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Joyce De Coninck

RELATIONAL HUMAN RIGHTS RESPONSIBILITY

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RELATIONAL HUMAN RIGHTS RESPONSIBILITY

Joyce De Coninck[*]

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 EU, and its Member States as an illustration, this 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 blurs the line between primary human rights violations and secondary rules on responsibility, making it hard to establish which

[*] Adjunct Professor of EU law at NYU School of Law, Scholar in Residence at the Center for Human Rights and Global Justice, former Emile Noël Fellow at New York University School of Law, and FWO Post-doctoral Fellow at Ghent University, Belgium. My sincere thanks for the insightful comments by and thought-provoking exchanges with the members of the Junior International Law Scholars Association (JILSA) during the annual meeting at Boston University in January 2023. Additionally, my sincere gratitude to Gráinne de Búrca, Joseph Weiler, Inge Govaere, Hélène Tigroudja, Thomas Streinz, Philip Alston, César Rodríguez-Garavito, Mikhal Shachar, and Neli Frost, as well as the staff and fellow (visiting) scholars of the Center for Human Rights and Global Justice, the Jean Monnet Center for International and Regional Economic Law and Justice, the Hauser Global Fellows Program at NYU, and the Ghent European Law Institute at Ghent University. Finally, a word of gratitude to my former students at Minnesota Law School for all of their comparative insights and critical questions. All errors remain my own.

entity 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 and ensuing reparations.

To eliminate this responsibility-gap, the Article advances "Relational Human Rights Responsibility" as an alternative 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 solution 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 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) for the purpose of facilitating 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 "*Disclosing 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 equipment. Releasing such information could benefit criminal networks*".[5]

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[1] Frontex, Poland-Warsaw: Satellite Radio Frequency Emitter Detection for Maritime Situational Awareness 2019/S 244-599045 (Contract award notice), TENDERS ELECTRONIC DAILY (2019), https://ted.europa.eu/udl?uri=TED:NOTICE:599045-2019:TEXT:EN:HTML&. In 2020, Frontex announced a renewal of the framework contract, which was again not subjected to a public tender procedure and the details of this framework contract, and its subsequent award have been kept confidential. See for the announcement of the renewal of the framework contract: Frontex, Satellite Radio Frequency Emitter Detection for Situational Awareness, TENDERS ELECTRONIC DAILY (2020), https://etendering.ted.europa.eu/cft/cft-display.html?cftId=7133; for a discussion of these contracts, see Matthias Monroy, Maritime Surveillance: Spy Satellites in Frontex Operation, DIGIT.SITE36 (2022), https://digit.site36.net/2022/06/26/maritime-surveillance-spy-satellites-in-frontex-operation/.

[2] Space: The Final Frontier of Europe's Migrant Surveillance, PRIVACY INT'L 4 (July 26, 2021), https://privacyinternational.org/news-analysis/4601/space-final-frontier-europes-migrant-surveillance.

[3] *Id*; See also, MEP Question by the MEP Özlem Demirel to the European Commission (question E-002739/2022) Internal Reference CBD/2022. https://www.europarl.europa.eu/doceo/document/E-9-2022-002739_EN.html, P. 2

[4] For an analysis on how such push- and pullbacks are similarly effectuated through drone technology used in EU naval military operations, see Joyce De Coninck, *Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?*, 24 GERMAN LAW JOURNAL, 2, 342 - 363 (2023). See also: Satellite and Aerial Surveillance for Migration: A Tech Primer, PRIVACY INT'L 8 (2021), https://privacyinternational.org/explainer/4595/satellite-and-aerial-surveillance-migration-tech-primer.

[5] Request for Comment, PRIVACY INT'L (June 9, 2021),https://privacyinternational.org/sites/default/files/2021-07/PI%20Frontex%20Request%20for%20Comment%20re%20Satellite.pdf.

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. Increased 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 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

[6] Intergovernmentalism and supranationalism do not account for the trend whereby regulatory powers are outsourced by States and IOs to private actors and the concomitant blurring of the public/private regulatory divide. Benedict Kingsbury and Richard Stewart refer to this trend as 'hybridization' in their forthcoming book and this is also referred to as the 'privatization' of (public) governance functions. *See* BENEDICT KINGSBURY AND RICHARD STEWART, GLOBAL HYBRID AND PRIVATE GOVERNANCE xx (forthcoming 2023).

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 which give rise to one single harm, despite conduct and responsibility being diffused across various regulatory actors? And more importantly, what are the implications of transnational cooperative governance on the 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 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 the 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

[7] For example, Operation Sophia resulted in *de facto* push and pull-backs in cooperation with the Libyan Coast Guard (LYCG) and 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 *Communication to the Office of the Prosecutor of the International Criminal Court Pursuant to the Article 15 of the Rome Statute* (Statewatch) (June 3, 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; Zach Campbell, *Europe's Deadly Migration Strategy*, POLITICO (Feb. 28, 2019), https://www.politico.eu/article/europe-deadly-migration-strategy-leaked-documents/; For scholarship on the matter see VIOLETA MORENO-LAX, ACCESSING ASYLUM IN EUROPE: EXTRATERRITORIAL BORDER CONTROLS AND REFUGEE RIGHTS UNDER EU LAW 27–41 (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 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); 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 85–90 (Satvinder Singh Juss ed., 2019); Daniel Ghezelbash, Violeta Moreno-Lax, Natalie Klein & Brian Opeskin, *Securitization of Search and Rescue at Sea: the Response to Boat Migration in the Mediterranean and Offshore Australia*, 67 INT'L & COMPAR. L. Q. 334 (2018).

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 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 being in compliance with internal and international human right standards. Aerial and satellite surveillance is increasingly relied on by Frontex in cooperation with EU Member States, to transmit location data of third country nationals (TCNs) – who are typically seeking international protection – to the Libyan Coast Guard. The EU NAVFORMED Operation Sophia and its successor Operation Irini provide ample evidence for 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]

[8] See Frontex. *supra* note 1.
[9] About: Revolutionizing RF Analytics, HAWKEYE 360 (last accessed Feb. 15, 2023), https://www.he360.com/about-us-rf-analytics/#top.
[10] See *supra* note 7, *infra* note 83
[11] See generally *supra* note 7.

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-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 meeting the

[12] While the general premise of the *non-refoulement* principle holds that individuals may not be sent back to a place where they risk being subjected to significant ill-treatment, there are subtle nuances in its understanding across these different jurisdictions. For example, the *non-refoulement* principle embedded in Article 33 of the Convention relating to the Status of Refugees (189 U.N.T.S. 150, entered into force April 22, 1954) (hereinafter – the Refugee Convention), it is necessary to note that this provision distinguishes itself from the *non-refoulement* principle embedded in the EU Charter of Fundamental Rights and the European Convention of Human Rights on a number of levels. See European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, at Art. 51-54 (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, 4 November 1950, ETS 5 (hereinafter – ECHR). Firstly, 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. Secondly, the *non-refoulement* principle according to Article 33 Refugee Convention 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 from the *non-refoulement* prohibition, is the main distinction between the Refugee Convention and the broader protection accorded against *refoulement* under the ECHR, the Convention against Torture, the International Covenant on Civil and Political Rights and consequently the EU CFR, which pursue absolute protection against *refoulement* irrespective of the status or conduct of the person concerned. This could raise the idea 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. De Weck argues that the difference in protection standards is not very pronounced, as there are forms of persecution against which the Refugee Convention provides protection, which may not reach the severity threshold to trigger the *non-refoulement* prohibition under general human rights provisions. 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). In addition, Hamdan points out that the protection afforded is more limited under the Convention Against Torture, as this is materially 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 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). On the principle of *non-refoulement* as customary international law, it has been observed that certain states that are specially affected (in line with the seminal *North Sea Continental Shelf* case), are *not* bound by the Refugee Convention despite hosting large numbers of international protection seekers. Yet, these States continue to abide by the principle, thereby affirming its existence via state practice as a norm of custom, in addition to the overwhelming number of states that are signatories to the Refugee Convention, as well as more general human rights treaties which implicitly and explicitly protect the *non-refoulement* principle. See ROBERTA MUNGIANU, FRONTEX AND NON-REFOULEMENT – THE INTERNATIONAL RESPONSIBILITY OF THE EU 100-102 (2016).

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, and returned to states that have been repeatedly acknowledged by civil society, and courts and tribunals as being unsafe countries of return. 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, the EU Member States, and HawkEye 360 is illustrative of three-pronged cooperative governance: The EU's border management is implemented by EU Member States (1), who contribute to Frontex Operations and EU border management policy (2), as supported technology procured by private corporations, such as HawkEye 360 (3). 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 *non-refoulement* prohibition. In other words, individuals are prevented from escaping the territorial waters of Libya, and thus cannot lodge requests for international protection – in violation of the essence 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 individual rights (the *non-refoulement* principle) may be violated. Simply put, there are complicit actors (Frontex, the EU Member States and US based company HawkEye 360), that generate individual harms towards individuals through their cooperation, in violation of a binding rule of law (*non-refoulement*) binding on all three parties. 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

[13] *Id.*
[14] Omer Shatz and Juan Branco, *Communication to the Office of the Prosecutor of the International Criminal Court - EU Migration Policies in the Central Mediterranean and Libya (2014-2019)*, STATEWATCH (2019), https://www.statewatch.org/news/2019/jun/eu-icc-case-EU-Migration-Policies.pdf.

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. The traditionally state-centric human rights regime appears not equipped to deal with these forms of cooperative governance thereby facilitating a responsibility-remedy gap.

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 corporations, as well as States that provide the former with the requisite authorizations to conduct extractive works. In addition, 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 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 complicates or prevents apportioning of wrongful conduct to the different implicated actors. In turn, the fact that those responsible for human rights violations cannot be decisively identified, prevents determinations of responsibility and access to an effective remedy for the affected claimants. The responsibility-remedy gap stemming from such cooperative governance, warrants the question whether the traditionally state-centric

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

human rights regime – including the developments *vis-à-vis* NSAs – is still appropriate in safeguarding human rights effectively, and if not, how this should be reconceptualized to ensure that human rights remain practical and effective, as opposed to theoretical and illusory. This *status quo* concerning human rights responsibility of NSAs raises the question whether modes of cooperative governance are deliberately deployed precisely to avoid triggering human rights responsibility and ensuing obligations.

This Article comprehensively identifies the reasons for the responsibility-remedy gap in constellations of transnational cooperative governance and develops 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 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, showcases the three-pronged transnational cooperative governance 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 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.

[16] RAN HIRSCHL, COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW 224-281 (2014).

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 wide range of NSAs from a wide range of angles.[18] In contrast to most existing work, this Article does not address accountability generally, but instead analyses legal responsibility for unlawful conduct stemming from transnational cooperative conduct specifically.

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 that scholarship and the ensuing replies to those critiques, by recalling that flaws in the contemporary state-centric human rights regime, do not invalidate its objective or demand its disappearance. Conversely, and in line with the famous human rights adage, human rights must not be in 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 from an international and regional EU angle. Part III addresses the rise of cooperative governance in an EU setting concerning border management in particular. Finally, Part IV argues that the traditionally state-centric human rights regime is no

[17] See *infra* Section 'Business and Human Rights'. See also: Surya Deva, Anita Ramasastry, Florian Wettstein, Michael Santoro, *Business and Human Rights Scholarship: Past Trends and Future Directions*, 4 BUS. HUM. RIGHTS J. 2 (2019).
[18] See *infra* Section 'International Organizations and Human Rights'.
[19] See among others: SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); GRÁINNE DE BÚRCA, REFRAMING HUMAN RIGHTS IN A TURBULENT ERA (2021).
[20] See *inter alia* N.D. and N.T. v. Spain, App. No. 8675/15 and 8679/15, EUR. CT. H.R. at ¶ 171 (Feb. 13, 2020), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-201353%22]}; Hamdan, *supra* note 12, at 17-18.

longer adequate in addressing human rights violations, particularly when such violations are the result of transnational cooperative governance. To remedy this problem, an alternative 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 organisations 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 question of human rights responsibility of businesses or that of IOs independently of each other, but instead looks at the question of responsibility when they cooperate, including with states. It complexifies the question of responsibility of NSAs by being cognizant of the fact that frequently, human rights harms do no emanate from one of these actors alone, but instead are frequently the result of complex interactions between states, IOs 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 "*Making 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*

[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 (Philip Alston ed., 2005).

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. A comprehensive mapping of unlawful human rights conduct by NSAs goes beyond the remit of this contribution, as more so now than ever, NSAs have become 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 sector giving rise to 'fast fashion' at the expense of labour rights, children's rights, health rights and women's rights.[24] Through voluntary human rights standard setting and through the (in-)direct effect of international trade agreements, such companies are potential guarantors of fundamental rights, they also 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 being responsible for human rights violations of communities displaced because of such extraction works. These human rights issues involving transnational businesses resurface among others, in the construction sector, the agro-chemical sector, as well as the electronics sector.

The European Union (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, that exists simultaneously as international human rights instruments with quasi-identical rights. The Charter of Fundamental Rights (CFR) is inspired by the common constitutional traditions of the EU Member States, as well as the International Bill of Human Rights and corresponding 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, as well as the EU's institutions, bodies, offices, and agencies

[22] *Id.*
[23] ANDREW CLAPHAM, HUMAN RIGHTS OBLIGATIONS OF NON-STATE ACTORS (2006); JAMES SUMMERS AND ALEX GOUGH, NON-STATE ACTORS AND INTERNATIONAL OBLIGATIONS (2018).
[24] Justine Nolan, *Regulating human rights in the textile sector: smoke and mirrors*, *in* RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS (Axel Marx and Jan Wouters eds., 2022).
[25] Consolidated Version of the Treaty on the Functioning of the European Union 2012 O.J. (C 326) 47, at Art. 2, 6 (hereinafter – TFEU); CFR, *supra* note 12, at Art. 51-54.

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 imposing human rights (financial) conditionality on its Member States. This is done through streamlining human rights provisions in the EU's internal legislation which binds the Member States. 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 Integrated Border Management (IBM) policy. These accusations culminated in two complaints brought before the ICC alleging EU responsibility for crimes against humanity for its border management policy,[28] as well as a number of different types of complaints before the EU's own Court of Justice. To date however, the EU has not yet been formally held legally responsible for having contributed to human rights violations in the enactment of its border management policy. Why is that? One could argue that this is because there simply is 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 resulting in 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

[26] CFR, *supra* note 12, at Art. 51.
[27] *Id*., at Art. 2.
[28] See *supra* note 14.

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 much later and developed divergently (see *infra*). But crucially, even the laudable developments in business and human rights on the one hand, and international organizations and human rights on the other hand, 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, allows for human rights violations to occur at the hands of States, international organizations and private businesses – all of which are bound to human rights to varying degrees – while leaving individual victims without access to an effective remedy.

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.[29] These initiatives include, among others, voluntary reporting, streamlined due diligences obligations, and internal complaint procedures.[30] Additionally, soft law guidelines and principles were developed, some of which have slowly hardened.[31] Similarly, with respect to international organizations – such as the EU

[29] See generally: Axel Marx, Kari Otteburn, Diana Lica, Geert van Calster and Jan Wouters, *Global governance of business and human rights: introduction*, *in* RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS (Axel Marx and Jan Wouters eds., 2022).
[30] *Id.*
[31] *Id.*

– 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.[32] 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 traditionally, human rights were intended to provide individuals with actionable claims *vis-à-vis* the government, 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 problematic as such. 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 (see *infra*). The increased duty-holders and the expanded human rights toolbox (guidelines, reporting, due diligence, internal grievance mechanisms) which characterize the developing human rights landscape, appear to contribute to an increase in human rights awareness, but at the same time contribute to a decrease in access to an effective remedy for aggrieved individuals. Acknowledging the rise of new regulatory actors who impact human rights is not problematic, but not recognizing that these actors cooperate in a transnational manner *is* problematic. In a situation of transnational cooperative governance, multiple (human rights) legal regimes are triggered, ranging from various domestic (tort) regimes applicable to the businesses involved in the cooperation, to the legal regime applicable to

[32] *Id.*

the involved international organizations, as well as the different *public* liability and human rights regime applicable to the implicated States. By not recognizing the applicability of the different legal regimes, and more importantly, by not aligning these regimes, situations are created in which all the implicated actors may avoid responsibility and individuals are ultimately left without access to an effective remedy altogether.

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 gain understanding on 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 and secondary norms in the field of international responsibility. Primary rules 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 as standards of conduct and directed at the duty-bearers. Secondary rules refer to the rules that determine when an actor will be considered to have violated the primary rules and under what conditions remedies should be provided to a victim. These rules are considered standards of review and are directed at the adjudicatory mechanisms 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. In turn, this limits the efficacy of these rules in holding NSAs responsible for human rights violations.

Questions on the responsibility of NSAs are not new and date back 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*".[33] 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 "*The 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*".[34] Thus, already the ICJ conceded that NSAs and States may be subject to different legal regimes under international (human rights) law. And precisely the question on the normative differences between State and NSAs in the realm of human rights responsibility, is addressed in the edited volume delivered by Alston in 2005.[35]

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 appear 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.[36] On the topic of the desirability of human rights obligations of NSAs generally, and businesses specifically, Alston notes the dangers of overregulation and excessive human rights limitations on the competitive advantage of companies.[37] Finally, a recurring question at the time, concerned 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*

[33] Interpretation of the Agreement of 25 March 1951 Between the WHO and Egypt, Advisory Opinion, I.C.J. Rep. 1980 ¶ 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 56 (Jan Wouters and Eva Brems eds., 2010).
[34] Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, I.C.J. Rep. 1949, 174, 178 (Apr. 11).
[35] Alston, *supra* note 21.
[36] *Id.*
[37] *Id.*

framework on responsibility of NSAs, while juxtaposing this with the desirability of imposing *normative* obligations on NSAs.[38]

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 in an isolated manner, consistently interacting and muddling the private/public divide, militating away from a siloed assessment of their responsibilities. This study does not question this development. Instead, any reconceptualized international human rights regime should reflect this dynamic, mindful of the ultimate objective of human rights protection to safeguard individuals rights. Tomuschat held in earlier work that while States may be the key actors in human rights adherence, the traditionally state-centrist international human rights regime would be doomed to fail if it only made space for such actors.[39]

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

The foregoing underscore the widespread consensus on the need to consider primary and secondary human rights rules for NSAs but fall short of investigating how this consensus could and should translate into responsibility in practice, particularly when NSAs cooperate, including with States. Instead, the need for primary rules gave rise to voluntary codes of conduct, as well as soft 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.

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[38] *Id.*
[39] CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM (2003).

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 ILC 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 regimes focus on both primary 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

The developments in the field of business and human rights are categorized semi-sequentially by Deva in three eras: the business or human rights era (1), the business *and* human rights era (2) and the business *of* human rights era (3).[40] The largest developments happened and continue to happen in this second era, in which Deva distinguishes four time periods.[41] 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.[42] In the subsequent time period from 1998 – 2004, the debate largely centered around the question of whether there should be voluntary primary norms or binding primary human rights norms for businesses.[43] These

[40] Surya Deva, *From 'Business or Human Rights' to 'Business and Human Rights': What Next?, in* RESEARCH HANDBOOK ON HUMAN RIGHTS AND BUSINESS 10 (Surya Deva and David Birchall eds., 2020).
[41] *Id.*
[42] *Id.*
[43] *Id.*

debates gave rise to the non-binding Draft Norms on the Responsibilities of Transnational Corporations and other Business Enterprises.[44]

In the following time period, spanning from 2005 – 2011, the Ruggie Principles[45] were developed. The Ruggie Principles are characteristic for 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 focused 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" which entails that they should refrain from infringing human rights and address (*ex-ante* and *ex post*) adverse effects of human rights violations. The Ruggie Principles clarify that businesses should heed the International Bill of Human Rights, as well as relevant ILO 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 principles, that are require *inter alia*, that the commitment to human rights is communicated in an informed, publicly available company policy; human rights due diligence; assessment of actual or potential adverse effects of company endeavors; followed by effective follow-up action to address potential adverse effects, both as concerns tracking and remediation. Finally, Section III of the Ruggie Principles, again shifts the obligation to States, and elaborates on the requirement flowing from their general human rights obligations under international law, to ensure

[44] 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, U.N. Doc. E/CN.4/Sub.2/2003/12 (May 30, 2003), https://digitallibrary.un.org/record/498842?ln=en.

[45] U.N. Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Protect, Respect and Remedy: A Framework for Business and Human Rights, U.N. Doc. A/HRC/8/5 (April 7, 2008), https://undocs.org/en/A/HRC/8/5.

access to an effective (judicial and non-judicial) remedy within their jurisdiction and territory.[46]

Two imperative observations must be made when analyzing the Ruggie Principles. At first glance, the distinction between foundational and operational principles throughout the Principles, suggest that the primary norms concerning corporate responsibilities (regardless of whether binding or not) developed in Section II, are quite clear and well-developed, when in fact they 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 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 unveil 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 – if anything at all – about the judiciable 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? Jumping ahead to the question of the company HawkEye 360 under scrutiny: what is the legally enforceable

[46] It is notable that in the Ruggie Principles, the (implicit) distinction was already made between [extra-territorial] *jurisdiction* and [*territorial*] jurisdiction. Recall in this respect that the distinction between territorial and extra-territorial jurisdiction, is relevant in determining the application of human rights obligations to duty-holders. This implicit distinction suggests that when developing the Ruggie Principles, it was already clear that amorphous NSAs and businesses in particular, would not necessarily conduct themselves within the confines territorial boundaries.

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? The vagueness of the Ruggie Principles should of course not be exaggerated, as they set out to be no more than principles that could be applied to an extremely heterogenous set of businesses, at a time when the main questions were whether businesses should even be bound by primary human rights norms to begin with. This indeterminacy of the Ruggie Principles underscore that they do not create new positive law in the form of concrete and enforceable primary norm obligations. Yet, the lack of concretization contributes directly to the lack of their enforcement. While the Ruggie Principles were undoubtedly a necessary first step in conceptualizing and understanding the human rights role of businesses – as was the non-binding Universal Declaration of Human Rights for States – Deva rightfully notes that insofar no corresponding legally binding obligations and corresponding provisions on access to remedies are developed, this abstract commitment is no more than an abstract unenforceable commitment.[47]

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 '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 (see *infra*), 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 variations of concrete human rights obligations applicable to

[47] Deva, *supra* note 40.

different types of businesses, in addition to demanding from domestic, regional, and international human rights bodies, to consider first the type of business under scrutiny, before ruling on whether the specific obligations that attach to that particular 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 fundamental rights protection. So, the question that 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: a question that has only partially been answered to date. 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.[48]

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. These developments have translated into the Third Revised Draft of the Binding Treaty on Business and Human Rights.[49] Yet, immediately it becomes evident that all operative provisions of the Draft Treaty are directed at States, rather than at 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.

[48] This perceived trend of dejudicialization of human rights protection, is the topic of an on-going study conducted by the author at the Center of Human Rights and Global Justice at NYU School of Law and will be the topic of discussion at the panel "Lawlessness, Dejudicialization and Privatization of Human Rights Protection" organized by the author at the 2023 annual ICON-S conference.

[49] Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises With Respect to Human Rights (OEIGWG), 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), https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf.

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.[50] This is not to say that there hasn't been a 'hardening' of some of these soft law norms.[51] 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.[52] Palomba and Deva note that this is likely due to the costs associated with human rights compliance, with on the one hand *ex ante* costs to prevent human rights violations and to streamline human rights standards into company policy and operation, and on the other hand, potential costs associated to remedying human rights violations as a result of unlawful business conduct.[53]

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).[54] However, a recent US Supreme Court 2021 decision ruled in favor of U.S.-based Nestlé USA, Inc. and Cargill, Inc. on the question whether child trafficking claims could trigger its human rights responsibility due to financing decisions of the company being made in the US.[55] 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 US, was not enough to trigger its (human rights) responsibility for unlawful activities conducted and happening abroad under the ATS.[56] Furthermore, to date debate persists on what can be considered unlawful conduct, and what the scope is of the 'sufficient connection' with

[50] DALIA PALOMBO, BUSINESS AND HUMAN RIGHTS 12 (2020); Deva, *supra* note 40.
[51] *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, http://data.europa.eu/eli/reg/2017/821/oj; See Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, ¶ 1502, 124 Stat. 1376, 2213-18. *See* specifically ¶ 1502 on conflict minerals.
[52] Ioana Cismas and 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 233-235 (James Summers and Alex Gough eds., 2018).
[53] Palombo, *supra* note 45; Deva, *supra* note 40.
[54] *See* 28 U.S.C. ¶ 1350 (1948).
[55] Nestle USA, Inc. v. Doe et al., 593 US _ (2021).
[56] *Id.*, at 5.

the US, required to trigger the ATS. Moreover, the ATS will only be triggered insofar the norms at stake are "specific, universal, and obligatory". 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 rule 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 these caveats to the application of the ATS in mind, it appears that its scope is actually quite limited.[57] 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's questionable whether this would be considered sufficient of a connection to make this domestic US regime applicable.

The rationale behind a strict and limited approach to human rights responsibility of businesses in light of their human rights obligations, is partially informed by the potential costs this would bring about, and the disincentivizing effect this may have on economic growth. Yet, this siloed cost-benefit analysis and subsequent conditional approach to enforcement of human rights on businesses, neglects the very essence of what prompted the development of these 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 *concretized* primary human

[57] As a result, the Alien Tort Statute Clarification Act has been introduced, as sponsored by Sen. Durbin, Richard J. (05/05/2022) https://www.congress.gov/bill/117th-congress/senate-bill/4155/titles.

rights norms for businesses and the near-total absence of secondary norms clarifying *how* businesses can be held responsible for primary norm violations, is what prompts both its lacking enforcement, and is the tool to achieve lacking enforcement.

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 topic of (human rights) responsibility of international organizations, questioned the subjecthood of international organizations and their ability to be human rights duty-holders.[58] This discussion was intimately tied to the question of how transnational cooperation through supranational and intergovernmental organizations affected the human rights obligations of signatory States. Another recurring questions at the time, concerned the sources of human rights obligations which could theoretically bind international organizations. Yet, the latter point – unlike the business and human rights movement – did not prompt in-depth analyses (at the time) on the desirability and subsequent scope of primary rule obligations.

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 of facilitating transnational cooperation between States, as a result of which, precedent to date remains limited.[59] Nevertheless, the recent exponential growth of

[58] See e.g., JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL INSTITUTIONAL LAW (2009); James Crawford, *The System of International Responsibility*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford, Alain Pellet, Simon Olleson and Kate Parlett eds., 2015); Alain Pellet, *The Definition of Responsibility in International Law*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY (James Crawford, Alain Pellet, Simon Olleson and Kate Parlett eds., 2015).

[59] The earliest systematic work on the topic of the responsibility of international organizations, dates back to 1950 – following shortly after the advisory opinion in the Reparation case by the ICJ - and was preceded only by haphazard and indirect references to the topic in earlier writings. See on the topic (and references cited therein): CHITTHARANJAN FELIX AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS, 385 (2009).

international organizations and their regulatory roles prompted the ILC, under direction of appointed Special Rapporteur Giorgio Gaja, to start work on the topic of the responsibility of international organizations – albeit at a later stage than similar developments on business and human rights. Interestingly, the focal point – unlike the business and human rights movement – was not directed at determining the desirability and subsequent scope of *primary* (human rights) rules. Instead, the project on responsibility of international organizations initially skipped this step altogether, and focused instead on the development of *secondary* rules, which would help determine when responsibility would arise for international organizations that violate (undefined and undetermined) primary rules.

The work conducted by Special Rapporteur Gaja gave rise to the (Draft) Articles on the Responsibility of International Organizations (ARIO)[60] 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, and are defined as secondary rules, as opposed to the rules containing the duties and legal obligations by which an international organization may be bound, defined as primary norms.[61] The ARIO contain both general international rules to establish responsibility of international organizations (***lex generalis***), and additionally recognize that such organizations may develop IO-specific rules governing their international responsibility (***lex specialis***).[62] 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

[60] *See* International Law Commission, *Draft Articles on the Responsibility of International Organizations*, U.N. Doc. A/66/10 (May 30, 2011) (hereafter ARIO).
[61] *Id*., General Commentary 3 ARIO. In this regard, it must be observed that the dichotomy between primary norms and secondary rules should not be overstated, as arguably the rules concerning indirect, joint, or shared responsibility are considered as constituting 'meta-primary' rules and the rules in ARIO concerning the content and consequences of internationally wrongful acts are arguably of a primary nature. See on the topic of the indirect responsibility: NIKOLAOS VOULGARIS, ALLOCATING INTERNATIONAL RESPONSIBILITY BETWEEN MEMBER STATES AND INTERNATIONAL ORGANIZATIONS 98 (2020); VLADYSLAV LANOVOY, COMPLICITY AND ITS LIMITS IN THE LAW OF INTERNATIONAL RESPONSIBILITY 11 (2016).
[62] See ARIO, *supra* note 55, at Art. 64.

international organizations generally, and the EU specifically, may be held responsible for violations of international (human rights) law.

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.[63] In determining whether the EU can be held legally responsible for 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 responsibility framework that is EU-specific.[64]

The *lex generalis* concerning the responsibility of international organizations, holds that the *lex specialis* (Article 64 ARIO), does not necessarily prevail over the general default ARIO provisions nor do such rules nullify the more generalized regime.[65] Furthermore, Article 32 ARIO recalls that "*The responsible international organization may not rely on its rules as justification for failure to comply with its obligations...*" entailing that internal rules of the organization cannot be invoked as a means to circumvent

[63] *Id*., at Arts. 6-13, 14-19.

[64] The question of responsibility is separate and distinct from the question of available legal fora to enforce responsibility and ensuing rights to reparation. The latter is not the topic of study in this work and falls outside of its scope.

[65] ARIO, *supra* note 55, at Commentary 1 to Art. 64, Comment 9 to Article 10; International Law Commission, *Eight Report on the Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur*, UN Doc. A /CN.4/640, (March 14, 2011) at ¶ 114-117; ILC, Seventh Report on the Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur. U.N. Doc. A /CN.4/610 (March 27, 2009), at 95 ¶ 121 – 124; Bruno Simma and Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 EUR. J. INT. LAW, 495, 505-519 (2006).

international responsibility *vis-à-vis* third parties[66].[67] Hence, insofar the *lex specialis* does not provide for a self-contained responsibility framework, recourse may thus be had to the more general – residual[68] – legal framework embodied by the ARIO.[69] According to its provisions, international organizations can be held *independently* responsible for

[66] Third parties as referenced in the ARIO, *supra* note 55, are typically intended to include (third) States, as well as other international organizations. However, as clarified by Article 50 ARIO, 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*". This is furthermore confirmed by the Commentary 2 to this same provision, which holds that the generic reference throughout the ARIO to States and international organizations as potentially aggrieved parties, is not intended to exclude the entitlement of other persons from reparations stemming from the international responsibility of international organizations. Article 32(2) ARIO similarly confirms the foregoing, as does the explicit reference to "*...any other subject of international law"* to whom international obligations are owed in Comment 3 to Article 10 ARIO. Also, the observations by Special Rapporteur Gaja confirm the expansive approach adopted in the ARIO towards the subjects of international law capable of invoking international responsibility by recalling that "*...the purpose of these* '*without prejudice*' *provisions is to convey that the articles are not intended to exclude any such entitlement*". See Giorgio Gaja, Articles on the Responsibility of International Organizations. AUDIOVISUAL LIBRARY INT'L L. 2 \(Dec. 9, 2011), https://legal.un.org/avl/ha/ario/ario.html; See also on the legal status of individuals, STIAN ØBY JOHANSEN, THE HUMAN RIGHTS ACCOUNTABILITY MECHANISMS OF INTERNATIONAL ORGANIZATIONS 35-37 (2020); See for a general discussion: ANNE PETERS, BEYOND HUMAN RIGHTS – THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW (2016).

[67] This is clarified by Comment 1 to Article 32 ARIO, *supra* note 55, which holds that "*...an 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*." While this has bearing on the international responsibility of the international organization *vis-à-vis* third countries, Comment 3 to Article 32 ARIO (in line with Comment 3 to Article 5 ARIO) recalls that the internal rules of the organization may affect the internal division of responsibility between the organization and its members. See also: Gaja, *supra* note 61, at 3.

[68] Academic debate on the position of *lex specialis* within the context of secondary rules is slightly more nuanced, as evidenced by the work of Bruno Simma and Dirk Pulkowski. The authors note that the availability of recourse to the more general rules on (state) responsibility is in part affected by whether a universalist or, alternatively a particularistic perspective on international law is adopted. Whereas the first perspective departs from a unified and general conceptualisation of international law, the latter approaches international law from within the bounds of a particular regime. The question of the residual nature of the generalized rules enshrined in the ARIO is less relevant *in casu*, as methodologically the conducted research departs from the universalist approach to international law, whereby from "*...a public international law perspective, the EC legal system remains a subsystem of international law...*", as EU law "*...still depends on the consent of the Union's sovereign member states*" and is thus inspired by the spirit of international law. Simma and Pulkowski, *supra* note 60, at 495, 505-519, 516 [*emphasis added*].

[69] The International Court of Justice ruled on the notion of *lex specialis* in secondary norms for (state) responsibility in the *Tehran Hostages* case, where it held that the specialized secondary rule regime embodied in the Vienna Convention on the Diplomatic Relations constituted a self-contained regime, on account of the fact that it provides both the obligations binding upon states and the legal consequences attached to non-compliance therewith. ICJ Judgment of 24 May 1980, *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ¶ 86. However, the notion of self-contained systems of law are not without controversy in international law, particularly as concerns the delineation and determination of self-contained systems. This was evidenced by the reluctance of Special Rapporteur James Crawford to explicitly address the matter in the commentaries to ARSIWA in 2001. See on the topic: Bruno Simma and Dirk Pulkowski, *Leges Specialis and Self-Contained Regimes, in* THE LAW OF INTERNATIONAL RESPONSIBILITY, 143, 144-145 (James Crawford, Alain Pellet, Simon Olleson and Kate Parlett eds., 2015); Simma and Pulkowski, *supra* note 60, at 494.

conduct engaged in without any cooperation by other actors (Articles 6 – 13 ARIO) or may incur *shared* responsibility for actions taken together with Member States (Articles 14 – 17 ARIO).[70]

An assessment of the international and regional regimes on responsibility for human rights violations, reveal that the conditions to establish such responsibility are largely analogous, if not identical for responsibility of States and international organizations.[71] For human rights responsibility to arise, there must be unlawful human rights conduct (1) attributable to the duty-bearer (2) and a causal connection must be established between the conduct and the experienced human rights violation (3). These three basic conditions are prefaced by the condition that there must be adjudicatory jurisdiction (4)[72]. Generally speaking, when these four conditions are met, responsibility for human rights violations may arise under the international responsibility framework – comprised of the Articles on the Responsibility of States (ARSIWA) and the Articles on the Responsibility of International Organizations (ARIO) – as well as under regional responsibility regimes.[73]

[70] The scenarios enumerated in Articles 14 – 17 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 responsibility, indirect responsibility, derivative responsibility 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.

[71] *Id*., De Coninck.

[72] Adjudicatory jurisdiction is distinguished from enforcement and legislative jurisdiction, in that they operate at different points of the continuum intended to establish responsibility. Adjudicatory jurisdiction entails that 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.

[73] Whereas the European Court of Human Rights does not always mention these conditions explicitly, it engages in an assessment of these conditions in establishing whether a violation of the European Convention of Human Rights 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 purported human rights violations of the Charter of Fundamental Rights (CFR).

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 other words, in addition to the four basic conditions to establish responsibility, the ARSIWA and ARIO recognize that there may be scenarios in which an international organization and States may share responsibility for a given line of unlawful (human rights) conduct. For an international organization and (a) State(s) to share responsibility, it would have to be demonstrated that the co-perpetrator of the unlawful human rights conduct occurred with knowledge of the violation (1) and was bound by the same international (human rights) obligation as its co-perpetrator (2). 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 in turn below.

1. Conditions for Independent Responsibility

a. Adjudicatory Jurisdiction

To establish human rights responsibility pursuant to conduct by an actor under international law, it would first have to be demonstrated that human rights obligations were binding upon the duty-bearers and governed the situation under dispute. Crucially, human rights instruments in their original form, govern the relationship between States 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.[74] The European Court of Human Rights (ECtHR) has a particularly

[74] N.D. and N.T. v. Spain, *supra* note 20, at ¶ 102. The notion of jurisdiction according to Article 1 ECHR is inspired by the notion of jurisdiction under public international law but is not necessarily synonymous (see at ¶ 109). The notion of jurisdiction under international law encompasses various forms of jurisdiction, namely: jurisdiction to prescribe (1), jurisdiction to enforce (2) and adjudicatory jurisdiction (3). As recalled by Milanovic, jurisdiction for the purpose of the ECHR refers to the authority of a State Party to regulate, by various means, the conduct of people. See on the topic, Marko Milanovic, *Jurisdiction and Responsibility*, *in* THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND GENERAL INTERNATIONAL LAW 99

well-developed doctrine of adjudicatory jurisdiction and holds that the obligations stemming from the European Convention of Human Rights (ECHR) are essentially territorial.[75] 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.[76] The limited circumstances in which extra-territorial jurisdiction may arise, were recently recalled by the ECtHR in *Güzelyurtlu and*

(Anne van Aaken and Iulia Motoc eds., 2018); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES – LAW, PRINCIPLES AND POLICY 23-26 (2011).

[75] N.D. and N.T. v. Spain, *supra* note 20, at ¶ 103; Banković and others v. Belgium, App. No. 52207/99, ECHR 2001-XII, at ¶ 312 (Dec. 12, 2001), https://hudoc.echr.coe.int/eng#{%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}. Jurisdiction is presumed to be established throughout all of the territory and will only be rebutted when a State is prevented from exercising authority over its own territory. See also Assanidze v. Georgia, ECHR App No. 71503/01, at ¶ 137-139 (Apr. 8, 2004), https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61875%22]}; Ilaşcu and others v. Moldova and Russia, ECHR App. No. 48787/99, at ¶ 312-313, 333 (Jul. 8, 2004), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61886%22]}.

[76] This development started when the ECtHR ruled in the case of *Issa*, holding that a State may be liable for actions violating human rights of individuals under its authority and control, albeit outside of its state territory. This ruling appears to contradict the seminal case of *Banković,* where the Strasbourg Court noted that jurisdiction as a general rule, is determined by territory and will only extend extra-territorially in (highly) exceptional cases to be determined on a case-by-case basis. Issa and others v. Turkey, ECHR App. No. 31821/96, at 4 ¶ 2 (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; Banković and others v Belgium, *supra* note 71, at ¶ 61. In 2011, the Strasbourg Court further clarified and nuanced its findings from the *Banković* ruling and the subsequent cases that (implicitly) endorsed the personal model of attribution. Specifically, the Strasbourg Court held in *Al Skeini* that "*jurisdictional competence under Article 1 is primarily territorial*" but in exceptional circumstances may result in extra-territorial applicability of the Convention. The two recognized circumstances of such extra-territoriality by the Strasbourg Court in *Al Skeini* are the instance of "*state agent authority and control*" and "*effective control over an area*". In this case the ECtHR furthermore accepted that the ECHR rights may be "*divided and tailored*" when applied extra-territorially, as a result of which a State party will be held to protect and safeguard Convention rights extra-territorially that are relevant to the individual concerned (¶ 136-137). Hence, despite the - at first glance - seemingly inconsistent approach to (spatial) jurisdiction taken by the Strasbourg Court, ensuing case law has incrementally evidenced a more expansive interpretation of jurisdiction for the purpose of triggering the ECHR. Al-Skeini and others v. the UK, ECHR App. No. 55721/07, at ¶ 130-142 (Jul. 7, 2011), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-105606%22]}. This trend was reaffirmed less than a year onwards with the *Hirsi* judgment, where the Court recognized the applicability of the Convention with respect to border management measures taken on high seas and on-board Italian military vessels. Hirsi Jamaa and others v. Italy, ECHR App. No. 27765/09, at ¶ 76-82 (Feb. 23, 2012), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-109231%22]}. In *Jaloud* several years later, the Strasbourg Court went even further regarding the extra-territorial applicability of the ECHR, holding that the extra-territoriality will be determined on a case-by-case basis, mindful of the case-specific facts, and that *in casu* the death of Mr. Jaloud as a result of being shot at in a vehicle passing a checkpoint "*under the command and direct supervision of a Netherlands Royal Army Officer*" was sufficient to establish jurisdiction in respect of the Netherlands. Jaloud v. the Netherlands, ECHR App. No. 47708/08, at ¶ 152 (Nov. 20, 2014), https://hudoc.echr.coe.int/fre#{%22fulltext%22:[%22jaloud%22],%22itemid%22:[%22001-148367%22]}. See on the matter: Milanovic, *supra* note 70, 99-103.

others v Cyprus and Turkey[77] and reaffirmed in *Hanan v Germany*[78].[79] Such extra-territorial jurisdiction may be established firstly, where acts by State(s) (agents) give rise to (legal) effects outside the respective territory of the Contracting party, thus amounting to state-agent control,[80] which must be assessed on a case-by-case basis.[81] Secondly, extra-territorial jurisdiction may arise where a State holds spatial effective control over territory abroad.[82] This may occur directly through the occupation of armed forces of territory abroad, including on-board vessels registered in or flying the flag of that state.[83] Indirectly, spatial effective control may be established, through subordinate local administrations, that "*...survive as a result of the Contracting State's military and other support*", irrespective of whether the State exercises influence over all policies and actions by the subordinate local administration.[84] Finally, and in addition to state-agent control and spatial effective control, which may exceptionally result in extra-territorial jurisdiction, the ECtHR has recognized that where such "*clear jurisdictional links*" have *not* been established, extra-territorial jurisdiction may nevertheless arise, due to the "*existence of special features*".[85] The ECtHR has held that it is not required to define such

[77] Güzelyurtlu and others v. Cyprus and Turkey, ECHR App. No. 36925/07, at ¶ 178-187 (Jan. 29, 2019). https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-189781%22]}.
[78] Hanan v Germany, ECHR App. No. 4871/16, at ¶ 132-145 (Feb. 16, 2021), https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-208279%22]}.
[79] For a more general discussion on the various forms of (extra-)territorial jurisdiction, see Milanovic, *supra* note 70; Seunghwan Kim, *Non-refoulement and Extraterritorial Jurisdiction: State Sovereignty and Migration Controls at Sea in the European Context*, 30 LEIDEN J. INT'L 1, 49 (2017); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHTS TREATIES – LAW, PRINCIPLES, AND POLICY (2011).
[80] Güzelyurtlu and others v Cyprus and Turkey, *supra* note 77, at ¶ 180; Jaloud v the Netherlands, *supra* note 72, at ¶ 152; Hirsi Jamaa and others v Italy, *supra* note 72, at ¶ 127; Al-Skeini and others v the UK, *supra* note 72, at ¶ 136, 149-150. State-agent control is interchangeably referred to as 'personal jurisdiction'. See Milanovic, *supra* note 79, at 173, 188.
[81] N.D. and N.T. v. Spain, *supra* note 20 ¶ 102 – 111.
[82] M.N. and others v. Belgium, ECHR App. no. 3599/18, at ¶ 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]}.
[83] See (and cases cited therein): Güzelyurtlu and others v Cyprus and Turkey, *supra* note 77, at ¶ 179; Medvedyev and others v. France, ECHR App. No. 3394/03, at ¶ 64 (Mar. 29, 2010) https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-97979%22]}. This latter case confirms that military coercive action on high seas may trigger jurisdiction and thus the extraterritorial application of the ECHR.
[84] Güzelyurtlu and others v Cyprus and Turkey, *supra* note 77, at ¶ 179.
[85] Hanan v Germany, *supra* note 78, at ¶ 132 – 136. See for an overview of the relevant case law on "special features" which may trigger extra-territorial jurisdiction: Güzelyurtlu and others v Cyprus and Turkey, *supra* note 77, at ¶ 182 – 187. Notably, the case law suggests that such special features are not limited to situations of armed conflict but may likewise arise in other cases such as medical negligence: Gray v. Germany, ECHR App no. 49278/09 (May. 22, 2014),

special features *in abstracto*. Instead, the existence of such special features is to be assessed on a case-by-case assessment.[86]

The evolution on extra-territorial jurisdiction in the case law of the Strasbourg Court and other regional and international courts, is arguably less relevant within an EU-setting. In fact, the EU's own catalogue of human rights – the Charter of Fundamental Rights (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 the CFR is limited in its applicability to the Member States and the EU, if not limited territorially? Milanovic notes that human rights treaties lacking an explicit clause delineating the (territorial) applicability thereof, can either be interpreted as being entirely territorially limited, or territorially 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 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 as set out in Articles 51 – 54 CFR. The latter provisions are oftentimes referred to as the horizontal clauses, which function as a precondition for its application. In addition, Protocol No 30 must be taken into regard when assessing the applicability and enforceability of the Charter.

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https://hudoc.echr.coe.int/eng#{%22display%22:[2],%22languageisocode%22:[%22ENG%22],%22appno%22:[%2249278/09%22],%22itemid%22:[%22001-144123%22]}.

[86] Hanan v Germany, *supra* note 78, at ¶ 136; Güzelyurtlu and others v Cyprus and Turkey, *supra* note 77, at ¶ 190. One of the elements that has been relevant in the determination of whether special features apply and trigger extra-territorial adjudicatory jurisdiction, is 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. These cases are indicative of the ongoing evolution in the case law of the Strasbourg Court concerning extra-territorial jurisdiction.

These EU and Charter-specific jurisdictional rules are the direct consequence of the constitutional dynamic between the Member States and the EU, and the division of competences in particular. 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". Article 51(1) CFR 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 not been without controversy, however, both as concerns the proviso "*institutions, bodies, offices and agencies of the Union*", as well as the provision that Member States are bound by the Charter "*only when they are implementing Union law*", which taken together have given rise to a number of questions and a number of cases that clarify its scope.[87]

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 which try to clarify when a Member State is effectively considered to be implementing Union law, and appear to favor – contrary to the drafting history – a broad interpretation of Article 51 CFR. 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 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. The ECJ does not appear to be inclined to follow a restrictive reading of jurisdiction, however, as in the seminal case of *Åkerberg Fransson*

[87] The Explanations to the Charter of Fundamental Rights (CFR) explain the former to a certain extent, by stating that "*the 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*", which suggests that a broad interpretation should be adopted when identifying the relevant entities set up under Union law that are bound by the CFR. This does not however, address the question of the enforceability of Charter rights *vis-à-vis* CFSP agencies, which may escape judicial review by the ECJ on account of Article 24(1) TEU despite incremental attempts by the ECJ to remedy this potential absence of judicial review. Additionally, there is no clarity on what the legal implications are of such a broad conceptualization of the first phrase in Article 51(1) CFR, particularly concerning Union naval missions, such as EUNAVFOR MED Operation Sophia or its successor, EUNAVFOR MED Operation Irini, that could arguably also escape judicial review by the CJEU. See for a discussion on the topic: De Coninck, *supra* note 4.

it held that in mixed cases, concerning both national measures and matters falling within the scope of EU law, the Member States will be considered to be implementing EU law, and thus triggering the application of the CFR. Furthermore, in *NS v Secretary of State*, the ECJ held that even where Member States retain discretion under EU law to adopt (national) measures, the Member States are still acting within a larger Union framework and are thus caught by Article 51(1) CFR. These cases were later elaborated upon in the *TSN* ruling by the Court, which recalls the scenarios in which a Member State can be considered to be implementing Union law. Article 52(3) CFR builds on these rules, by requiring for corresponding rights in the CFR and in the ECHR, the ECHR and its corresponding case law, functions as a normative baseline. In other words, rights in the CFR that correspond to rights in the ECHR, can never fall below the minimum standards set by the ECHR and the ECtHR. Finally, Article 53 CFR 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*". This provision reiterates that in the interpretation and applicability of the CFR, the reconcilability of the latter with international human rights and domestic constitutions 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. This means that there is an overwhelming absence on adjudicatory jurisdictional rules for NSAs. Simply put, there are no defined and all-encompassing rules that determine (extra-territorial) jurisdiction for human rights obligations of NSAs. As an exception to this jurisdictional ambiguity, the CFR provides that the EU and its institutions, bodies, offices, and agencies, will be bound by its (internal) human rights provisions without any territorial limitations governing their applicability. This seems to point 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. In short, it is clear that in the absence of clear adjudicatory jurisdictional rules for NSAs involved in transnational cooperative governance, it will be difficult to contend that they will incur any human rights responsibility for a contribution to a human rights violation.

b. Attribution

For an international organization such as the EU to be held independently responsible for violations of human rights, two cumulative conditions must be met, its questionable human rights conduct – which may constitute either an act or omission[88] – must be attributable to the organization.[89] Secondly, 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 of international organizations for human rights violations.

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 (Article 6 ARIO). Secondly, conduct may be attributed to an organization insofar the individual/entity responsible for the conduct was placed "*...at the disposal of the organization*" (Article 7 ARIO). Thirdly, conduct may be attributed to

[88] ARIO, *supra*, at Art, 2.
[89] *Id*., at Comment 2 to Article 5, acknowledges that it is possible for international organizations to be held responsible "*...when conduct is not attributable to that international organization*" when it concerns for example, incurred responsibility based upon joint action between an international organization and states or international organizations. See on the topic: International Law Commission, Report of the International Law Commission - 55th Session, Supplement No. 10 (5 May – 6 June and 7 July – 8 August 2003), U.N. Doc. A/58/10(2003), at 45; ANDRÉS DELGADO CASTELEIRO, THE INTERNATIONAL RESPONSIBILITY OF THE EUROPEAN UNION. FROM COMPETENCE TO NORMATIVE CONTROL 63-64 (2016).

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*" (Article 8 ARIO). Finally, conduct may be attributed to the organization, insofar the conduct is acknowledged by the organization as being its own (Article 9 ARIO). However, for most of these tests, different variations exist, with on the one hand a strict test, and on the other hand a more lenient test, with no definitive standards to determine when a particular test of attribution applies. For example, concerning Article 7 ARIO applied to human rights in particular, there is a 'stricter' effective control variant, and a broader 'ultimate control' variant, which have been applied interchangeably and haphazardly by different courts, as well as by the same courts.

Crucially, this entails that the test of attribution that is applied to assess responsibility, depends primarily on the discretion of the court charged to assess responsibility, which in turn, will be impacted by the applicable legal regime. This also means however, that in cases of transnational cooperative governance, a domestic court may apply a given test of attribution, that prevents responsibility to be established *vis-à-vis* the implicated State (for example, the 'ultimate normative control' test of attribution militating in favor of EU responsibility), whereas the EU's Court of Justice tasked with assessing the responsibility of the EU, may conversely apply the 'effective control' test of attribution, militating in favor of state responsibility. Bluntly worded, this would mean that the EU's Court considers the State responsible, whereas the domestic Court would consider the EU responsible. In such a scenario, where both courts apply two different tests of attribution *vis-à-vis* the respective actors, one of the cumulative conditions 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.

c. Breach of an international obligation

Article 4 ARIO prescribes that in addition to attribution, there must be a breach of an international obligation for international responsibility to arise. A breach of international law may occur "*...regardless of the origin or character of the obligation concerned*".[90] The reference in Article 10 ARIO to the 'origin or character' of the obligation, entails that the obligation binding upon an international organization may be deduced from "*...a customary rule of international law, by a treaty or by a general principle applicable within the international legal order*".[91] In other words, obligations may arise *vis-à-vis* any subject of international law[92], irrespective of the classification and nature of the primary norm.[93]

International obligations may likewise be deduced from the rules of the international organization, which in line with Article 2(b) ARIO, include in particular "*...the constituent instruments, decisions, resolutions and other acts of the organization adopted in accordance with those instruments, and established practice of the organization*".[94] Concerning this last point, Special Rapporteur Gaja observes that not necessarily *all* rules of the organization may qualify as international obligations, pointing out that practice is divided on the matter.[95] Certain authors have rejected the proposition that rules of the organization generate international obligations entirely[96], whereas others have adopted a more nuanced approach holding that the rules of the organization may encompass international obligations depending on the source and subject matter of such rules.[97] The ARIO do not purport to settle the matter.[98]

[90] ARIO, *supra*, at Art. 4.
[91] *Id*., at Comment 2 to Art. 10.
[92] *Id*., at Comment 3 to Article 10.
[93] *Id*., at Comment 2 to Article 10.
[94] *Id*., at Article 2(b); Comment 4 to Article 10.
[95] International Law Commission, *Third report on the responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur*, U.N. Doc. A /CN.4/553 (May 13 2005), at 11 ¶ 15 – 19; International Law Commission, U.N. Doc. A /CN.4/610, *supra* note 65, at 81-82 ¶ 40-41.
[96] *Id*.
[97] ARIO, *supra*, at Comment 5 to Article 10; International Law Commission, U.N. Doc. A /CN.4/553, *supra* note 91, at 11-12 ¶ 18-23. Special Rapporteur Gaja argues in the *travaux préparatoires,* that ICJ case law appears to point in the direction that rules of the organization effectively encompass international obligations but acknowledges immediately thereafter that this holds true for the UN, but not automatically for other international organizations.
[98] ARIO, *supra* note 55, at Comment 7 to Article 10.

However, for the purpose of the present study on the EU and in line with the commentaries to Article 10 ARIO, the parallelism of the EU's CFR with other international human rights treaties, containing in large part, reaffirmations of international human rights norms[99], confirm that it contains international obligations, binding both upon the Member States, as well as the EU[100].[101] 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*".[102] Hence, in light of the symbiosis of the Charter with international human rights treaties, it can be considered that the CFR contains international human rights obligations.[103]

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

Firstly, the Special Rapporteur in the *travaux préparatoires* pointed out that adherence to primary law obligations may be difficult, particularly when such obligations require positive action by the organization, which in certain cases can only be achieved through (majority) voting procedures.[104] In this respect, concerns were raised that the political unwillingness in voting procedures of the organization may prevent adherence to positive obligations.[105] The Special Rapporteur responded however, by noting that the absence of

[99] CFR, *supra* note 12, at Recital 5, 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, Tamara Hervey, Jeff Kenner, Angela Ward eds., 2014). The Charter does provide for *additional* fundamental rights that are not protected under the traditional, international human rights covenants and instruments. See Sionaidh Douglas-Scott, *The European Union and Fundamental Rights, in* OXFORD PRINCIPLES OF EUROPEAN UNION LAW, 387, 391, 395 (Robert Schütze and Takis Tridimas eds., 2018). See, for example, CFR, *supra* note 12, at Art. 13 Freedom of the Arts and Sciences. Art. 16 Freedom to Conduct a Business, Art. 27 Workers' Right to Information and Consultation within the Undertaking.
[100] CFR, *supra* note 12, at Art. 51, "*1. 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*". See also: Douglas-Scott, *supra* note 95.
[101] "*The Charter is an internal set of rules that legally binds the EU.... This applies both within the EU and to its external* relations". Douglas-Scott, *supra* note 99, at 387.
[102] International Law Commission, U.N. Doc. A /CN.4/553, *supra* note 95, at 12 ¶ 22.
[103] CFR, *supra* note 12, at Recital 5, Art. 53; See also Rosas, *supra* note 99, at 1685-1686.
[104] International Law Commission, U.N. Doc. A /CN.4/553, *supra* note 95, at 9 ¶ 8; International Law Commission, U.N. Doc. A /CN.4/610, *supra* note 65, at, at 82 ¶ 43.
[105] International Law Commission, U.N. Doc. A /CN.4/553, *supra* note 95, at 9 ¶ 8.

political will in adhering to international *positive* obligations is not a prerogative of or an issue exclusively associated to international organizations.[106] States are similarly confronted with political pushback and this does not exonerate states from their international obligations, nor should it exonerate international organizations.[107] Likewise, the Special Rapporteur holds, it would be "*...strange to assume that international organizations cannot possess obligations to take positive actions*".[108] 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 and very interesting 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 notion is transposable *in casu* and unveils the most rudimentary and elemental argument of this study. 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, the Special Rapporteur, making note that within a European Union context Member States are at the helm of the implementation of EU measures, underlines that differentiated obligations may exist for the Member States and the EU in adhering to international obligations.[109] This is indicative – if nothing else – of the fact that different obligations for states and 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* refers to the idea that although Member States and international organizations may

[106] *Id.*, at 9 ¶ 9.
[107] *Id.*, at 9 ¶ 9-10.
[108] *Id.*
[109] Special Rapporteur Gaja furthermore recalls 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. *Id.*, at 10-11 ¶ 14-15.

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 doctrine[110], 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,* it was held that "*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*".[111] Applied specifically to the EU, this entails that it is bound by general rules of international law, including customary international (human rights) law, general principles of EU law, its constituent treaties (TEU, TFEU and CFR), as well as any other agreement to which it is a party. Furthermore, the rules of the organization may arguably encompass a number of international obligations depending on their content and subject (see *supra*). While this provides ample breeding ground for the identification of 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 how to comply with that abstract commitment in practice.

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 European Union for example – besides having bound itself to the Charter directly and the ECHR indirectly – is not a contracting

[110] Christiane Ahlborn, *To Share or Not to Share? The Allocation of Responsibility between International Organizations and their Member States*, 88 DIE FRIEDENS-WARTE, 52 – 53 (2013).
[111] I.C.J. Advisory Opinion, *supra* note 28, at ¶ 37.

party to any international human rights treaty of a general nature, with the exception of the UN Convention on the Rights of Persons with Disabilities since 2010.[112] Traditionally, human rights instruments regulate(-d) the dynamic between the state exercising jurisdiction and the individual under that states' jurisdiction. International human rights instruments were traditionally not developed with international organizations in mind as the duty-bearers of its obligations. Instead, such treaties and instruments specifically identify States as the duty-bearers. Nevertheless, the EU is now bound by these same obligations. And precisely at this point a nuance is elemental. The very simple, albeit extremely crucial question must be posed, how and whether it is 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 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. Hence, should it 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 its disposal that single Member States do not have, which may steer the conduct of a single or multiple States in a particular direction – 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 international human rights law generally, should be analogous for Member States, the EU, and private corporations alike. The mere fact that the Union has legal personality, is a subject of international law, and bound by (international) human rights law embodied in the Charter and customary international law, neither clarifies the contours of the

[112] Rosas, *supra* note 99, at 1687.

obligations borne by the EU, nor does it clarify the concrete rights that can be invoked by an individual *vis-à-vis* the EU.[113] 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 (yet) *vis-à-vis* a highly integrated international organization such as the EU. In the *Reparations Advisory Opinion* by the ICJ, it 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*".[114]

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, in ensuring respect for primary rules.[115] This could translate for example, 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 somehow inherent to the human rights framework as it stands. The argument is made here however, that this is currently not sufficiently constitutionally embedded within the positive and negative obligations doctrine applicable 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 – to the detriment of legal certainty, legitimate expectations, and the effectiveness of human rights protection. Simply put, if

[113] Casteleiro, *supra* note 89, at 14; Pierre Klein, *Responsibility*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ORGANIZATIONS 1034 – 1035 (Jacob Katz Cogan, Ian Hurd and Ian Johnstone eds., 2016); Klabbers, *supra* note 58, at 284.

[114] I.C.J. Advisory Opinion, *supra*, at 174, 178; 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).

[115] Special Rapporteur Gaja furthermore recalls 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. See International Law Commission, U.N. Doc. A /CN.4/553, *supra* note 95, at 10-11 ¶ 14-15.

the positive and negative human rights obligations binding on the EU, remain obscure and nebulous and without explicit constitutional foundations, how can an individual rights-seeker successfully direct claims at the EU for neglect of those obligations in a manner that meets the requirements of the rule of law?

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 of legal certainty, legitimate expectations, the effectiveness of human rights, and the principle of legality which lay at the basis of the EU based upon the rule of law. The formulation of Article 51 CFR suggests that the question of the concrete obligations of Member States and the EU under the CFR arose in the CFR drafting process. According to Article 51 CFR, Member States and the EU and its agencies are held to "*...therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers...*".[116] However, this generalized approach which implicitly acknowledges the *sui generis* nature and functional speciality of the EU, 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 indeed the EU has committed a breach through act or omission, of its primary human rights norms. In turn, this again diminishes the access of an individual to an effective remedy in situations of transnational cooperative governance.

2. 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 responsibility for a *separate* wrongful act, which constitutes a "*...separate trigger of responsibility (fait générateur) from the principal*

[116] CFR, *supra* note 12, at Art. 51.

wrongful act it facilitates".[117] Accordingly, 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.[118] Articles 14 – 18 ARIO encompass this type of shared responsibility and are considered codifications of existing custom and progressive development of international law.[119] These provisions were developed with the intent of preventing situations whereby an international organization could successfully circumvent one of its international obligations "*...by availing itself of the separate legal personality of its members, whether States or other international organizations*".[120] 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.[121] Firstly, independent responsibility in a multi-actor context, does not sufficiently take into consideration the diffusion of responsibility.[122] The diffusion of responsibility across various actors, may disincentive the various complicit actors from acting in accordance with human rights norms, in light of the fact that the diffusion of responsibility will likely hamper definitive determinations of responsibility.[123] Secondly, 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, in order to identify the 'correct' perpetrator(s) of the unlawful conduct that resulted in harm.[124] In line with these concerns, Nollkaemper concludes that "*If cooperative conduct in*

[117] Lanovoy, *supra* note 61, at 4.
[118] Lanovoy, *supra* note 61, at 5.
[119] Lanovoy notes that the underlying premise of complicity may have acquired the status of custom, but that this has no bearing on the customary nature of the *constituent elements* of complicity. This is one of the main themes of his monograph, in which he holds that the principle of complicity holds validity as a source of international law, but that the diverging and ambiguous application thereof in practice, impair determinations of custom. In coming to this conclusion, Lanovoy builds upon the seminal works of Andreas Felder, Helmut Aust and Miles Jackson. Lanovoy, *supra* note 61, at 6, 9; MILES 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).
[120] International Law Commission, U.N. Doc. A /CN.4/610, *supra* note 65, at 83 ¶ 47.
[121] 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, 29-30 (Thomas Gammeltoft-Hansen and Jens Vedsted-Hansen eds. 2017).
[122] *Id.*
[123] *Id.*
[124] *Id.*

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."[125] 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 responsibility to the detriment of the right to an effective remedy of 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[126], but rather the indirect or secondary responsibility of an international organization for its involvement in *facilitating* the primary breach of an international obligation.[127] Scholarship and practice interchangeably refer to such situations as resulting in secondary and ancillary[128], complicit[129], derivative[130], indirect[131], shared[132], relational[133] or joint[134] responsibility.[135] Lanovoy notes that although there may be subtle differences

[125] *Id*, at 31.
[126] International Law Commission, *Fourth Report on the responsibility of international organizations by Mr. Giorgio Gaja, Special Rapporteur*, U.N. Doc. A /CN.4/564 (Feb. 28, 12 and 20 April, 2006), at 114-115 ¶ 54.
[127] ARIO, *supra*, at General Comment 2 to Chapter IV.
[128] ROBERT KOLB, THE INTERNATIONAL LAW OF STATE RESPONSIBILITY, 215-230 (2017); JAMES CRAWFORD, STATE RESPONSIBILITY, 395-434 (2013).
[129] Lanovoy, *supra* note 61; Jackson, *supra* note 119.
[130] Derivative responsibility is used to denote the fact that the responsibility for the international organization would arise only after responsibility for the primary wrongful act by the principal wrongdoer is established. Lanovoy, *supra* note 61, at 10.
[131] Voulgaris *supra* note 61.
[132] André Nollkaemper and Ilias Plakokefalos, *The Practice of Shared Responsibility: A Framework for Analysis*, *in* THE PRACTICE OF SHARED RESPONSIBILITY, 1-11 (André Nollkaemper and Ilias Plakokefalos eds., 2017).
[133] Nollkaemper, *supra* note 121, at 27-52.
[134] Matthias Hartwig, *International Organizations or Institutions, Responsibility and Liability*, *in* MAX PLANCK ENCYCLOPAEDIA IN PUBLIC INTERNATIONAL LAW ¶ 25 (Rüdiger Wolfrum ed., 2011).
[135] 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. Essentially, the argument is that by construing the responsibility of the international organization as derivative, this diminishes the gradation of involvement, the nature of the involvement, the potential remedial consequences associated to this responsibility and may have the impact of shifting the primary burden of responsibility upon the primary actor (the state for example), 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. Lanovoy, *supra* note 61, at 10-11.

in the terminology, ultimately these notions all refer to situations where the responsibility of an international organization is considered for having facilitated a wrongful act by another actor – the principal wrongdoer.[136]

Much like in cases of independent responsibility for international organizations, this second form of responsibility is plagued by limited practice.[137] 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.[138] The ARIO explain that this type of responsibility will arise when the international organization is responsible for aiding or assisting (Article 14 ARIO), directing or controlling (Article 15 ARIO), coercing (Article 16 ARIO) (a) signatory State(s) unlawful conduct and finally, in case of circumvention of an international obligation by addressing decisions and authorizations to Signatory States.[139] Such responsibility is thus premised not on the primary international rule that is breached by the state(s) or international organization(s), but

[136] *Id.*, at 4, 10. A more contemporary approach to shared responsibility expands the scope and definition thereof, however. This is predominantly done by the work under direction of André Nollkaemper. Nollkaemper defines this form of responsibility as referring to situations 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 contributing actors*". Nollkaemper and Plakokefalos, *supra* note 132, at 3. For the purpose of the present study, joint responsibility functions as an umbrella term that references both 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, as well as any other dynamic that results in one undivided injury. The relevance of the terminological distinctions in joint responsibility is limited in the present study on account of the fact that the constituent elements to determine whether such responsibility has arisen, still require that attribution and an internationally wrongful act be established. Hence, the issues that arise with respect to the determination of attribution and an internationally wrongful act under *independent* responsibility, remain applicable under any conceptualisation of joint responsibility. See on the topic (and sources cited therein): 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).

[137] ARIO, *supra* note 55, at General Comment 1 to Chapter IV. Limited practice on the topic is complicated by the fact that in cases of such complicit conduct, adjudicatory bodies have not assessed the joint or complicit responsibility of the international organization on account of lacking jurisdiction *ratione personae*, particularly within the realm of fundamental rights protection. See for case law references ARIO, *supra* note 55, at General Comment 4 to Chapter IV. See also Lanovoy, *supra* note 61, at 7, 11. Lanovoy notes that one of the reasons why practice is scant for responsibility is because of the fact that a cognitive and thus subjective element is added in the determination of responsibility, which is much harder to identify than objective responsibility. See Nollkaemper, *supra* note 121, at 29.

[138] Lanovoy, *supra* note 61, at 4.

[139] ARIO, *supra*, at General Comment 1 to Chapter IV.

rather, on the *causal conduct* by the international organization that *facilitates* this primary rule violation of the international obligation by the primary actor.[140]

A second overarching issue with the provisions on joint responsibility in the ARIO, is the underdeveloped state thereof and the limited scope of these provisions. While this was - and to a certain extent still is - understandable in light of the limited practice, recent developments have demonstrated that the identified variations of joint responsibility were only in an embryonic phase when incorporated in the ARIO. An analysis of the topic would thus not be complete without including the (partially doctrinal) developments since, which are in large part, fruits of the labor conducted under the direction of Nollkaemper and which paved the path to the 2020 *Guiding Principles on Shared Responsibility in International Law*.[141] These developments adopt a broader approach to shared responsibility.[142] Nollkaemper defends this broader approach, as 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*".[143] Accordingly, the degree and intensity of the relationship will determine what actor and to what extent the complicit actor(s) are to be held responsible.[144]

Despite the recent developments on the topic, to date, joint responsibility particularly for international human rights violations, remains underexplored and much ambiguity persists as to the precise scope and implications of such responsibility.[145] Nevertheless,

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[140] ARIO, *supra*, at General Comment 2 to Chapter IV.
[141] André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski and Ilias Plakokefalos, *Guiding Principles on Shared Responsibility in International Law*, 31 EUR. J. INT. LAW 1, 15 - 72 (2020).
[142] The Guiding Principles are broader in identifying shared responsibility, but purportedly also as concerns the invocation of international responsibility by actors other than States and other international organizations. However, as aforementioned, despite not explicitly noting that individuals may invoke the international responsibility of an international organization, this is nevertheless implied in a number of provisions across the ARIO. Nollkaemper *et al*, *supra* note 141, at 20-21, 22.
[143] Nollkaemper, *supra* note 121, at 32.
[144] *Id*.
[145] Joint responsibility predominantly finds its inspiration in domestic legislation and has only been used sparsely in international legal instruments and case law. This was highlighted repeatedly in the *travaux préparatoires* to the ARIO. International Law Commission, U.N. Doc. A /CN.4/553, *supra* note 91, at 13-14 ¶ 28-29. Despite the absence of practice concerning joint responsibility, much scholarly work has been

common across the various conceptualizations of joint responsibility, is that there must be multiple actors implicated on the one hand (interdependent conduct), and a single harmful outcome on the other hand (interdependent outcome).[146] The interdependent conduct must have led – causally or not – to an interdependent outcome that could not have been achieved by one of the parties 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 (international and regional) practice[147], NOLLKAEMPER – based on similar distinctions in earlier scholarship – identifies three main forms of shared responsibility – concurrent responsibility (1), cumulative responsibility (2) and joint responsibility for one single wrongful act (3).[148] While the latter presupposes joint responsibility stemming from a *single* wrongful act, the former two variations of joint responsibility, refer to scenarios of multiple wrongful acts (by multiple actors) that result in a single harmful result. 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 what the standard is that must be met for these two conditions to result in shared responsibility. When can knowing intent be considered to be established, particularly concerning the EU – which is ultimately a legal construct to facilitate cooperation between States. Who bears the burden of proof, and what is the applicable standard and method of proof to establish knowing intent? Concerning the opposability condition, and drawing from the earlier discussion, it is unclear whether the opposability condition demands that the

devoted to analyzing this form of responsibility. For an extensive discussion on joint responsibility, see: Nollkaemper, *supra* note 121, at 308-319.

[146] Nollkaemper, *supra* note 121, at 31 – 34; Nollkaemper and Plakokefalos, *supra* note 132, at 3; Ahlborn, *supra* note 110, at. 55.

[147] Nollkaemper, *supra* note 121, at 32.

[148] Principle 2; Comment 5 – 8 to Principle 2. See (and sources cited therein): Nollkaemper et al, *supra* note 141, at 23; Nollkaemper, *supra* note 121, at 38-39.

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 gives flesh to the bones of the abstract human rights commitments. If the latter, the opposability condition cannot be met until the primary rules have been clarified *vis-à-vis* 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 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 *vis-à-vis* the implicated business (HawkEye 360), individual litigants will also find it problematic to address their concerns and seek reparations *vis-a-vis* the EU.

C. Interim Conclusions: The Perennial State-centrism Objection

The objective of this study is to unveil the difficulties associated to 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 to these two strands on responsibility.

Concerning businesses, analyses on human rights responsibility have been traditionally focused on determining the desirability, scope and limitations of primary human rights rules and obligations for businesses. Conversely, limited to no analyses have gone 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 on behalf of 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. 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, for these rules to become judicially actionable and provide individuals with access to an effective remedy.

To date, the approaches to NSA responsibility overwhelmingly approach human rights responsibility in a siloed, disaggregated and actor-specific manner. In other words, when 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 situations of transnational cooperative governance, the primary and secondary rules to establish human rights responsibility will likely be insufficient to establish responsibility of the implicated private business, the international organization and/or the implicated State(s).

As these modes of responsibility for different State 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 and secondary rules for both businesses and international organizations thus problematize access to an effective remedy for individual applicants.

Moreover, the siloed and indeterminate understanding of responsibility of NSAs entails it subordination to the rules governing the responsibility of states 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 responsibility of NSAs, which is subordinated 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, the contention is that State responsibility remains an avenue for legal redress, and thus no real responsibility-remedy gap arises due transnational cooperative governance. Consider the following however:

As concerns (adjudicatory) jurisdiction to establish state responsibility, a shift is noticeable from territorial jurisdiction to extra-territorial jurisdiction. However, this shift cannot be overstated, as extra-territorial application of human rights norms is a strictly construed exception to the traditional rule of territorial jurisdiction. The reasoning behind this strict conceptualization of extra-territorial jurisdiction, is that it would otherwise open up the possibility of near-universal jurisdiction of human rights norms, which generally signatory States did not agree to when drafting the original human rights instruments. In other words, the contemporary international human rights regime remains predicated on a state and territorial conceptualization of jurisdiction. One could argue that human rights responsibility of NSAs is not constrained by territorial boundaries in the same manner. Yet, this same fear of near-universal jurisdiction, resurfaces also in these NSA approaches. Accordingly, complicit NSAs increasingly take measures that limit any responsibility to an understanding of jurisdiction that is overwhelmingly state-centric and territorial. In 2021, the US Supreme Court held that the ATS requires that cause of action would have to be demonstrated (i.e., customary nature of the norm according to state practice) and that the complicit company is sufficiently connected to the US, with mere corporate presence not being sufficient. Similarly, measures are taken by international organizations to limit jurisdiction to the traditional state-centric limitations. Although the EU as the most advanced and integrated human rights international organization, is not constrained by territorial jurisdiction under the CFR (see *supra*), it actively engages in methods to avoid jurisdiction. As will be demonstrated, by moving towards satellite imaging and detection in its border

management, the EU evades territorial *and* extra-territorial jurisdiction for the purpose of human rights adjudication.

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 currently there are 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.[149]

Finally, as elaborated upon, primary human rights norms have been traditionally interpreted, enacted, and applied to States as the primary duty-bearers of such obligations. While one may argue that this condition to establish State responsibility would likely pose the least difficulties for individual claimants, it need 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.

[149] For a discussion on how the absence of definitiveness on tests of attribution could impact court rulings in a single jurisdiction, concerning Mukeshimana-Ngulinzira and others v. Belgium, and Mothers of Srebrenica Ass'n v Netherlands, see De Coninck, Joyce, *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) (PhD Dissertation, Ghent University), at 168-170.

In summary, the absence of clearly defined and enforceable primary and secondary rules for businesses and international organizations, make these NSAs unlikely contenders to hold responsible for human rights violations. While these NSAs do increasingly have internal mechanisms, 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 the implicated State. However, diffused, and convoluted conduct shared between the State, the private corporation, and the international organization (*in casu* the EU), complicate the choice of which test that should apply, which in turn is left to adjudicatory discretion with no definitive standard or hierarchy on how to determine the applicable test. Finally, presupposing that the obstacle 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 (see *infra*), 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 study 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.

III. COOPERATIVE GOVERNANCE AND THE RESPONSIBILITY-REMEDY GAP

This Part addresses 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 for such cooperative governance on the other hand. 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 which transcends the traditionally state-centric human rights regime, to the detriment of the access to an effective remedy of 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, shifted gradually from a predominantly humanitarian-centric policy to an increasingly security-centric policy.[150] This shift is evidenced *inter alia* by the EU policy of Integrated Border Management (IBM).[151] IBM is

[150] Mariagiulia Giuffré and 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 82-108 (Satvinder Singh Juss ed., 2019); Arantza Gomez Arana and 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 272-273 (Sergio Carrera, Juan Santos Vara and Tineke Strik 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 'Rescue-Through-Interdiction/Rescue-Without-Protection' Paradigm*, 56 J. COMMON MARK. 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 172-173 (Bernard Ryan and Valsamis Mitsilegas eds., 2010).

[151] Integrated Border Management is defined in Article 3 of Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No. 1052/2013 and (EU) 2016/1624 (hereinafter – EBCG Regulation 2019) [2019] OJ L295/1 (see also consideration 3 of the repealed 2016 Frontex Regulation).

inspired by the 'four-tier access control model'[152] and refers to the entirety of measures taken by the EU at every stage of the trajectory of an individual attempting 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*".[153] Accordingly, IBM maps the movement of TCN's from the point of departure of the country of origin (or transit) and seeks to regulate their movement by firstly, imposing measures to control migratory movements in third countries (1); secondly, via border checks outside the EU external border, in cooperation with neighboring third countries (2); thirdly, by exercising control measures at the EU external border, as well as within the EU (3); and finally, by executing expulsions and returns of individuals that do not meet the conditions for entry and/or stay in the EU (4).[154] The first tier of IBM encompasses *inter alia*, measures taken in cooperation with third countries concerning border control, or may refer to visa requirements imposed for TCN's to legally reach EU-territory. Such measures are implemented to dissuade individuals from attempting to reach the EU's external border and require rather that an individual obtains prior authorization *before* embarking upon travel to the Union.[155] The second phase of IBM refers to the measures taken *throughout* the journey undergone by the TCN's in an attempt to reach 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. Within this second tier, cooperation is established with third countries. The third tier of IBM includes measures taken upon *arrival* at the EU external border by the TCN, while the fourth and final tier of IBM refers to the measures taken for the purpose of return and readmission of TCN's to third countries.

[152] *Id*., EBCG Regulation 2019, at Recital 11; Moreno-Lax, *supra* note 150, at 27-41.
[153] *Id*., EBCG Regulation 2019, at Recital 11.
[154] Moreno-Lax, *supra* note 150, at 27-41; den Heijer, *supra* note 150, at 173-174.
[155] den Heijer, *supra* note 150, 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 and Valsamis Mitsilegas eds., 2010).

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 granted entry into a particular country.[156] 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.[157] However, the multi-functionality of EU border management and the various phases of IBM have 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 from group to group…*" as a result of which "*…the 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*".[158]

Secondly, 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 TCN's 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 (see *supra*). This facilitates a dichotomous situation whereby the EU pursues fundamental rights protection for third country nationals 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 responsibility of the EU for its contribution to human rights violations in this field.

[156] *Id*., at 199.
[157] EBCG Regulation 2019, *supra* note 168, at Recital 11: "*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 155 at 199.
[158] den Heijer, *supra* note 150, at 170.

The question of legal responsibility for unlawful human rights conduct in the implementation of IBM, is intimately connected to the right to an effective remedy for victims of such unlawful conduct.[159] Indeed, legal remedies cannot be obtained by victims of human rights violations throughout IBM, without first establishing responsibility. To ensure an effective remedy and ensuing reparations, an individual TCN is required to enforce primary rules and secondary rules before a court of law or tribunal.[160] But who shall these primary and secondary rules be enforced against, when parts of IBM rely on intangible cooperation between the EU, its Member States, and private international corporations?

B. HawkEye 360

[159] 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 Article 47 CFR concerning the right to an effective remedy provides more extensive protection than the analogous right under Article 13 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 and require instead that for it to be considered effective, a number of factors affecting must be considered. See for example "*290. In order to be effective, the remedy required by Article 13 must be* ***available in practice as well as in law****, in particular in the sense that its exercise* ***must not be unjustifiably hindered by the acts or omissions of the authorities*** *of the respondent State. 291. Article 13 requires the provision of a domestic remedy allowing the competent national authority both to deal with the* ***substance of the relevant Convention complaint*** *and to* ***grant appropriate relief****, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. 292. Particular attention should be paid to the* ***speediness*** *of the remedial action itself, it not being excluded that the adequate nature of the remedy can be undermined by its excessive duration. 293. Lastly, in view of the importance which the Court attaches to Article 3 of the Convention and the* ***irreversible nature of the damage which may result if the risk of torture or ill-treatment materializes****, the effectiveness of a remedy within the meaning of Article 13 imperatively* ***requires close scrutiny by a national authority****, independent and rigorous scrutiny of any claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3 (see Jabari, cited above, § 50), as well as a* ***particularly prompt response*** *(see Batı and Others v. Turkey, nos. 33097/96 and 57834/00, § 136, ECHR 2004-IV); it also requires that the person concerned should have access to a remedy with automatic suspensive effect (see Čonka v. Belgium, no. 51564/99, §§ 81-83, ECHR 2002-I, and Gebremedhin [Gaberamadhien], cited above, § 66)*". M.S.S. v. Belgium, ECHR App. No. 30696/09, at ¶ 290-293 (Jan. 21, 2011); 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 unlawful (human rights) conduct of international organizations, see: KAREL WELLENS, REMEDIES AGAINST INTERNATIONAL ORGANIZATIONS (2009).

[160] Concerning remedies for human rights violations in particular: DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 10-27 (2015).

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 that Frontex is keeping the details of this latest award confidential. Consequently, 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 – facilitates 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 for data, which would allow it to increase its situational awareness in the Mediterranean. While aerial surveillance is not problematic as such, in light of the *non-refoulement* principle under international and regional human rights law, it becomes problematic when such location data is shared with the Libyan Coast Guard, which push- and pull individuals back onto Libyan land territory.[161] Although in 2021, Frontex confirmed 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.[162]

Terminated CSDP military operation EUNAVFOR MED Sophia (Operation Sophia)[163] is an example of how the EU has shared location data obtained by unmanned drones covering the high seas in the Mediterranean.[164] This operation has sparked much

[161] See on this topic: Judith Sunderland and 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.
[162] Id.
[163] Council of Europe, Decision (CFSP) 2015/972 of 22 June 2015 Launching the European Union military Operation in the Southern Central Mediterranean [2015] OJ L157/51; Council of Europe, Decision (CFSP) 2015/778 of 18 May 2015 on a European Union Military Operation in the Southern Central Mediterranean (EUNAVFOR MED) [2015] OJ L122/31.
[164] Operation Sophia was recently terminated in its entirety. Its tasks have been incorporated in CSDP mission EUNAVFOR MED Operation Irini (Operation Irini). This new mission has as the objective the implementation of the UN arms embargo on Libya. Additionally, it has taken over the former Operation Sophia tasks of conducting information gathering and aerial surveillance to control irregular migratory

controversy due to the human rights implications it has had on individual TCNs, yet has not given rise to any legal review concerning the damage resulting therefrom.[165] Specifically, within this Operation, the EU made use (and continues to do so through its successor Operation Irini[166]) 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 back into Libya, 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 the Member States in adopting these measures, it is extremely questionable whether this practice is in conformity with their respective abstract commitments to adhere to the *non-refoulement* prohibition.

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flows and the countering of human smuggling and trafficking in the area. Hence, the considerations on aerial surveillance and resulting *de facto* push- and pull-backs, similarly apply to Operation Irini. Council of the European Union, Decision (CFSP) 2020/472 of 31 March 2020 on a European Union Military Operation in the Mediterranean (EUNAVFOR Med Irini) [2020] OJ L101/4.

[165] 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 on the topic Joni Heliskoski, *Responsibility and liability for CSDP operations*, *in* RESEARCH HANDBOOK ON THE EU'S COMMON FOREIGN AND SECURITY POLICY 136-142 (Steven Blockmans and Panos Koutrakos eds., 2018). On why this operation has not given rise to legal review, see: Joyce De Coninck, *Effective Remedies for Human Rights Violations in EU CSDP Military Missions: Smoke and Mirrors in Human Rights Adjudication?*, 24 GERMAN LAW JOURNAL, 2, 342 - 363 (2023).

[166] Council of the European Union, Decision (CFSP) 2020/472 of 31 March 2020 on a European Union Military Operation in the Mediterranean (EUNAVFOR Med Irini) [2020] OJ L101/4.

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 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 hypothesis 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 for the purpose of asking international protection and possibly from leaving Libyan territory altogether.

Such practices stand in stark contrast with the customary international law norm of *non-refoulment*, 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. Firstly, Libya has been repeatedly condemned as an unsafe third country by international, regional, and domestic courts and tribunals. Secondly, 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.

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 specifically, 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, 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, militate away from establishing extra-territorial jurisdiction. In addition to this considerable jurisdictional hurdle, it need be recalled that under EU and international human rights law, there is a significant absence of secondary rules on establishing (extra-territorial) jurisdiction *vis-à-vis* businesses and HawkEye 360 specifically, capable of rendering the full scope of European human rights provisions enforceable.

Secondly, the question of attribution would have to be overcome. As hinted at previously, much will depend on which test of attribution 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?[167] 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, without any definitive standards to decide which one prevails, the test of attribution 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

[167] It is notable that 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 and hypothesis. The question that is being investigated, is whether the EU can be held responsible under EU human rights law or international human rights law for having contributed to the *non-refoulement* violations.

it unlikely that – absent any *ex ante* human rights obligations imposed on HawkEye 360 – will result in attribution of problematic conduct to the latter. In the best but unlikely scenario, unlawful conduct may be attributed to the Member States. This will be difficult to argue however, as it is unlikely that the Member States will be considered as acting as an organ of the EU (normative control attribution test), or that they have the necessary competence to engage in this data-sharing (competence attribution test), which is effectuated through Frontex, or that they have operational effective control, or ultimate normative control (operational control test). Accordingly, it becomes unlikely that the existing tests of attribution, 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 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 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 thus 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 under the *non-refoulement* principle. As the individuals concerned are being prevented from even

leaving Libyan territory and territorial waters or are immediately pulled-back without any contact with the authorities of a given EU Member State capable of triggering 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 rightsholder with the option of relying on the conditions of shared responsibility. As has been elaborated upon however, the conditions of 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.

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 *vis-à-vis* the 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 potentially more advantageous model. With this model, the emphasis is placed on the cooperation between the various actors in perpetrating human rights harms, to ensure that the individual victim will not ultimately be deprived of access to an effective remedy. In other words, in addressing human rights responsibility for modes of transnational cooperative governance holistically and in relation to the contributions of the separate actors, the right to an effective remedy and ensuing remedies 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 responsibility for international organizations. However, these developments have not yet come to full fruition and arguably the primary and secondary rules for both types of NSAs lack sufficient precision to function as legally actionable for individuals who fall victim to unlawful human rights NSA conduct. 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 of NSAs is picking up speed. The need for a reconceptualized approach to 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

mechanisms 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 of any one of the separate actors, 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, entailing 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; (3) and finally, the subordination of NSA responsibility to state responsibility (3).

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 hand.

B. A Relational Regime

1. Primary Norms

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

First steps in this direction have been taken both in the business and human rights movement, and more recently, in the approach to human rights responsibility of international organizations. As concerns the business and human rights approach to responsibility, the Draft Treaty on Business and Human Rights – 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 specifically, impose binding human rights obligations on private corporations. Concerning international organizations, the EU's CFR is an example of how IOs are increasingly bound to international and regional human rights obligations.

What both developments are missing however, is more specificity. In that sense, 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 that business refrain from "*causing or contributing to adverse human rights*

impacts…And address such impacts when they occur".[168] Yet, the causality test or contributory test remains undefined, as is the understanding of what constitutes an 'adverse human rights impacts'. Similarly, it is unclear what type of measures are to be taken by companies in 'addressing' such detrimental impacts: does this entail that companies must 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 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 protection of all parties 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 obligations, and open, standard-setting substantive human rights obligations.

For example, the EU's 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

[168] Draft Treaty on Business and Human Rights, *supra* note 44, at 4.

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 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 *vis-à-vis* 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 European Union 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,* 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 *vis-à-vis* all three actors, albeit for different contributions to the single human rights harm stemming from transnational cooperative governance.

2. Secondary Norms

Much of the 'responsibility-remedy' gap is the result of lacking or underdeveloped secondary rules to establish human rights responsibility. But insofar the *primary* norms are sufficiently developed beyond the abstract commitment and 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, which 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 commitment* but by different concrete legal obligations.

3. 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 the associated costs human rights responsibility brings about. Indeed, costs are inevitable, and the rationale goes that excessive costs would hamper the functionality of NSAs. These costs translate on two levels. On the one hand, there are the costs associated to 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 the potential remedial costs, that

are associated to 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 case of excessive remedial costs. Accordingly, it advances the argument that 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. In other words, the determinations of responsibility would 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.[169]

[169] A similar system of remedies has recently been developed for the EU's agency for Law Enforcement Cooperation.