

TRANSNATIONAL REPRESSION AND THE DIFFERENT FACES OF SOVEREIGNTY

*Siena Anstis**, *Noura Al-Jizawi** & *Dr. Ronald J. Deibert**

| | |
|---|-----|
| INTRODUCTION..... | 641 |
| I. WHAT IS TRANSNATIONAL REPRESSION? | 644 |
| II. STATE SOVEREIGNTY AND TRANSNATIONAL REPRESSION..... | 648 |
| <i>A. Transnational Repression and the Extension of Sovereignty Beyond Territory.....</i> | 649 |
| <i>B. Transnational Repression and the Violation of the Sovereignty of Host States</i> | 653 |
| III. INDIVIDUAL SOVEREIGNTY AND TRANSNATIONAL REPRESSION..... | 656 |
| <i>A. Defining Individual Sovereignty.....</i> | 657 |
| <i>B. Digital Authoritarianism and Individual Sovereignty in the Age </i> | 657 |
| <i>C. Violations of Individual Sovereignty Through Digital Transnational Repression</i> | 658 |
| CONCLUSION..... | 660 |

INTRODUCTION

In the summer of 2018, Omar Abdulaziz, a Saudi dissident and Canadian permanent resident living in Montreal, was targeted with NSO Group’s advanced spyware technology by Saudi operators.¹ He was also harassed in person by Saudi agents in an attempt to get him to return to Saudi Arabia.² In October 2018, Saudi journalist and dissident Jamal Khashoggi was murdered in Turkey by Saudi authorities.³ That same year, women’s rights activist Loujain Al-Hathloul was abducted by Saudi government

* PhD Fellow, University of Oslo, Faculty of Law; Senior Legal Advisor, the Citizen Lab.

* Senior Researcher, the Citizen Lab.

* Professor, Department of Political Science; Professor, Munk School of Global Affairs & Public Policy; Director, the Citizen Lab.

1. Bill Marczak, John Scott-Railton, Adam Senft, Bahr Abdul Razzak & Ron Deibert, *The Kingdom Came To Canada: How Saudi-Linked Digital Espionage Reached Canadian Soil*, THE CITIZEN LAB (Oct. 1, 2018), <https://citizenlab.ca/2018/10/the-kingdom-came-to-canada-how-saudi-linked-digital-espionage-reached-canadian-soil/> [https://perma.cc/GPQ6-TCDT].

2. Jillian Kestler-D’amours, *Saudi Dissident Vows To ‘Keep Fighting’ After Year Of Intimidation, Arrests And Murder*, MIDDLE EAST EYE (Dec. 28, 2019), <https://www.middleeasteye.net/news/saudi-dissident-vows-keep-fighting-after-year-intimidation-arrests-and-murder> [https://perma.cc/99C2-J9YD].

3. *Jamal Khashoggi: All You Need To Know About Saudi Journalist’s Death*, BBC (Feb. 24, 2021), <https://www.bbc.com/news/world-europe-45812399> [https://perma.cc/QD6V-QNCS].

agents while she was in Dubai and thrown in jail in Saudi Arabia.⁴ In June 2021, the Belarus government hijacked Belarusian journalist Roman Protasevich's flight and had him arrested.⁵ In October 2022, a protester outside the Chinese consulate in Manchester, United Kingdom was pulled into the consulate grounds and violently beaten.⁶

These disparate incidents are all acts of transnational repression, which arises when governments target nationals who live abroad in order to prevent acts of political or social dissent or, in other words, to silence them.⁷ As these examples show, acts of transnational repression range from the abduction and killing of dissidents in exile to digital targeting with surveillance technologies or online disinformation or harassment campaigns.⁸ Transnational repression is a cross-border activity where countries of origin—the perpetrating states—exercise control over nationals who are no longer within the territorial borders of the state.⁹ Perpetrating states employ authoritarian tactics domestically to control and subjugate citizens; transnational repression represents an extraterritorial extension of these practices.¹⁰ Transnational repression attempts to strip activists and dissidents abroad of the security to speak and act freely.¹¹ It compromises spaces where dissidents and activists are supposed to enjoy protections against human rights violations because of their residence in a rights-respecting country.¹² It is a practice that appears to be accelerating with the growth of authoritarianism worldwide, as well as increased migration and the availability of digital technologies that facilitate persistent online harassment and surveillance.¹³

This Essay seeks to contribute to existing scholarship on transnational repression by looking at the practice through the lens of *sovereignty*.¹⁴ Scholars of transnational repression have primarily focused on understanding the practice of transnational repression, developing databases that map the frequency of acts of transnational repression and its perpetrators, describing state methods and tactics, and understanding

4. *See Saudi Rights Activist Loujain al-Hathloul Sues ex-US Contractors* (2021), AL JAZEERA (Dec. 10, 2021), <https://www.aljazeera.com/news/2021/12/10/saudi-rights-activist-loujain-al-hathloul-sues-ex-us-contractors> [https://perma.cc/69BA-TJG3].

5. *Roman Protasevich: Belarus Dissident Seized from Ryanair Plane*, BBC (June 25, 2021), <https://www.bbc.com/news/world-europe-57229635> [https://perma.cc/LT6Z-MJEM].

6. Tiffany May, *Protester Is Dragged Into a Chinese Consulate in England and Beaten*, N.Y. TIMES (Oct. 17, 2022), <https://www.nytimes.com/2022/10/17/world/asia/manchester-china-consulate-beating.html> [https://perma.cc/RXD4-AHC3].

7. NATE SCHENKKAN & ISABEL LINZER, FREEDOM HOUSE, OUT OF SIGHT, NOT OUT OF REACH: THE GLOBAL SCALE AND SCOPE OF TRANSNATIONAL REPRESSION 3 (2021), [https://perma.cc/WW8W-RACP].

8. *Id.* at 9.

9. *Id.* at 1.

10. *See id.* at 7.

11. *See id.* at 8.

12. *Id.*

13. For example, the Transnational Repression of Uyghurs Dataset documented 238 incidents of transnational repression from 1997 to 2014 and another 6,870 events since 2014. Edward Lemon, Bradley Jardine & Natalie Hall, *Globalizing Minority Persecution: China's Transnational Repression of The Uyghurs*, GLOBALIZATIONS, Nov. 1 2022, at 1, <https://doi.org/10.1080/14747731.2022.2135944>.

14. This interrogation joins a growing body of scholarship concerned with “the growing obsolescence of territorially bound political authority.” *See* Stephen Allen, Danielle Costelloe, Malgosia Fitzmaurice, Paul Gragl & Edward Guntrip, *Introduction: Defining State and Jurisdiction in International Law*, in THE OXFORD HANDBOOK OF JURISDICTION IN INTERNATIONAL LAW 3, 9 (Stephen Allen ed., 2019).

its impact on targeted individuals.¹⁵ Few have engaged in a discussion of how international law intersects with transnational repression or how sovereignty is challenged by this practice.¹⁶ More broadly, this Essay hopes to contribute to a broader understanding of the norms and rules that apply to the relationship between a country of origin and the “diaspora,” which “has largely occurred in an ethical vacuum.”¹⁷ The risk is that without “an agreed set of principles about what constitutes reasonable diaspora engagement, governments in many parts of the world have begun to treat interference with ‘their’ citizens abroad as part of normal politics.”¹⁸

In light of this normative and scholarly gap—inspired by “Sovereignty Identity Crisis: State, Self, and Collective in a Digital Age,” a symposium hosted by Temple Law’s Institute for Law, Innovation & Technology (iLIT) and *Temple Law Review*—we consider transnational repression through the lens of two articulations of sovereignty: state sovereignty and individual sovereignty. Under this first view of sovereignty, we focus primarily on its territorial aspects. The state’s exclusive competence and control over its territory are central to contemporary definitions of sovereignty and, as we lay out, is increasingly challenged by transnational repression, suggesting that we may need to rethink the modern boundaries of sovereignty.¹⁹ Then, in examining individual sovereignty, we review the broader context for this term and consider how transnational repression undermines individual rights and freedoms, particularly through its digital dimensions.

We proceed as follows. In Section I, we define transnational repression and review prior scholarship on the issue. In Section II, we discuss tensions between transnational repression and state sovereignty. We interrogate why host states have been reluctant to resist transnational repression despite what we argue have been clear violations of territorial sovereignty. In Section III, we discuss the notion of individual sovereignty and explore how transnational repression limits and represses the individual rights and freedoms of targeted dissidents and activists. In this Section, we explore, in particular, the digital dimensions of transnational repression and the impact on targeted individuals and communities with respect to the exercise of fundamental rights and freedoms.

Through this exploration of the multifaceted notion of sovereignty, we highlight how there remains significant room for normative development with respect to whether

15. For a helpful summary of research on transnational repression, see Alexander Dukalskis, Saipira Furstenberg, Yana Gorokhovskaia, John Heathershaw, Edward Lemon & Nate Schnkkan, *Transnational Repression: Data Advances, Comparisons, and Challenges*, 4 POL. RSCH. EXCH., July 27, 2022, at 2, <https://doi.org/10.1080/2474736X.2022.2104651>.

16. *But see* Marcus Michaelsen & Johannes Thumfart, *Drawing a Line: Digital Transnational Repression Against Political Exiles and Host State Sovereignty*, EUR. J. INT’L SEC., Aug. 17, 2022, <https://doi.org/10.1080/14747731.2022.2135944>.

17. ALAN JOHN GAMLEN, HUMAN GEOPOLITICS: STATES, EMIGRANTS, AND THE RISE OF DIASPORA INSTITUTIONS 15 (2019).

18. *Id.* at 13.

19. *See, e.g.*, Thomas Biersteker, *State, Sovereignty, and Territory*, in HANDBOOK OF INTERNATIONAL RELATIONS 245 (Walter Carlsnaes, Thomas Risse & Beth A. Simmons, eds., 2013); Alfred Van Staden & Hans Vollaard, *The Erosion of State Sovereignty: Towards a Post-Territorial World?*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 165 (Gerard Kreijen, Marcel Brus, Jorri Duursma, Elisabeth De Vos & John Dugard eds., 2002); GBENGA ODUNTAN, SOVEREIGNTY AND JURISDICTION IN AIRSPACE AND OUTER SPACE 21 (2011).

(or not) sovereignty sets boundaries around the practice of transnational repression. More specifically, we argue that the practice of transnational repression challenges norms of state sovereignty. The failure of host states to articulate a clear response and anchor this in well-grounded rules of international law raises a question as to whether this practice could become further normalized and, worryingly, tacitly accepted. The lack of a coordinated response by host states—particularly democratic states considered to be at least nominally rights-respecting—in the face of the transnational curtailing of individual rights and freedoms of targeted dissidents and activists facilitates the spread of authoritarian practices around the globe.

I. WHAT IS TRANSNATIONAL REPRESSION?

Transnational repression arises when governments target their nationals or individuals residing abroad in order to repress or silence acts of political or social dissent.²⁰ Targets of transnational repression tend to be journalists, dissidents, human rights defenders, or members of the political opposition living in exile. Because their activities are perceived as threatening to authoritarian states, targeted persons are likely to be engaged in transnational social or political advocacy.

While transnational refers to the cross-border nature of the state practice, repression refers to the country of origin's goal, namely to "prevent[] dissident beliefs and/or activities which [states] deem as imperiling political order."²¹ Repression involves the "actual or threatened use of physical sanctions against an individual or organization," although in this case *outside* the territorial jurisdiction of the country of origin.²² Further, while this definition of repression is focused on physical acts of repression, repression can also be understood as encompassing *digital* repression, which is defined as "the use of information and communications technology to surveil, coerce, or manipulate individuals or groups in order to deter specific activities or beliefs that challenge the state."²³ Digital repression, which is an increasingly common form of repression, often

20. There is no universally accepted definition of transnational repression. However, in a recent bill, US government policymakers have proposed the following definition of transnational repression:

The term "transnational repression" means any activity by a foreign government, or an agent of a foreign power or a proxy thereof, that meets each of the following criteria: '(A) The activity involves— '(i) any effort intended to intimidate or coerce, including by force or fear, a person to take an action in the interest of a foreign government; '(ii) any effort intended to intimidate or coerce, including by force or fear, a person to take an action to forebear from exercising a right guaranteed to the person by the Constitution or laws of the United States; '(iii) enabling an effort specified in clause (i) or (ii); or '(iv) an extrajudicial killing. '(B) The activity is engaged in for the purpose of stifling dissent against or otherwise advancing the interests of a foreign government. '(C) The activity— '(i) occurs, in whole or in part, in the United States; or '(ii) is committed against— '(I) A United States person; '(II) a person in the United States; or '(III) a person not specified in subclause (I) or (II) if the activity could reasonably be expected to result in the deprivation of any rights, privileges, or immunities of such person secured or protected by the Constitution or laws of the United States.

Stop Transnational Repression Act, H.R. 9460, 117th Congress (2022).

21. Dukalskis et al., *supra* note 15, at 2.

22. Christian Davenport, *State Repression and Political Order*, 10 ANN. REV. POL. SCI. 1, 2 (2007), <https://doi.org/10.1146/annurev.polisci.10.101405.143216>.

23. STEVEN FELDSTEIN, *THE RISE OF DIGITAL REPRESSION* 25 (2021).

goes hand in hand with physical repression as states deploy multiple methods of transnational repression to coerce and intimidate targets.²⁴

Repression takes on a transnational character when “autocratic states aim to maintain and control their populations living abroad through their foreign policies.”²⁵ States undertaking transnational repression “securitize citizens’ freedom of movement” through the adoption of deterritorialized policies aimed at citizens abroad.²⁶ This practice, which extends authoritarian practices outside the territorial borders of the state, challenges the territorial focus of authoritarian studies—traditionally focused on state practices within the territorial borders—and migration studies, which has tended to focus on the practices of receiving states.²⁷ As we argue, it also challenges the contemporary definition of state sovereignty.

Transnational repression is not a new phenomenon. Documented incidents of nondemocratic states repressing dissidents or perceived state enemies beyond their territorial borders emerged in the twentieth century.²⁸ Leon Trotsky, for example, was assassinated in Mexico in 1940 by Soviet agents.²⁹ Such practices expanded in the post-Soviet era and followed the same tactic of silencing dissidents located beyond territorial borders. Examples include the assassination of the former Chilean ambassador to the United States, Orlando Letelier, in the United States by Chilean agents in 1976.³⁰ Ten days before the bombing of Letelier’s car, the head of the Chilean regime stripped him of his citizenship.³¹ In 1980, the Libyan regime, led by General Muammar Qaddafi, committed a series of executions abroad: four political opponents were assassinated in Italy, two in the United Kingdom, and one each in West Germany, Greece, and Lebanon.³²

Political and social activism in exile is not a new phenomenon; historically, communities of exiled activists and members of the diaspora have been pioneers of

24. *See id.* at 25–37.

25. Dukalskis et al., *supra* note 15, at 3.

26. Gerasimos Tsourapas, *The Long Arm of The Arab State*, 43 *ETHNIC AND RACIAL STUDS.* 351, 353 (2020), <https://doi.org/10.1080/01419870.2019.1585558>.

27. Emanuela Dalmasso, Adele Del Sordi, Marlies Glasius, Nicole Hirt, Marcus Michaelsen, Abdulkader S. Mohammad & Dana Moss, *Intervention: Extraterritorial Authoritarian Power*, 64 *POL. GEOGRAPHY* 95, 95 (2017), <https://doi.org/10.1016/j.polgeo.2017.07.003>.

28. David Lewis, “*Illiberal Spaces: Uzbekistan’s Extraterritorial Security Practices and The Spatial Politics of Contemporary Authoritarianism*,” 43 *NAT’YS PAPERS* 140, 141 (2015), <https://doi.org/10.1080/00905992.2014.980796>. Yossi Shain goes as far back as to the French Emperor Napoleon and the establishment of a French Political Police to “suppress subversive acts against the regime said to be instigated by political exiles in England.” *See* Yossi Shain, *The War of Governments Against Their Opposition in Exile*, 24 *GOV’T AND OPPOSITION* 341, 341 (1989).

29. *Russian Revolutionary Leon Trotsky Assassinated in Mexico*, *HISTORY* (Oct. 18, 2020), <https://www.history.com/this-day-in-history/trotsky-assassinated-in-mexico> [<https://perma.cc/A6N3-N3R8>].

30. *See* Vanessa Walker, *At the End of Influence: The Letelier Assassination, Human Rights, and Rethinking Intervention in US-Latin American Relations*, 46 *J. CONTEMP. HIST.* 109, 109–110 (2011), <https://doi.org/10.1177/0022009410383295>.

31. *Id.*

32. Jay Ross, *Qaddafi Threatens Dissidents Overseas*, *WASH. POST* (Dec. 6, 1982), <https://www.washingtonpost.com/archive/politics/1982/12/06/qaddafi-threatens-dissidents-overseas/d7bfa1d3-22b5-419a-a8df-a39805e9ed26/> [<https://perma.cc/2GD2-FM4L>].

change and a thorn in the side of authoritarian states seeking to maintain power.³³ Digital communication technologies, migration, and an increase in refugee claims are further amplifying the role of exiled dissidents and activists in transnational political and social advocacy efforts.³⁴ As diaspora and exiled activists become increasingly critical to transnational political and social advocacy and pushing for change domestically, authoritarian states are prompted to take more violent measures to stop this activity. Tsourapas theorizes that authoritarian countries are faced with what he calls an “illiberal paradox” that makes transnational repression a critical practice for repressive states.³⁵ Authoritarian states need to allow emigration in order to reap financial benefits; at the same time, those in exile or living abroad may challenge the status quo at home or threaten the state’s international image, prompting the state to take measures designed to silence this activity.³⁶

The methods of transnational repression can be broken down into different categories,³⁷ such as direct physical attacks, the co-optation of host states, the use of mobility controls, and threats from a distance, such as the use of digital technologies or coercion by proxy, which involves threats to family members or colleagues who are in the country of origin in order to pressure or blackmail the activist or dissident residing abroad.³⁸ The common thread is the cross-border nature of the activity and its aim to disrupt or terminate the work of activists and dissidents engaged in transnational political or social advocacy.

The killing of Jamal Khashoggi in the Saudi consulate in Turkey by Saudi authorities is an example of a direct physical attack. Host state co-optation also plays a key role in transnational repression.³⁹ Such co-optation may take place through convincing a host state to share information regarding a dissident in their territory, entering into an extradition treaty, or acceding to the deportation of that person back to the country of origin despite the likelihood that the individual will be arbitrarily detained or tortured upon arrival.⁴⁰ The use of mobility controls is another dimension of

33. Shain, *supra* note 28.

34. See generally DANA M. MOSS, *THE ARAB SPRING ABROAD: DIASPORA ACTIVISM AGAINST AUTHORITARIAN REGIMES* (2022).

35. Tsourapas, *supra* note 26, at 354–55.

36. Tsourapas, *supra* note 26, at 352.

37. As an alternative model, David Lewis, in his case study on Uzbekistan, divides transnational repression into five practices: (1) the securitization of external spaces to Uzbekistan in a way that serve to “legitimize government security practices”; (2) conducting “extensive operations abroad, including surveillance, intelligence-gathering, and informal interventions”; (3) use of a “range of mechanisms . . . to attempt to detain individuals abroad and restrict their movement”; (4) use of “a range of legal and extra-legal mechanisms to return individuals from other jurisdictions to face prosecution in Uzbekistan” as well as (5) physical attacks and assassinations abroad. See Lewis, *supra* note 28, at 146.

38. SCHENKKAN & LINZER, *supra* note 7, at 9.

39. See YANA GOROKHOVSKAIA & ISABEL LINZER, FREEDOM HOUSE, *DEFENDING DEMOCRACY IN EXILE: POLICY RESPONSES TO TRANSNATIONAL REPRESSION* 11 (2022), https://freedomhouse.org/sites/default/files/2022-06/Complete_TransnationalRepressionReport2022 [<https://perma.cc/URH3-KRGQ>].

40. See ALEXANDER COOLEY & JOHN HEATHERSHAW, *DICTATORS WITHOUT BORDERS: POWER AND MONEY IN CENTRAL ASIA* 48–52 (2017).

transnational repression and includes strategies like limiting a citizen's ability to get their country of origin passport renewed at the local consulate or embassy in their host state.⁴¹

Finally, threats from a distance capture what some have called "everyday" forms of transnational repression through digital technologies, such as online harassment or the deployment of sophisticated spyware to spy on dissidents abroad.⁴² The expansion of digital technologies is a particularly important factor in the growth of transnational repression as it intensifies and expands this practice. This form of transnational repression is happening at an alarming rate and provides new opportunities for remote surveillance, harassment, and abuse of activists and dissidents.⁴³

Beyond categorizing and documenting the different methods of transnational repression,⁴⁴ research has focused on trying to understand the impacts associated with transnational repression on targeted individuals and communities. For example, sociologist Dana Moss has explored the role of transnational repression and its impact on diaspora communities during the Arab Spring and their freedom to engage in transnational work.⁴⁵ She observes that diaspora activists, who play a critical role in transnational efforts to advance human rights, have their physical safety threatened and their freedom to engage in protest curbed due to this practice.⁴⁶ A case study of the Syrian diaspora in Sweden explains that the perceived fear that the Syrian state had "eyes and ears 'everywhere' [in Sweden]" complicated the creation of a mobilization structure and that "potential activists have remained on the sidelines as a result of expected repression by Syrian authorities."⁴⁷ Threats against those who remained in Syria "caused activists to try to work in less visible ways while others have de-mobilized entirely."⁴⁸

Others have examined specific strategies of transnational repression, such as the use of digital technologies, and its impacts.⁴⁹ A report published by the Citizen Lab in

41. SCHENKKAN & LINZER, *supra* note 7, at 9.

42. *Id.* at 2.

43. BRADLEY JARDINE & LUCILLE GREER, BEYOND SILENCE: COLLABORATION BETWEEN ARAB STATES AND CHINA IN THE TRANSNATIONAL REPRESSION OF UYGHURS 11 (2022).

44. See, e.g., Dukalskis et al., *supra* note 15, at 2–5.

45. Dana Moss, *Voice After Exit: Explaining Diaspora Mobilization for the Arab Spring*, 98 SOC. FORCES 1669, 1169 (2020), <https://doi.org/10.1093/sf/soz070>; Dana Moss, *The Promise and Perils of Diaspora Mobilization Against Authoritarian Regimes*, 26 BROWN J. WORLD AFFS. 7, 7 (2019); Dana Moss, *Transnational Repression, Diaspora Mobilization, and the Case of the Arab Spring*, 63 SOC. PROBS. 480, 480 (2016), <https://doi.org/10.1093/socpro/spw019>.

46. Dana Moss, *The Importance of Defending Diaspora Activism for Democracy and Human Rights*, in FREEDOM HOUSE, PERSPECTIVES ON "EVERYDAY" TRANSNATIONAL REPRESSION IN AN AGE OF GLOBALIZATION 14, 14 (Nate Schenkkan, Isabel Linzer, Saipira Furstenberg & John Heathershaw eds., 2020), [<https://perma.cc/HQ7W-2539>].

47. Emma Lundgren Jorum, *Repression Across Borders: Homeland Response to Anti-Regime Mobilization Among Syrians in Sweden*, 8 DIASPORA STUD. 104, 115 (2015), <https://doi.org/10.1080/09739572.2015.1029711>.

48. *Id.*

49. See Marcus Michaelsen, *Exit and Voice in a Digital Age: Iran's Exiled Activists and the Authoritarian State*, 15 GLOBALIZATIONS 248, 248 (2018), <https://doi.org/10.1080/14747731.2016.1263078>; Marcus Michaelsen, *Far Away, So Close: Transnational Activism, Digital Surveillance and Authoritarian Control in Iran*, 15 SURVEILLANCE & SOC'Y 465, 465 (2017) [hereinafter Michaelsen, *Far Away, So Close*]; MARCUS MICHAELSEN, SILENCING ACROSS BORDERS: TRANSNATIONAL REPRESSION AND DIGITAL THREATS AGAINST EXILED ACTIVISTS FROM EGYPT, SYRIA, AND IRAN 17–27 (2020); Marcus Michaelsen, *The Digital*

2022 identified numerous negative impacts associated with digital transnational repression on targeted individuals, such as negative impacts on physical and mental health, social isolation, and self-censorship.⁵⁰ Others have similarly concluded that digital transnational repression negatively impacts targeted persons. In addition to mental stress and burnout, it can cause a chilling effect on online speech by generating fear for relatives and contacts at home, leading people to reduce or stop communicating with close contacts.⁵¹ We revisit the documented impacts of transnational repression in our discussion of individual sovereignty.

II. STATE SOVEREIGNTY AND TRANSNATIONAL REPRESSION

Sovereignty is a multidimensional concept that changes in substance and meaning over time and within a discipline.⁵² Sovereignty does not have an objective, inherent meaning; rather, it is given meaning through states' mutual recognition of each other's sovereignty and the prioritizing of this concept above others in global politics.⁵³ Thus, sovereignty depends "on a monitored set of relations between states."⁵⁴ Here, we choose to examine one feature of contemporary sovereignty that has been considered a core component of contemporary sovereignty: territoriality.⁵⁵ The point of this exercise is to show that even features considered essential to sovereignty—such as territory—are subject to change, and that the practice of transnational repression adds to broader literature questioning whether we can accurately think of sovereignty as coexistent with territory.⁵⁶

Transnational Repression Toolkit, and Its Silencing Effects, in PERSPECTIVES ON "EVERYDAY" TRANSNATIONAL REPRESSION IN AN AGE OF GLOBALIZATION 4, 4–5 (Nate Schenkkan, Isabel Linzer, Saipira Furstenberg & John Heathershaw, eds., 2020), [<https://perma.cc/HQ7W-2539>] [hereinafter, Michaelsen, *Digital Transnational Repression Toolkit*]; Dana M. Moss, *The Ties That Bind: Internet Communication Technologies, Networked Authoritarianism, and 'Voice' in the Syrian Diaspora*, 15 GLOBALIZATIONS 265, 265 (2016), <https://doi.org/10.1080/14747731.2016.1263079>; NOURA AL-JIZAWI, SIENA ANSTIS, SHARLY CHAN, SOPHIE BARNETT, NIAMH LEONARD, ADAM SENFT & RON DEIBERT, PSYCHOLOGICAL AND EMOTIONAL WAR: DIGITAL TRANSNATIONAL REPRESSION IN CANADA 1 (2022), <https://citizenlab.ca/2022/03/psychological-emotional-war-digital-transnational-repression-canada/> [<https://perma.cc/5LTK-62SJ>].

50. AL-JIZAWI ET AL., *supra* note 49, at 15.

51. See, e.g., Michaelsen, *Digital Transnational Repression Toolkit*, *supra* note 49, at 7.

52. See Ronald A. Brand, *Sovereignty: The State, the Individual, and the International Legal System in the Twenty First Century*, 25 HASTINGS INT'L & COMPAR. L. REV. 279, 279–80 (2002); see also Henry Schermers, *Different Aspects of Sovereignty*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 185, 185 (Gerard Kreijen et al. eds., 2002); Robert Jennings, *Sovereignty and International Law*, in STATE, SOVEREIGNTY, AND INTERNATIONAL GOVERNANCE 27, 27 (Gerard Kreijen et al. eds., 2002); Michael Ross Fowler & Julie Marie Bunck, *What Constitutes the Sovereign State?*, 22 REV. INT'L STUDS. 381, 382–83 (1996), <https://doi.org/10.1017/S0260210500118637>; J. SAMUEL BARKIN, THE SOVEREIGNTY CARTEL 18 (2021); ROBERT JACKSON, SOVEREIGNTY: THE EVOLUTION OF AN IDEA ix–x (2007); J. Samuel Barkin & Bruce Cronin, *The State and the Nation: Changing Norms and the Rules of Sovereignty in International Relations*, 48 INT'L ORG. 107, 107–08 (1994).

53. BARKIN, THE SOVEREIGNTY CARTEL, *supra* note 52, at 7, 18.

54. Barkin & Cronin, *supra* note 52, at 110.

55. John Agnew, *The Territorial Trap: The Geographical Assumptions of International Relations Theory*, 1 REV. INT'L POL. ECON. 53, 53 (2008).

56. STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 6–7 (1999); Agnew, *supra* note 55, at 54.

Thus, we examine the territorial dimension of our contemporary understanding of state sovereignty in light of transnational repression.⁵⁷ In defining sovereignty, we refer to the 1928 *Island of Palmas* arbitral award where sovereignty was defined as the state's "right to exercise [in a portion of the globe], to the exclusion of any other State, the functions of a State."⁵⁸ This "Westphalian" concept of sovereignty (based on the 1648 Treaty of Westphalia, which helped establish fundamental principles around territoriality and sovereignty in Europe) is based on two core features, namely "an international system of states [exercising] exclusive dominion over their own territories" and "states which are the sole sources of authoritative decision in international law."⁵⁹ Westphalian sovereignty means that states have "exclusive power or jurisdiction over territory and population, fettered only by the requirements of international law."⁶⁰ This particular view of state sovereignty underscores that "states exist in specific territories, within which domestic political authorities are the sole arbiters of legitimate behavior."⁶¹ In short, physical territory is largely considered to be synonymous with the legitimate exercise of state control and state power.⁶²

In the following Parts, we consider how countries of origin (those who perpetrate transnational repression) and host states (those who host activists and dissidents living in exile or who have left their countries of origin) instrumentalize, or fail to instrumentalize, sovereignty in the context of responding to transnational repression. We first note how countries of origin are challenging the boundaries of territorial sovereignty by engaging in transnational repression. Then, we turn to the behavior of host states in the face of this territorial incursion. Host states have been relatively quiet regarding these violations of sovereignty.⁶³ We interrogate why host states leverage sovereignty as a tool to keep noncitizens *out* of the host state versus being used as a principle leveraged to protect political and social activists who form part of communities of refugees, immigrants, and the diaspora.

A. Transnational Repression and the Extension of Sovereignty Beyond Territory

The erosion of territorial notions of state sovereignty is an issue that has been heavily debated in international law and international relations.⁶⁴ Much of this

57. Van Staden & Vollaard, *supra* note 19, at 166 (noting that state sovereignty "has been traditionally defined in reference to the principle of territoriality").

58. *Island of Palmas* (U. S. v. Neth.), 2 R.I.A.A. 829, 838 (Perm. Ct. Arb. 1928).

59. Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1030 (2001). As noted in *Island of Palmas* arbitration,

The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.

Island of Palmas, 2 R.I.A.A. at 838. See also ODUNTAN, *supra* note 19, at 21.

60. JOHN H. CURRIE, PUBLIC INTERNATIONAL LAW 39 (2d ed. 2008).

61. Chander, *supra* note 59, at 1030 (quoting KRASNER, *supra* note 56, at 20).

62. See *id.*

63. See *infra* Part II.B for a discussion of host states responses to transnational repression.

64. See, e.g., Van Staden & Vollaard, *supra* note 19; Jennings, *supra* note 52; Biersteker, *supra* note 19; James Crawford, *Sovereignty as a Legal Value*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 117,

scholarship has considered how globalization has wrestled power from the state and displaced it into the hands of other international actors (e.g., multinational corporations or international organizations).⁶⁵ Others have argued that international norms—in particular, international human rights law—have placed supranational limits on what states are permitted to do within their own territory; thus, the argument is that territorial sovereignty does not mean full control over populations within the territorial borders, but control mediated by international norms.⁶⁶

In the case of transnational repression, the country of origin engaged in transnational repression challenges territorial sovereignty in yet another way.⁶⁷ Transnational repression involves the exercise of state power over nationals outside the territorial boundaries of the country of origin and within the territory of another state, the host state.⁶⁸ It is a practice that comprises an attempt to “build a system of patronage and control that would lead to ‘reasserting sovereignty’ over emigrants across national borders.”⁶⁹ States do not behave as if confined to their territorial borders when it comes to “their” citizens abroad. Instead, they exercise their power over “their” nationals abroad by ordering state-affiliated agents to conduct targeted assassinations or to harass and terrify targets into returning to their country of origin, engage in kidnappings and forced renditions, undertake surveillance, and fund electronic armies to engage in targeted abuse of human rights defenders.⁷⁰

These practices can be situated in the broader literature on the relationship between diaspora and countries of origin, which recognize this growing disconnect between territorial notions of state sovereignty and actual state behavior.⁷¹ Alan John Gamlen notes that the rapid spread of diaspora institutions around the world is a challenge both empirically and theoretically: “Because they involve the projection of domestic policies beyond borders and the claiming of citizens based under foreign sovereignty, such institutions do not conform to the territorial principles underpinning the modern international system.”⁷² Transnational repression similarly questions this territorial view of sovereignty. Diaspora groups who maintain a relationship with their country of origin

132 (James Crawford & Martti Koskeniemi eds., 2012); Louis Henkin, *Human Rights and State “Sovereignty”*, 25 GA. J. INT’L & COMPAR. L. 31 (1995).

65. See e.g., Van Staden & Vollaard, *supra* note 19 at 167; Jennings, *supra* note 52; Biersteker, *supra* note 19; Crawford, *supra* note 64, at 11.

66. See e.g., Henkin, *supra* note 64, at 33.

67. See Gamlen, *supra* note 17, at 4.

68. While not specifically focused on transnational repression, the growth of countries of origins’ interest in managing and influencing the diaspora has been noted as a challenge to the modern international system. See, e.g., GAMLEN, *supra* note 17, at 4 (“Diaspora institutions are also theoretically surprising because they project domestic policies beyond state borders in ways that seem inconsistent with the territorial definitions of citizenship and sovereignty that underpin the modern international system. They potentially interfere in the domestic affairs of foreign states, raising concerns about conflicting sovereignty claims. They potentially interfere with the freedom of exit of emigrants, who may want to sever their ties to their former homeland.”).

69. R. Raczyński, *Relations Among the State and the Diaspora in the Context of the Diaspora Engagement Policy*, in GOVERNING FOR THE FUTURE: INTERDISCIPLINARY PERSPECTIVES FOR A SUSTAINABLE WORLD 41, 46 (Andrei Taranu ed., 2016).

70. SCHENKKAN & LINZER, *supra* note 7.

71. GAMLEN, *supra* note 17, at 48–49.

72. *Id.*

challenge this “statist model of international law, which limits the reach of a state’s laws to its own geographic boundaries, [and] allows no legal connection between a diaspora and its homeland.”⁷³ But, such transnationalization lies not only with the transnational activities of *diaspora groups* but, as transnational repression shows, also with the practices of *countries of origin* in relation to nationals or diaspora abroad.⁷⁴ States “are becoming transnational, increasingly reaching out to their populations abroad, severely questioning the traditional understanding of the Westphalian configuration of International Relations.”⁷⁵

We can place these transnational practices within “broader structural shifts in the ‘art of government’ and in particular in the way the relations between authority, territory and populations are rationalized, organized, practiced and legitimized at the transnational and international levels.”⁷⁶ When we think of the sovereign state, it is perhaps no longer accurate to think of a single monolithic giant; rather, contemporary states involve “transboundary networks and formations” that lead to a “deterritorialized system of governance.”⁷⁷ Through this lens, states operate “a series of complex assemblage structures that stretch across national boundaries, but operate in national settings” and operate not in a hierarchical structure but rather “across multiple sites, agencies, and actors . . . beyond the geographical boundaries of the state.”⁷⁸

States exercising sovereignty over nationals abroad is not a new practice. As historical examples of transnational repression show, states have been seeking to influence their diaspora as well as repress dissent abroad for a long time.⁷⁹ More broadly, a review of the concept of jurisdiction in international law also shows that states are permitted to exercise criminal jurisdiction over persons abroad (i.e., on a basis other than that person’s physical presence in the state’s territory)—which is known as territoriality.⁸⁰ Jurisdiction refers to “the entitlement of states . . . to authoritatively declare what the law is in their domain and how it is to be enforced.”⁸¹ There is broad consensus that jurisdiction is an element of state sovereignty and that domestic laws *generally* extend only as far as the territorial limits of the state.⁸² Thus, laws tend to apply *inside* the state, and “international jurisdiction is, consequently, more or less congruent with a state’s territory and its nationals.”⁸³ However, these principles become messier

73. Chander, *supra* note 59, at 1005; *see also* Raczyński, *supra* note 69, at 41 (“The so-called diaspora engagement policy, increasingly popular, constitutes a challenge to the traditionally perceived state and contributes to the reconceptualization of this category (especially in the context of such attributes of statehood as sovereignty, territoriality, citizenship and loyalty).”).

74. Raczyński, *supra* note 69, at 45 (noting that “not only emigrants are characterized by greater interest in the countries of origin, but also the countries of origin have increased interest in their diasporas”).

75. Francesco Ragazzi, *Governing Diasporas*, 3 INT’L POL. SOCIO. 378, 380 (2009).

76. *Id.* at 383.

77. Saipira Furstenberg, *Spatialising State Practices Through Transnational Repression*, 6 EUR. J. INT’L SEC. 358, 362 (2021), <https://doi.org/10.1017/eis.2021.10>.

78. *Id.* at 363.

79. Shain, *supra* note 28.

80. Bruno Simma & Andreas Th. Müller, *Exercise and Limits of Jurisdiction*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW 134, 139 (James Crawford & Martti Koskenniemi eds., 2012).

81. *Id.* at 135.

82. *Id.* at 139.

83. Allen et al., *supra* note 14, at 5.

“once the relationship between the two becomes dynamic and nationals of a given state move across borders.”⁸⁴

Indeed, there are a number of bases for states to exercise their jurisdiction extraterritorially.⁸⁵ In this respect, the extraterritorial dimensions of transnational repression—in the sense of the exercise of sovereign power abroad—are not a novel issue. States have acted in respect of events and activities outside their borders they consider to be criminal⁸⁶ and can base this exercise of criminal jurisdiction under international law on the basis of other principles beyond territoriality, namely: nationality (meaning that a citizen abroad can be subjected to the jurisdiction of the state), protective principle (meaning that jurisdiction can be exercised over “acts abroad which affect state security”), passive personality (meaning jurisdiction over “acts in which the victim was a national”), and universality (relating to certain international crimes, like war crimes).⁸⁷ These bases of criminal jurisdiction are not linked to territory, but rather are focused on the “person of the offender or of the victim, or with the character of the offence.”⁸⁸ For example, the personality or nationality principle endows “jurisdiction over [a state’s] nationals, that is, persons linked to it by the bond of nationality.”⁸⁹ The “idea underlying [this] principle is that nationality is accompanied by special allegiance on the part of the national vis-à-vis his or her state and a corresponding right or duty of protection of the state with regard to the national.”⁹⁰ Thus, we see that states have an interest in addressing activities that arise outside their borders, that nationality has been a basis for such actions, and that this is a sovereign act contemplated in international law.⁹¹

However, while countries of origin may enact rules that impact nationals outside the boundaries of the state, transnational repression is not about the enactment of laws intended to capture crimes committed by nationals abroad or to protect the state. Indeed, transnational repression is not necessarily undertaken pursuant to *any* domestic law. Transnational repression is primarily about demonstrating the state’s power abroad in order to silence dissent.⁹² It concerns the exercise of state violence outside territorial

84. *Id.*

85. “The terms ‘extraterritoriality’ and ‘extraterritorial jurisdiction’ refer to the competence of a State to make, apply and enforce rules of conduct in respect of persons, property or events beyond its territory.” Menno T. Kamminga, *Extraterritoriality*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW 1 (Anne Peters and Rudiger Wolfrum eds., 2020).

86. For example, certain American federal laws apply to conduct that occurred outside the borders of the United States. *See, e.g., Citizen’s Guide to U.S. Federal Law on the Extraterritorial Sexual Exploitation of Children*, DEP’T OF JUST., <https://www.justice.gov/criminal-ceos/citizens-guide-us-federal-law-extraterritorial-sexual-exploitation-children> [https://perma.cc/G7BN-V2FA] (May 28, 2020). The United States has been projecting state power extraterritorially for a long time now. *See* Ronald K. Deibert & Louis W. Pauly, *Mutual Entanglement and Complex Sovereignty in Cyberspace*, in DATA POLITICS: WORLDS, SUBJECTS, RIGHTS 81, 82 (Didier Bigo et al. eds., 2019).

87. Noam Lubell, *Extraterritorial Applicability of Human Rights Law*, in EXTRATERRITORIAL USE OF FORCE AGAINST NON-STATE ACTORS 208 (Noam Lubell ed., 2010). Simma & Müller, *supra* note 80, at 140–45; ODUNTAN, *supra* note 19, at 40–41.

88. ODUNTAN, *supra* note 19, at 40–41.

89. Simma & Müller, *supra* note 80, at 142.

90. *Id.*

91. The exercise of extraterritorial jurisdiction in this manner has not been without controversy. *See, e.g.,* ODUNTAN, *supra* note 19, at 31–32 (discussing the United States’ position on extraterritorial jurisdiction).

92. SCHENKKAN & LINZER, *supra* note 7.

borders and the implicit assertion by the host state that it can control individuals anywhere it pleases. In that sense, we can perhaps conceive of transnational repression as the state engaged in an act of enforcement jurisdiction. Enforcement jurisdiction is “commonly held to be governed by a straightforward territorial approach.”⁹³ In short, “acts of enforcement (e.g., detention, seizure, telephone surveillance) must not be carried out in another state’s territory save with its consent.”⁹⁴

The exercise of state sovereignty—as expressed through enforcement jurisdiction—outside national borders is clearly problematic under international law. But, presumptions against extraterritoriality are not necessarily as self-evident as “[s]tates increasingly perceive the need to protect both their own interests and the interests of the international community in respect of conduct occurring beyond their borders.”⁹⁵ In particular, when it comes to digital technologies, states have been “exercising extraterritorial power to acquire data about the world around them: to anticipate, analyze, and interdict threats; to shape the strategic environment to their advantage; to promote their interests via the movement of goods and services, information, and capital.”⁹⁶ Transnational repression forms part of a complex set of practices where states are challenging the territorial underpinnings of state sovereignty. As Oduntan writes, the “legitimate exercise of extraterritorial jurisdiction are crucial issues in the 21st century” and require further examination.⁹⁷ In particular, the potential erosion of international rules around the exercise of enforcement jurisdiction and the territorially bounded nature of state violence raises serious concerns for the protection of human rights.

B. Transnational Repression and the Violation of the Sovereignty of Host States

Transnational repression not only expands traditional practices of state sovereignty beyond territorial limits; it also violates a host state’s sovereignty over activities that take place in its own territory.⁹⁸ Gorokhovskaia and Linzer write that transnational repression demonstrates a “disregard for international law, democratic norms, and state sovereignty.”⁹⁹ The United States Department of Justice has stated, in indicting Chinese nationals who were stalking, harassing, and spying on American residents for the Chinese secret police, that this activity “violates the fundamental sovereignty of the United States.”¹⁰⁰

93. Simma & Müller, *supra* note 80, at 147.

94. *Id.*

95. Kamminga, *supra* note 85, at 2.

96. Deibert & Pauly, *supra* note 86, at 81.

97. ODUNTAN, *supra* note 14, at 56.

98. See Jack I. Garvey, *Repression of the Political Emigré—The Underground to International Law: A Proposal for Remedy*, 90 YALE L.J. 78, 79 (1980) (finding that the targeting of political emigrés in the United States was seen as “violat[ing] the fundamental principle of territorial sovereignty that restricts the reach of the police forces of one sovereign into the territorial jurisdiction of another”).

99. GOROKHOVSKAIA & LINZER, *supra* note 39, at 1.

100. *Five Individuals Charged Variously with Stalking, Harassing and Spying on U.S. Residents on Behalf of the PRC Secret Police*, DEP’T OF JUST. (Mar. 16, 2022), <https://www.justice.gov/opa/pr/five-individuals-charged-variously-stalking-harassing-and-spying-us-residents-behalf-prc-0> [<https://perma.cc/ER56-D6U7>]; see also Matthew Olsen, *Countering Nation-State Threats*, USC

However, the analysis is not necessarily as straightforward as stated. An examination of the practice of transnational repression raises various issues regarding how we define violations of territorial sovereignty and how this type of violation is used (or not) by host states in responding to transnational repression. There would seem to be a cut-and-dried violation of state sovereignty where a country of origin sends government agents into the territory of the host state to harass and repress dissidents in exile without the host state's consent. As stated by the Permanent Court of International Justice in the *Lotus* case,

[T]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.¹⁰¹

As noted earlier, there is a clear rule in international law against the exercise of enforcement jurisdiction by a country of origin in a host state without the latter's consent.¹⁰² Yet, some complexities color this rule.

First, there is an open question as to whether even a physical act of transnational repression (e.g., sending an agent into the host state to harass a dissident in exile) leads to a violation of state sovereignty if transnational repression is characterized as an act of espionage or intelligence collection by the country of origin.¹⁰³ This question raises two issues: (1) is cross-border espionage permitted under international law, despite our present understanding of the rule of territorial sovereignty?; and (2) is transnational repression something that falls within the scope of espionage?

Some scholars argue that “territorially intrusive forms of espionage violate the principle of territorial sovereignty,” while others point out that cross-border espionage is essentially tolerated by states.¹⁰⁴ Indeed, states have been engaging in extraterritorial peacetime cyber espionage for decades, and the expanding commercial surveillance market means that more and more states are acquiring the technological capabilities to engage in these same practices.¹⁰⁵ Thus, there remains an open debate as to whether espionage is presently permitted under international law. Further, it remains unclear

US-CHINA INSTITUTE (Feb. 23, 2022), <https://china.usc.edu/matthew-olsen-countering-nation-state-threats-february-23-2022> [<https://perma.cc/9XYM-FZBP>] (“What is alleged in the indictment represents a direct affront to the rule of law, human rights and American sovereignty.”).

101. S.S. “*Lotus*” (Fr. v. Turk.), Judgment 1927 P.C.I.J. (ser. A) No. 10, at 18–19 (Sept. 7); see also HARRIET MOYNIHAN, *THE APPLICATION OF INTERNATIONAL LAW TO STATE CYBERATTACKS: SOVEREIGNTY AND NON-INTERVENTION* (2019).

102. See *supra* notes 93–94.

103. See GOROKHOVSKAIA & LINZER, *supra* note 39, at 12–13.

104. MOYNIHAN, *supra* note 101, at 17. For further reading on the debate regarding the application of international law to espionage, see, e.g., Asaf Lubin, *The Liberty to Spy*, 61 HARV. INT'L L. J. 185 (2020); A. John Radsan, *The Unresolved Equation of Espionage and International Law*, 28 MICH. J. INT'L L. 595 (2007); Patrick C.R. Terry, *The Riddle of the Sands—Peacetime Espionage and Public International Law*, 51 GEO. J. INT'L L. 377 (2019).

105. See Russell Buchan, *The International Legal Regulation of State-Sponsored Cyber Espionage*, in LEGAL, POLICY & INDUSTRY PERSPECTIVES 65, 67–68 (Anna-Maria Osula & Henry Røigas eds., 2016).

whether transnational repression would fall within the scope of espionage.¹⁰⁶ Some scholars argue that the focus of the espionage activity must be on a state, and thus transnational repression falls outside.¹⁰⁷ For example, Michaelsen and Thumfart argue in their discussion of digital transnational repression that “[a]lthough a significant overlap between [digital transnational repression] and intelligence activities cannot be denied, [digital transnational repression] appears to be closer to enforcement as it is not motivated by issues of interstate competition, but rather by the perpetrating state’s domestic security interests.”¹⁰⁸ Indeed, it does seem hard to square espionage with the targeting of dissidents and human rights defenders in exile. Yet, the ambiguity around what constitutes espionage and how it is regulated under international law, combined with the fact that host states have been slow to respond to transnational repression and few have called specifically on notions of territorial sovereignty to argue that it is a breach of international law, means there is significant room for greater normative clarity on what states permit and what they do not.

Second, *digital* transnational repression raises further questions regarding the violation of the sovereignty of host states. Digital transnational repression can arise through acts of cross-border targeted cybersurveillance through, for example, phishing campaigns to access email or social media accounts or the covert installation of spyware on a dissident’s device. It may also include the systematic tracking and collection of targeted individuals through their social media accounts.¹⁰⁹ In many cases, there is no physical entry by a state agent into the host state’s territory as these acts are achieved remotely, at least in part.¹¹⁰ Further, the physical damage caused by such cyber intrusions may be considered nonexistent or very limited.¹¹¹ As noted in the *Tallinn Manual 2.0* and by other scholars, there is an ongoing debate regarding whether remote cyber operations that fall below the threshold of use of force give rise to violations of state sovereignty.¹¹² Michaelsen and Thumfart argue that digital transnational repression should also be considered an exercise of “extraterritorial enforcement jurisdiction [that] can be compared to physical enforcement” and thus gives rise to a violation of a state’s territory and its sovereignty.¹¹³ On the other hand, Asaf Lubin argues that the territorially grounded concept of enforcement jurisdiction perhaps does not make sense in cyberspace.¹¹⁴ In the absence of clearer norms regarding how sovereignty applies in cyberspace by state actors, this remains a live question.

106. See GOROKHOVSKAIA & LINZER, *supra* note 39, at 12–13.

107. See, e.g., Terry, *supra* note 104, at 379 (defining peacetime espionage as “the gathering, by or on behalf of a state, of information which is not publicly available and which another state wants to keep secret”).

108. Michaelsen & Thumfart, *supra* note 16, at 10.

109. See GOROKHOVSKAIA & LINZER, *supra* note 39, at 27.

110. See *id.*

111. See *id.*

112. TALLINN MANUAL 2.0 ON THE INTERNATIONAL LAW APPLICABLE TO CYBER OPERATIONS 21 (Michael N. Schmitt ed., 2017) (finding that “no consensus could be achieved as to whether, and if so, when, a cyber operation that results in neither physical damage nor the loss of functionality amounts to a violation of sovereignty”) [hereinafter TALLINN MANUAL 2.0]; see also MOYNIHAN, *supra* note 101, at 17.

113. Michaelsen & Thumfart, *supra* note 16, at 11.

114. Asaf Lubin, *The Prohibition on Extraterritorial Enforcement Jurisdiction in the Datasphere*, in HANDBOOK ON EXTRATERRITORIALITY IN INTERNATIONAL LAW (Austen L. Parrish & Cedric Ryngaert eds., forthcoming 2023).

Third, the situation is further complicated by the fact that host states do not always take action against such incursions into their territory and may even play a role in facilitating transnational repression through their own co-optation by countries of origin (which could possibly amount to providing consent to the country of origin's exercise of enforcement jurisdiction).¹¹⁵ For example, in the case of widespread targeting against Uyghurs, host states have been known to “tacitly accept or actively collaborate with agents of the Chinese state to target Uyghurs.”¹¹⁶ While the United States has referred to the protection of its sovereignty in addressing acts of transnational repression, this is by far not a uniform approach among host states.¹¹⁷ Further, while host states dedicate growing resources to the protection of their critical infrastructure and democratic institutions against cyber threats, digital transnational repression is not a practice that appears to have generated much concern despite its impairment of human rights.¹¹⁸

In conclusion, responses by host states to transnational repression have been muted, and the language of sovereignty has not been a common thread across host states. This failure to speak of sovereignty in the context of state-led digital and physical attacks from abroad against activists and dissidents living within their borders can be contrasted with the use of state sovereignty as a principle of exclusion of similar groups. As E. Tendayi Achiume observes, “[t]oday, sovereignty-based justifications remain legal shields that enable racial conduct and policy that would in many jurisdictions amount to prohibited discrimination but for the fact that the conduct or policy is laundered through the categories of nationality.”¹¹⁹ One could conclude that host states utilize sovereignty where they perceive it to maximize welfare. At least in practice, the protection of vulnerable communities of activists and dissidents—in many cases refugees and immigrants—is not necessarily considered to be a sufficiently important goal to pursue and prioritize. To remedy this gap, clear norms need to be identified by host states with respect to sovereignty and the practice of transnational repression. In the next Section, we argue that host states should be concerned with limitations on the individual sovereignty of activists and dissidents, especially as a frontier against the expansion of authoritarian practices.

III. INDIVIDUAL SOVEREIGNTY AND TRANSNATIONAL REPRESSION

In this Section, we explore the notion of individual sovereignty through the lens of transnational repression. We conclude that transnational repression—and, in particular, its digital dimensions—pose a threat to individual sovereignty. In Part III.A, we define what we mean by individual sovereignty in the context of this Essay. In Part III.B, we examine the literature on individual sovereignty and digital technologies and discuss the tension between authoritarianism (which privileges state sovereignty) and human rights (which is underpinned by notions of individual sovereignty) in the context of digital technologies. In Part III.C, we identify how the digital dimensions of transnational

115. See GOROKHOVSKAIA & LINZER, *supra* note 39, at 30.

116. Lemon et al., *supra* note 13, at 11.

117. See DEP'T OF JUST., *supra* note 100.

118. See Michaelsen & Thumfart, *supra* note 16, at 17.

119. E. Tendayi Achiume, *Race, Borders, and Jurisdiction*, 82 HEIDELBERG J. INT'L L. 465, 479–80 (2022).

repression interfere with individual sovereignty in concrete ways and identify the types of rights violations that flow from this practice.

A. Defining Individual Sovereignty

Like state sovereignty, the concept of individual sovereignty is multifaceted and may be assigned different meanings. In this Essay, we draw from Kofi Annan's definition of individual sovereignty, which is to understand this as "the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties," as well as Annan's statement regarding the need "to protect individual human beings, not to protect those who abuse them."¹²⁰ In this sense, we can contrast the protection of individual sovereignty with authoritarianism, which views state sovereignty as something that can be exercised without any external or internal restriction in a given territory over citizens (and, as we see with transnational repression, even outside the territorial borders of the state). Individual liberty, on the other hand, is closely tied to liberalism and the development of human rights. In short, individual sovereignty is a view of sovereignty that competes and clashes with authoritarianism.¹²¹

As we highlighted earlier in this Essay, this authoritarian view of the place of individual sovereignty clashes with contemporary understandings of state sovereignty.¹²² A strict interpretation of state sovereignty is that states can do what they wish with individuals within their territory. However, as we noted, contemporary notions of territorial sovereignty understand that there may be external limitations placed on what states do with citizens in their territory (for example, through obligations under international human rights law). Less discussed is whether, and how, international human rights law addresses the extraterritorial acts of states—particularly in cyberspace—when they seek to curtail and repress the fundamental rights and freedoms of their nationals abroad.

B. Digital Authoritarianism and Individual Sovereignty in the Digital Age

The internet and the use of digital technologies to communicate have opened new windows into the discussion around individual sovereignty. Scholars argue that digital technologies offer individuals the unique opportunity to exercise their individual sovereignty in a way that avoids the regulation and power of the state (for example, through the evasion of state media censorship by communicating on multiple channels, including channels that are very hard to regulate and which are not state owned).¹²³ A free and independent internet¹²⁴ has been described by some scholars as an expansion of individual sovereignty, in the sense of users being able to enjoy full autonomy over

120. Kofi Annan, *Two Concepts of Sovereignty*, THE ECONOMIST, Sept. 18, 1999, at 49 <https://www.economist.com/international/1999/09/16/two-concepts-of-sovereignty> [<https://perma.cc/V7DY-YCJB>].

121. See Shain, *supra* note 28.

122. See *supra* Section I.

123. See PHILIP N. HOWARD AND MUZAMMIL M. HUSSAIN, DEMOCRACY'S FOURTH WAVE? DIGITAL MEDIA AND THE ARAB SPRING 35–46 (2013).

124. John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (Feb. 8, 1996), <https://www.eff.org/cyberspace-independence> [<https://perma.cc/5PBG-8QDB>].

activities in the digital world.¹²⁵ At the same time, the digital infrastructure, systems, and economy that facilitate this freedom are increasingly exploited by states and corporations to the detriment of individual sovereignty.¹²⁶ It is now underscored that the “[i]nternet expands and intensifies the capacities of states within and across conventional territorial boundaries.”¹²⁷ Further, the physical infrastructure upon which the internet is built is subject to state control, and, as authoritarian regimes are increasingly demonstrating, information control legislation and other measures to gain exclusive control over this physical infrastructure can cut users off from a free and independent internet and prioritize state sovereignty to the detriment of individual sovereignty.¹²⁸ There are also costs to a regulation-free internet where private individuals exploit this freedom to harm others.

Digital technologies and the promotion and protection of human rights are intimately connected. Indeed, domestic contemporary, pro-democracy, and pro-human rights social revolutions have been reliant on the use of digital technologies.¹²⁹ As Steven Feldstein writes, digital technologies are a key part of political crises, and “social and political changes are, in part, due to changing global network structures.”¹³⁰ In particular, the present variety of sources of information and means of online communication have “fragmented the state’s ability to monitor and regulate citizen communication and was [considered] responsible for the initial outpouring of optimism regarding liberation technology’s potential to counteract autocratic regimes.”¹³¹

Discussion around individual sovereignty in cyberspace has tended to focus on domestic movements. However, as digital authoritarianism spreads as a policy of curtailing such activities, transnational social and political networks are increasingly important to the success of these domestic movements.¹³² Individuals living in a diaspora or in exile were once perceived as having the luxury of freedom on the internet as well as physical security in the space where they live.¹³³ The abuse of human rights online is changing this calculus and the reality of those engaged in transnational advocacy work.¹³⁴ Their individual sovereignty is also being curtailed online by authoritarian states.¹³⁵

C. Violations of Individual Sovereignty Through Digital Transnational Repression

In our research into digital transnational repression in Canada, we identified a number of critical impacts on targeted dissidents and activists that translate into

125. HOWARD & HUSSAIN, *supra* note 123, at 35–46.

126. See Ron Deibert, *The Geopolitics of Cyberspace After Snowden*, 114 CURRENT HIST. 9, 10–11 (2015), <https://doi.org/10.1525/curh.2015.114.768.9>.

127. Deibert & Pauly, *supra* note 86, at 81.

128. See *id.* at 82.

129. See FELDSTEIN, *supra* note 23, at 4.

130. *Id.* at 4.

131. *Id.*

132. Cf. Shain, *supra* note 28 (discussing exiles escaping authoritarian regimes).

133. Michaelsen, *Far Away, So Close*, *supra* note 49 at 465.

134. See AL-JIZAWI ET AL., *supra* note 49, at 10.

135. See *id.* at 10–13.

violations of individual sovereignty.¹³⁶ Research participants described negative costs to their mental and physical health, flowing from the stress, anxiety, and paranoia caused by being repeatedly targeted with hacking attempts or being the focus of online harassment and disinformation campaigns.¹³⁷ Participants also noted that they engaged in self-censorship and that they were forced to modify their behavior online or, at times, withdraw completely from both online and offline communities.¹³⁸ Others spoke of violations of their privacy, for example, by being doxxed.¹³⁹ These impacts are attacks against the individual sovereignty of the target—in the sense that they undermine the target’s ability to exercise their rights and freedoms freely—and could potentially be translated into human rights harms such as violations of the rights to freedom of expression, peaceful assembly, privacy, and security of the person.¹⁴⁰

A critical component of individual sovereignty is the *protection* of human rights, as noted by Annan.¹⁴¹ In thinking through how such human rights violations are addressed under international human rights law, digital transnational repression reveals a potential gap in the framework of international human rights law.¹⁴² Digital transnational repression, by its very nature, involves rights violations that are happening outside the country of origin. However, human rights treaties, like the International Covenant on Civil and Political Rights, are primarily focused on violations that happen within the jurisdiction of the country of origin, usually, but not exclusively, associated with territorial jurisdiction.¹⁴³ This issue is further complicated by the violation of rights through digital technologies. There is precedent for finding that states cannot violate the rights of individuals over which they have authority or control,¹⁴⁴ but this interpretation of jurisdiction does not go far in the digital sphere where states committing human rights violations do not have this type of close control (e.g., physical detention) over targeted individuals.

Setting aside the question of extraterritoriality, the protection gap that arises with transnational repression, including its digital forms, could be closed by better articulating the positive obligations of host states to protect those within their territory against human rights violations.¹⁴⁵ However, the complexity of regulation in the digital space also makes this a challenging task and brings us back to questions regarding individual

136. *See id.* at 1.

137. *Id.* at 15–18.

138. *See id.* at 18–22.

139. *See id.* at 23.

140. Note that this research did not investigate other issues such as attribution to a state actor.

141. Annan, *supra* note 120.

142. For example, there has been a growing debate around the extraterritorial application of international human rights law when such violations arise through the use of digital technologies. *See, e.g.,* TALLINN MANUAL 2.0, *supra* note 112, at 179–208.

143. The debate around the extraterritorial violation of human rights abuses is a complex one. In this Essay, we underline that this debate is also engaged by digital transnational repression which involves, by its very nature, transnational rights violations. For more on extraterritoriality and human rights law, see, e.g., Lubell, *supra* note 87.

144. Lubell, *supra* note 87, at 211.

145. *See* Siena Anstis & Sophie Barnett, *Digital Transnational Repression and Host States’ Obligation to Protect Against Human Rights Abuses*, 14 J. HUM. RTS. PRACTICE 698, 699 (2021), <https://doi.org/10.1093/jhuman/huab051>.

sovereignty and how much control states can (and should) have over the use of digital technologies and online communications.

CONCLUSION

As the United Nations Independent Expert on human rights and international solidarity stated in a recent report,

the realities of an increasingly interconnected, interdependent and globalized world have necessitated attempts to reshape notions such as territoriality and sovereignty, and call for a shift from the “State-centric” position to one that acknowledges more deeply that certain types of human rights violations at the domestic level are increasingly being committed by extraterritorial actors¹⁴⁶

As we have argued in this Essay, the practice of transnational repression is particularly revelatory with regards to contemporary notions of sovereignty and the protection of individual sovereignty, namely through international human rights law. Territorial notions of state sovereignty are increasingly challenged by growing global interconnectedness. Countries of origin do not limit the exercise of sovereignty to those within their territorial borders; rather, they target and pursue dissidents and activists abroad as well as at home.¹⁴⁷ Host states have left room for significant uncertainty in whether transnational repression gives rise to violations of state sovereignty; this uncertainty is particularly the case with violations of sovereignty in cyberspace, which remains a developing and uncertain area of international law.¹⁴⁸ Finally, narrow interpretations of jurisdiction under international human rights law treaties have likely left an extraterritorial gap in addressing rights violations that happen outside the country of origin.¹⁴⁹ Overall, transnational practices—such as transnational repression—raise a series of concerns and questions regarding the applicability of international norms and rules. Part of an effective policy response against transnational repression will require host states to examine and clarify the application of these rules to this practice.

146. Obiora Chinedu Okafor (Independent Expert on Human Rights and International Solidarity), *International Solidarity and the Extraterritorial Application of Human Rights: Prospects and Challenges*, ¶ 8, U.N. Doc. A/HRC/50/37 (Apr. 22, 2022).

147. See Anstis & Barnett, *supra* note 145, at 699.

148. See *id.* at 701.

149. See *id.* at 705 n.10.