperative governance.

ii. Secondary Rules

Much of the "responsibility-remedy" gap is the result of lacking or underdeveloped secondary rules to establish human rights responsibility. But insofar as primary norms are sufficiently developed beyond the abstract commitment to reflect the functional speciality of the different categories of actors, the issues concerning attribution and the determination of unlawful conduct will also be remedied. If the different actors engaged in transnational cooperative governance are subjected to common but differentiated (*ex-ante* defined) primary norms, the issue of attribution to different actors of the same conduct will not necessarily arise. Instead, attribution of the conduct to the actor will occur in line with the established primary rule, which is different across the three actors. Similarly, a more clearly defined primary norm entails that there will be no real issues in identifying the legal obligation, which was violated and, if developed thoroughly, would also identify the primary norm by clarifying conditions of causation and knowing

intent. The opposability requirement to establish responsibility would, similarly, no longer pose an issue in light of the recognition of these functionally distinct actors which are bound by the same abstract commitments but by different concrete legal obligations.

iii. A Case for Tertiary Norms . . . ?

The foregoing model is no more than a bridging of the different strands of responsibility and taking it one step further. What this model does not address however, is how remedies and reparations would be discharged. This distinction is not made by the current rules on responsibility, and instead rules of reparations are embedded in the secondary norms. This relational model would do away with this conflation and instead propose a new approach to reparations with tertiary rules on reparations.

One of the perennial arguments that resurfaces in debates on the responsibility of NSAs is associated costs that would hamper the functionality of NSAs. These costs translate on two levels. On the one hand, there are the costs associated with streamlining human rights adherence into the architecture of NSAs. These are costs made to ensure that human rights are protected pre-emptively and embody a precautionary approach. On the other hand, there are remedial costs associated with the occurrence of human rights violations and ensuing claims for remedies.

This relational model acknowledges the functional differences between States, international organizations, and businesses and the need to ensure their continued functioning, which would be hampered in the case of excessive remedial costs. Accordingly, while the preventive/precautionary costs would be borne by the respective actors, the remedial costs could be limited through a cascade system. Inspired by the Committee of Ministers' role in the implementation of judgments of the ECtHR and the envisaged co-respondent mechanism for the EU's accession to the ECHR, this cascade system would ensure that division of reparations could be the subject of a follow-up proceeding between the implicated parties. A mechanism reminiscent of this approach can be found in the joint and several liability regime of the EU's Europol agency, which foresees in an internal procedure to reallocate the burden of reparations between Europol and the EU Member States following successful liability claims through Europol's Management Board of Europol. In other words, the determinations of responsibility would

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be distinct from any follow-up rulings or arbitration on the division of reparations. This entails on the one hand that the individual would be ensured access to a remedy, while it is left to the complicit parties on the other hand to determine how those costs should be divided according to their respective roles in the unlawful conduct, the gravity of the violations, and the deterrent effect this would have on economic performance of the implicated corporations.[192]

This rudimentary blueprint for "relational human rights responsibility" does not purport to solve the responsibility-remedy gap stemming from transnational cooperative governance in its entirety. However, it is being developed with a view to spurring the conversation in a direction that places the right to an effective remedy for individuals at the forefront, while acknowledging that one actor alone cannot exclusively bear the burden of human rights responsibility where transnational cooperative governance increasingly takes centerstage.

[192] A similar system of remedies has recently been developed for the EU's Agency for Law Enforcement Cooperation. *See* Regulation 2016/794, of the European Parliament and of the Council of 11 May 2016 on the European Union Agency for Law Enforcement Cooperation (Europol) and Replacing and Repealing Council Decisions 2009/371/JHA, 2009/934/JHA, 2009/935/JHA, 2009/936/JHA and 2009/968/JHA, Recital 57, 2016 O.J. (L135/53).