



# Understanding Human Rights on the Internet: An Exercise of Translation?

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## Abstract

In the massive ecosystem of internet governance, the Dynamic Coalition on Internet Rights and Principles at the Internet Governance Forum has claimed that one way to integrate human rights and internet policy making is to ‘translate existing human rights to the internet environment to build awareness, understanding and a shared platform for mobilization around rights and principles for the internet.’<sup>1</sup> This paper examines the metaphor of translation as an approach to understand human rights in the digital age, and the role of civil society as ‘translator’ to participate in global internet governance. The paper argues that translation is a unique way to conceive human rights in the digital age and, more broadly, the relation between law and technology. By referring to theories of translation studies, I aim to demonstrate the conflicted consequences of resorting to translation, and the need for accountability of the translator.

## Keywords

human rights – the internet – translation – multi-stakholderism

## 1 Introduction

Despite the relatively short history of the internet, a massive ecosystem of internet governance has been developed gradually over the past decade with the

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1 Internet Rights & Principles Coalition, *The Charter of Human Rights and Principles for the Internet* (2014) 1 <<http://www.ohchr.org/Documents/Issues/Opinion/Communications/InternetPrinciplesAndRightsCoalition.pdf>> accessed 2 May 2017.

input of all kinds of social actors. Since the World Summit on the Information Society in 2003 in Geneva, one of the major aims in the project of internet governance is to build a people-centered, inclusive and development-oriented information society.<sup>2</sup> While it is recognized in the Geneva Declaration that a people-centered information society is premised on fully respecting and upholding the Universal Declaration of Human Rights,<sup>3</sup> internet governance followed a sharp division between technology, social justice and politics for a long time.<sup>4</sup> Some sporadic but important efforts to reframe the internet and bridge the internet governance regime with the human rights legal regime were made before 2010.<sup>5</sup> However, the large-scale public discussion on the human rights implications of the internet as distinct for political struggle took off following a series of the events in recent years – the Arab Spring, the Occupy Movement, and the Snowden Revelations. Since then, human rights themes are included in every event on internet policy-making.

This paper selects one of the actors from the ‘international civil society’: the Dynamic Coalition on Internet Rights and Principles (IRP Dynamic Coalition) at the Internet Governance Forum, which has mandated itself to increase awareness and understanding of human rights in the digital age and creating a shared platform for mobilizing rights and principles for the internet by translating existing human rights to the internet environment.<sup>6</sup> The contribution of the IRP Dynamic Coalition to the sea of change in internet governance in the early 2010’s is the Charter of Human Rights and Principles for the Internet (IRP Charter).

The exercise in ‘translation’ and the self-claimed role of translator by the IRP Dynamic Coalition are the object of inquiry in this paper. I will draw on some insights from the translation theories in relation to the key characteristics of translation, translation techniques, and the role of the translator. These translation theories provide an interesting perspective, both substantive and

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2 World Summit on Information Society (WSIS) ‘Declaration of Principles – Building the Information Society: A Global Challenge in the New Millennium’ (12 December 2003) WSIS-03/GENEVA/DOC/4-E.

3 Ibid.

4 Marianne Franklin, ‘(Global) Internet Governance and Its Discontents’ in Joanna Kulesza and Roy Balleste (eds), *Cybersecurity and Human Rights in the Age of Cyberveillance* (Rowman & Littlefield Publisher 2015) 87.

5 E.g. Association of Progressive Communications, ‘APC Internet Rights Charter’ <[http://www.apc.org/en/system/files/APC\\_charter\\_EN\\_o\\_1.pdf](http://www.apc.org/en/system/files/APC_charter_EN_o_1.pdf)> accessed 2 May 2017; Rikke Frank Jørgensen, *Human Rights in the Global Information Society* (MIT Press 2006).

6 IRP Charter (n1) s 1.

processual, to look at the project of incorporating human rights regime and internet governance. The substantive aspect concerns how translation, albeit in a metaphorical sense, will facilitate, or by contrast, impede our understanding about human rights in digital times. The processual aspect, on the other hand, addresses the role of civil society groups, as translator, in participating in the norm-making of the global internet governance.

Translation is concerned with communication and how to overcome the intelligibility barrier in communication.<sup>7</sup> To make translation possible, three elements are needed: similarity, difference and mediation.<sup>8</sup> For the element of similarity, translation presupposes the possibility of things being perceived as similar, or being made to seem similar. The element of difference is the logical condition of similarity and also the practical reason for translating in the first place. The element of mediation can be defined as ‘the overcoming of difference by means of similarity but without abolishing difference’.<sup>9</sup> The act of translation may be used as a metaphor to describe the transposition of the existing human rights legal regime to the internet context, which involves a process similar to the underlying logic and assumptions of translation. By engaging with translation theories, I argue that translation is a special way of thinking about human rights in the digital age, and more generally about the relation between law and technology: neither does it equate to the view that law is always lagging behind technology,<sup>10</sup> nor is it similar to the view of ‘law of the horse’.<sup>11</sup>

Translation is a promising metaphor to deal with the unfamiliarity and perceptive difficulties of the cyberspace. And with the presumed possibility of things being perceived as similar, the metaphor of translation also fits the objective of incorporating human rights and internet governance: ‘The same rights that people have offline must also be protected online’. This was first expressed in a resolution of the UN Human Rights Council, which endorsing Frank La Rue’s 2011 report on the right to freedom of opinion and expression,<sup>12</sup>

7 Theo Hermans, ‘What Is (Not) Translation?’ in Carmen Millán and Francesca Bartrina (eds), *The Routledge Handbook of Translation Studies* (Routledge 2012) 77.

8 *Ibid* 78.

9 *Ibid*.

10 Lyria Bennett Moses, ‘Understanding Legal Responses to Technological Change: The Example of in Vitro Fertilization’ (2005) 6 *Minn. J.L. Sci. & Tech.* 505.

11 Frank H Easterbrook, ‘Cyberspace and the Law of the Horse’ [1996] *U. Chi. Legal F.* 207.

12 UNHRC Res 20/8 (2012) UN Doc A/HRC/RES/20/8.

and has now become the standard language in the post-Snowden documents dealing with human rights on the internet in and outside the UN.

Invoking the metaphor of translation also raises a number of questions which will be addressed in Section III. Specifically, the dichotomy of source and target texts in translation essentially corresponds to the offline-online duality that is usually presumed when we talk about the internet and the digital age. Besides, as mentioned before, similarity, difference and mediation are the three basic elements in translation. However, if we dichotomize the offline (physical) and the online (virtual) world, we have to think carefully about and articulate what the similarities and the differences between the online and the offline are, and in what way the mediation should be done. This forces us to admit that not everything on one side of the dichotomy, however mediated, has its counterpart in the other, and mediation between the two sides – source and target – requires that something has to be abandoned or created. Such mediation makes one wonder if translation can still be true to its name, or at what point translating becomes authoring. This section also asks whether metaphorically calling the IRP Charter a product of translation makes more sense than other initiatives which do not use this term.

Section IV looks at the self-proclaimed ‘translatorship’ of the IRP Dynamic Coalition. So far, translation in a metaphorical sense is only seen in the work of this Dynamic Coalition. Other social actors participating in the internet governance project, be it sovereign states, corporations or other civil society groups, have not explicitly invoked this term although the goal to incorporate human rights and internet governance is the same. The approach of translation may demonstrate the self-perception of the role of a civil society group in shaping internet governance. The non-transparent role of translator may raise the question of authority and legitimacy of the Dynamic Coalition. I would argue that this issue and the utility of translation in the whole internet governance project need to be considered along with the institutional characteristics of internet governance. Multi-stakeholder participation is now deemed to be the legitimate way of internet governance, and translation by a civil society group is a product of such multi-stakeholderism as well as a generator of further multi-stakeholder participation and deliberation. But multi-stakeholderism may raise the problem of self-coherence of the translation, as the translator seeks to outreach different actors, and the solution remains to be seen. The processual issue discussed in this section is also closely connected to the substantive question about the relation between law and technology. Translation bridges human rights regime and internet governance, and potentially redefines both the ethos of internet governance and the identity

of human rights institutions.<sup>13</sup> It can therefore be understood as a case of co-production.<sup>14</sup>

## 2 Conducting the Translation

Before moving to the specific issues about translating human rights and the role of translator, the work of the IRP Dynamic Coalition and the drafting of the IRP Charter needs a brief introduction. As noted before, the Dynamic Coalition on Internet Rights and Principles is one of the Dynamic Coalitions at the Internet Governance Forum (IGF). The IGF is a multi-stakeholder platform of policy dialogue convened by the UN Secretary-General as a result of the 2005 Tunis Agenda.<sup>15</sup> It takes the form of dynamic coalitions which are informal, issue-specific groups comprising of interested individuals following the principles of open membership, open mailing lists and open archives. The Internet Rights and Principles Dynamic Coalition was set up in Hyderabad IGF meeting in 2008, which merged the Internet Bill of Rights and Framework of Principles for the Internet Coalition and joined later by the Freedom of Expression Coalition. It aims to promote and provide a space for multi-stakeholder dialogue and collaboration, and to function as an umbrella platform for facilitating the collaboration on human rights issues in the IGF process.<sup>16</sup>

In its early years, the IRP Dynamic Group had the ambition to develop a concrete document which could reframe the internet policy-making into a more comprehensive, coherent, and recognizable legal framework anchored in international human rights law.<sup>17</sup> It is for this reason of reframing internet policy-making that the metaphor of translation was used by the IRP Dynamic

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13 An example is the Council of Europe which has incorporated internet governance into its missions and has become a regularly participant at the IGF. See also Nanette Levinson and Meryem Marzouki, 'Internet Governance Institutionalization: Process and Trajectories' in Michèle Rioux and Kim Fontaine-Skronski (eds), *Global Governance Facing Structural Changes: New Instructional Trajectories for Digital and Transnational Capitalism* (Palgrave Macmillan 2015).

14 Sheila Jasanoff (ed), *States of Knowledge: The Co-Production of Science and Social Order* (Routledge 2004).

15 World Summit on Information Society (WSIS) 'Tunis Agenda for the Information Society' (18 November 2005) Doc WSIS-05/TUNIS/DOC/6(Rev.1) para 72.

16 The IRP Coalition <<http://internetrightsandprinciples.org/site/about/>> accessed 1 November 2016.

17 Franklin (n 4) 73.

Coalition, and the flagship contribution is the Charter of Human Rights and Principles for the Internet. The process of translation was described as ‘collabowriting’ by Marianne Franklin,<sup>18</sup> who has been involved in the work of the IRP Dynamic Coalition since the very beginning as a member of its steering committee and co-chair from 2012 to 2014. The IRP Dynamic Coalition was essentially a loose cross-sector network of interested individuals and organizations communicating and consulting largely through email, listserv and other forms of social media. The translation started with a spirit of ‘Do It Yourself’. To conduct the translation, it was decided that the IRP Charter would follow the organization and order of appearance of the Universal Declaration of Human Rights (UDHR). Members of the IRP Dynamic Coalition took each clause (from the UDHR and other international human rights treaties) in turn, and tasked themselves to translate one to three clauses.<sup>19</sup> Having brought the clauses from the UDHR into the context of the internet, the draft document underwent several rounds of consultation and revision to make its content more legally coherent. The Charter (version 2.0) which was publicly launched in 2011, provides the following rights:

1. Right to Access to the Internet
2. Right to Non-Discrimination in Internet Access, Use and Governance
3. Right to Liberty and Security on the Internet
4. Right to development through the Internet
5. Freedom of Expression and Information on the Internet
6. Freedom of Religion and Belief on the Internet
7. Freedom of Online Assembly and Association
8. Right to Privacy on the Internet
9. Right to Digital Data Protection
10. Right to Education on and about the Internet
11. Right to Culture and Access to Knowledge on the Internet
12. Rights of Children and the Internet
13. Rights of People with Disabilities and the Internet
14. Right to Work and the Internet
15. Right to Online Participation in Public Affairs
16. Rights to Consumer Protection on the Internet
17. Right to Health and Social Services on the Internet

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18 Ibid 74; Marianne Franklin, *Digital Dilemmas: Power, Resistance, and the Internet* (Oxford University Press 2013) 159–161.

19 Marianne Franklin, *Digital Dilemmas: Power, Resistance, and the Internet* (Oxford University Press 2013).

18. Right to Legal Remedy and Fair Trial for actions involving the Internet
19. Right to Appropriate Social and International Order for the Internet
20. Duties and Responsibilities on the Internet
21. General Clauses

The influence of the IRP Charter needs to be considered along with the bottom-up, policy-hacking approach<sup>20</sup> of the Dynamic Coalition's contribution to the human rights approach to internet governance. Through its active participation and outreach in various initiatives, the IRP Dynamic Coalition obtained the support from and gained voice in the international human rights community. At the UN level, Frank La Rue, UN Special Rapporteur for Freedom of Expression, is an early supporter of the IRP Charter project. At the Council of Europe, the IRP Charter itself became a more visible influence in the preparation of a Guide on Human Rights for Internet Users, which will be discussed in more detail in Sections 3 and 4.

### 3 Substantive Merits and Flaws of Translation

#### 3.1 *The Online–Offline Dichotomy*

Translation is concerned with cross-lingual and cross-cultural communication. Translation involves two main features: the source and the target. And translation process can be described as including all activities of a translator from starting to work on the source text to finishing the target text.<sup>21</sup> Although the process from the source to the target is not necessarily unidirectional,<sup>22</sup> the dichotomy of source and target persists. In this sense, if translation is a proper metaphor for rethinking human rights in digital times, it seems that the digital, networked, virtual world constitutes a separate 'other'. And we understand the new and strange other by translating what appears to be familiar to us in the physical world. In other words, the dichotomy between the source and the target presumed in the metaphor of translation introduces an equally dichotomized relation between the online and the offline world. This dichotomy has an important impact on how the internet is framed. To consider the online as a separate other, the internet is framed not only as an instrument or a type of

<sup>20</sup> Franklin (n 4) 77.

<sup>21</sup> Gyde Hansen, 'The Translation Process as Object of Research' in Carmen Millán and Francesca Bartrina (eds), *The Routledge Handbook of Translation Studies* (Routledge 2012) 88.

<sup>22</sup> Itamar Even-Zohar, 'Polysystem Theory' (1990) 11 *Poetics Today* 9, 23.

infrastructure that fulfills the needs of the physical world, but also as a different social space that is composed of the element of virtuality in which various human experiences and relations take place.

The presumption in the exercise of translation that cyberspace is that the separate other sounds similar to the digital libertarian claim that cyberspace is separate from the offline and immune from the regulation of sovereign states.<sup>23</sup> However, this metaphor of translation may look suspicious in the eyes of the digital libertarians: isn't this so-called translation a colonization of the cyberspace in the name of human rights law which is primarily state-centric? This question raises a number of issues. For the purpose of this section, I relate this concern to the value hierarchy in the dichotomized discourses in both translation and internet governance that the question seems to be referring to. I shall come back to this question in Section 4 regarding the legitimacy issue of the translation.

For translation, the source-target dichotomy usually places the original text in a higher value order than the translated text, either due to some inherent beauty or verity or its unique cultural context that is sometimes considered hardly translatable.<sup>24</sup> On the side of the discourse about internet, the value hierarchy is expressed by usually deeming the offline world as more 'real' and 'authentic' than the online world. In both dichotomies, there exists a romanticized view about the source text and the offline world.<sup>25</sup> Translation theories can provide important solutions to the problem of value hierarchy. Theorists, in a postmodern and post-structuralist fashion, deconstruct the notions of the 'original' and 'translation'. For example, Jacques Derrida has argued:

[F]or the notion of translation we would have to substitute a notion of *transformation*: a regulated transformation of one language by another, of one text by another. We will never have, and in fact have never had, to do with some 'transport' of pure signifieds from one language to another, or within one and the same language, that the signifying instrument would leave virgin and untouched.<sup>26</sup>

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23 John Perry Barlow, 'A Declaration of the Independence of Cyberspace' (*Electronic Frontier Foundation*, 8 February 1996) <<https://www.eff.org/cyberspace-independence>> accessed 6 March 2017.

24 Hermans (n 7).

25 Nathan Jurgenson, 'The IRL Fetish' (*The New Inquiry*, 28 June 2012) <<http://thenewinquiry.com/essays/the-irl-fetish/>> accessed 2 November 2016.

26 Jacques Derrida, *Positions* (Alan Bass tr, University of Chicago Press, 1981) 20.



Translation reduces the source meaning, but also unleashes the potential of the source text, and gives the source text afterlife due to the foreign language. Therefore, the view that translation as secondary to the original text is considered false.<sup>27</sup> The translation metaphor, seen from the postmodern and post-structuralist perspective, elevates the inherent value of the online. The online experience is equally real,<sup>28</sup> and human rights in the digital context should be recognized and protected to the same extent as in the non-digital context. For example, to recognize and give expression to the right to privacy on the internet is to recognize and elevate individual's virtual identity and privacy it enjoys. Similarly, the freedom of online assembly and association acknowledges the authenticity of the new digitalized social movements which may or may not be accompanied by the traditional ways such as gatherings or marches on the street.

Having dealt with the value hierarchy, the very dichotomy presumed in translation remains to be a problem. One potential issue is the translatability of the offline human rights law which deals with the vertical relation between sovereign states and individuals to the free and open cyberspace. In my view, this concern misses the point. Human rights law has developed approaches to expanding human rights protection to cover the relation between private individuals.<sup>29</sup> There has even emerged a turn to the societal dimension of human rights experiences in human rights treaties such as the UN Convention on the Rights of Persons with Disabilities.<sup>30</sup> Admittedly, both are largely incorporated into the positive obligations of states, but coordination between private actors in society is an indispensable part of human rights implementation.<sup>31</sup> Such coordination to make human rights law take effect horizontally actually

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27 Lawrence Venuti, *The Translator's Invisibility: A History of Translation* (2 edn, Routledge 2008) 13–14.

28 Sociologic studies have also deconstructed the hierarchy between the offline and the online, e.g. Jurgenson (n 25).

29 E.g. the interpretation by the European Court of Human Rights analyzed in Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006).

30 E.g. Article 16 of this convention on the right to 'freedom from exploitation, violence and abuse'. See also Frédéric Mégret, 'The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?' (2008) 30 *Human Rights Quarterly* 494.

31 It has been argued that in France and Luxemburg where the European Convention of Human Rights is part of the national legal order, the Convention has a direct horizontal effect of creating obligations for individuals and private entities, which implies that one individual can enforce his or her rights against another individual. See also Clapham (n 29).

is consistent with the spirit of multi-stakeholderism (discussed later), which internet governance is inspired by and aspires to.

The problem lies not on the translatability from the vertical to the horizontal, but rather on the presumed dichotomy between the offline and the online. I have mentioned the digital libertarian claim of the internet and the cyberspace being immune from the regulation of the offline. This view echoes some arguments in the legal scholarship since the mid-1990s about the laws of the sovereign states being obsolete and the cyberspace can only be governed by decentralized rules organically developed by the internet users.<sup>32</sup> Deeming the online as separate simplifies both the ways state exerts power in cyberspace and how individuals experience reality. For the former, James Boyle pointed out in mid-1990s that instead of being unable to regulate the cyberspace, the state can and does use privatized enforcement to exercise power over the internet.<sup>33</sup> Lawrence Lessig also warns that the government can increase its regulation of cyberspace by controlling the market of software.<sup>34</sup> This more nuanced power of states adapted to technological development coexists with the more explicit and traditional form of sovereign power, to legislate or to censor people's behavior online or to selectively block people's access to the internet over the last two decades.<sup>35</sup>

For the latter (the simplification of the way people experience reality), it is important to recognize the 'augmented reality', the constant interpenetration of the offline and the online that is experienced by human beings now. As Nishant Shah describes, human subjects online are human-avatar-digital hybrids, 'cyborgs' which are beyond the online-offline dichotomy.<sup>36</sup> 'Cyborg' refers to a biological being with a kinetic state that can be transferred from one environment to another, being able to adapt to changing environments through technological augmentation.<sup>37</sup> The cyborg identity generated from people's everyday experience means that '[t]he cyborg is neither the physical body nor the translated digital self. It resides in the interface between the

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32 David R Johnson and David Post, 'Law and Borders: The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367; David Post, 'What Larry Doesn't Get: Code, Law and Liberty in Cyberspace' (2000) 52 *Stanford Law Review* 1439.

33 James Boyle, 'Foucault in Cyberspace: Surveillance, Sovereignty, and Hardwired Censors' (1997) 66 *U. Cin. L. Rev.* 177.

34 Lawrence Lessig, *Code and Other Laws of Cyberspace, Version 2.0* (Basic Books 2006).

35 E.g. Toby Mendel and others, 'Global Survey on Internet Privacy and Freedom of Expression' (UNESCO 2012).

36 Nishant Shah, 'Material Cyborgs; Assisted Boundaries: Formulating the Cyborg as A Translator' 12 *European Journal of English Studies* 211.

37 *Ibid.*

two, each constantly referring to the other, creating an interminable loop of dependence'.<sup>38</sup>

If we accept the ideas of augmented reality and cyborg, it seems that the translation metaphor is rather misleading because there are no two separate and distinct realities for the translation to take place. The consequence of the online-offline dichotomy preserved by the translation metaphor therefore seems to be the fragmentation of human subjectivity. René Urueña has described the constitution of the subject through international law and argued that the fragmented law results in fragmented legal subjects.<sup>39</sup> While the incoherence of legal subject is not necessarily a problem but rather a value of our humanity, the downside of the fragmented subjectivation by law is that it is conceptually disconnected from the human experience and disregards human agency.<sup>40</sup> Adopting his proposal to re-humanize global law, I argue that the effect of the online-offline fragmentation of the human subject needs to be considered. In the area of data protection for example, continental Europe developed the doctrine of informational self-determination in the 1980s against the backdrop of governments collecting citizens' data in centralized databases. The concept of informational self-determination from German constitutional law is closely connected to the right of dignity and personality rights.<sup>41</sup> As personal data are now collected and processed more by private companies, the digital subject is sometimes considered as consumer of the online service.<sup>42</sup> Here, we have two types of legal subject: the holder of the right to informational self-determination which derives from the offline inalienable fundamental rights, and the consumer in the cyberspace whose rights can be contracted out. It is even argued that the approach to protecting personal data should be shifted from the former to the latter, because given people's generally low awareness of privacy online, consumer protection seems to be more effective

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38 Ibid 217.

39 René Urueña, *No Citizens Here: Global Subjects and Participation in International Law* (Martinus Nijhoff 2012) 36.

40 Ibid 111, 286.

41 Antoinette Rouvroy and Yves Poullet, 'The Right to Informational Self-Determination and the Value of Self-Development: Reassessing the Importance of Privacy for Democracy' in Serge Gutwirth and others (eds), *Reinventing Data Protection?* (Springer Netherlands 2009) <<http://link.springer.com/10.1007/978-1-4020-9498-9>> accessed 8 March 2017.

42 E.g. The White House, 'Consumer Data Privacy in a Networked World: A Framework for Protecting Privacy and Promoting Innovation in the Global Digital Economy' (2012) 4 *Journal of Privacy and Confidentiality* 95.

to protect the weaker party.<sup>43</sup> This claim, in my view, disregards human agency when people share personal data: while most internet users may not pay attention to the privacy terms every time they choose to use a service, internet users generally have an expectation about the purpose for which their information will be used,<sup>44</sup> and such expectation is based on the augmented reality people experience. So, informational self-determination should not be seen as an 'all or nothing' concept shifting from the offline to the online. Informational self-determination should remain the philosophical basis for protecting the data of internet users who experience and are aware of the constant interpenetration between their online and offline life. In this sense, although the metaphor of translation, with its assumption of source-target duality, elevates the online experience, it may also limit the way of understanding human rights in the digital age by disregarding the augmented reality experienced by the cyborg-like legal subject.

The rest of this section tries to demonstrate the problems of dichotomizing the offline and the online in 'translating' human rights more concretely, which may be categorized in two ways. Firstly, the dichotomy creates difficulties for the translation itself, since both the online and the offline have specificities which may not be translatable. The ingenuity to overcome the differences demanded on the part of the translator blurs the line between translation and creation. The blurring of the line is not a problem by itself, but to call such exercise a translation seems to be less genuine. Secondly, holding the offline human rights law as a reference frame introduces, or at least reinforces, the managerialist mindset in conceiving human rights in the digital times.

### 3.2 *Domestication and Foreignization: Mediating the Differences*

Notwithstanding the above discussion on the false dichotomy between the offline and the online, I keep this separation for the purpose of examining the actual translation. Conducting translation requires good understanding of the distinctiveness of the two spheres. Then we are compelled to admit that the digital is not a mirrored representation or reproduction of the physical

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43 Article 29, Data Protection Working Party, 'Opinion 03/2013 on Purpose Limitation' (2013) <[http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203\\_en.pdf](http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2013/wp203_en.pdf)> accessed 7 March 2017.

44 Attila Kiss and Gergely László Szóke, 'Evolution or Revolution? Steps Forward to a New Generation of Data Protection Regulation' in Serge Gutwirth, Ronald Leenes and Paul de Hert (eds), *Reforming European data protection law* (Springer 2015) <[http://link.springer.com/chapter/10.1007/978-94-017-9385-8\\_13](http://link.springer.com/chapter/10.1007/978-94-017-9385-8_13)> accessed 7 March 2017.

and that the two domains have their own features which may or may not include counterparts in one another.

Translation theorists have come up with two strategies to deal with the differences in the language systems: foreignization and domestication. Foreignization is to preserve the ‘foreignness’ of the source text in translation. Therefore, the reader of the translation will be struck by the otherness of the text.<sup>45</sup> Domestication, on the other hand, is a strategy to make the source text comply with the target cultural norms and the reader’s pre-existing expectations.<sup>46</sup> For our project of translating human rights to the context of the internet, foreignization and domestication need to be twisted since the ‘readers’ are presumably more familiar with the source language which is the pre-digital human rights law, and it is the target language, the digital, that poses intelligibility barriers for the readers. The concepts of foreignization and domestication, however, may be described in the following way: foreignization implies that the specificities of the digital are preserved while certain human rights concepts are made exotic; domestication implies that the strangeness of the digital is normalized and becomes less difficult to be incorporated into the human rights discourse. Domestication can be seen in a number of rights translated in the IRP Charter, such as the right to freedom of opinion and expression, the right to education on and about the internet, the right to culture and access to knowledge on the internet, etc. For these rights, the internet is conceived in an instrumental way, as a medium, a resource, or a type of infrastructure. Despite its newness, the internet does not create too many problems for translation. For example, according to the Charter the right to education on the internet requires publications, research, text books, course materials and other kinds of learning materials to be published as Open Educational Resources with the right to freely use, copy, reuse, adopt, translate and redistribute them.<sup>47</sup> It is compatible with what the existing right to education requires in the International Covenant on Economic Social and Cultural Rights – availability and accessibility of education – commented by the Committee on Economic, Social and Cultural Rights (CESCR).<sup>48</sup> The IRP Charter also requires digital literacy be a key component of education which enables people to use and shape the

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45 Robert Holland, ‘News Translation’ in Carmen Millán and Francesca Bartrina (eds), *The Routledge Handbook of Translation Studies* (Routledge 2013) 334.

46 Ibid.

47 IRP Charter (n 1) 20.

48 ECOSOC ‘General Comment No. 13: The Right to Education (Art 13 of the Covenant)’ E/C.12/1999/10 (8 December 1999), paras 6(a)–6(b).

internet to meet their needs.<sup>49</sup> It can be easily incorporated into the right to education, as the CESCR commented that technology education should be part of general education.<sup>50</sup>

While domestication by perceiving the internet in an instrumental way helps a smooth translation of human rights to the internet, foreignization is also used in the IRP Charter when specific features of the online cannot simply be normalized by regarding the internet as an instrument. The most obvious element that is difficult to translate from the offline to the online is the bodily and physical nature of certain rights. Some rights are translated to become de-physicalized, for example the freedom of online assembly and association. According to the IRP Charter, everyone has the right to form, join, meet, or visit the website or network of an assembly, group, or association for any reason, and access assemblies and associations through ICTs should not be blocked or filtered.<sup>51</sup> So the idea of coming together and its performative sense expressed by the very word of assembly can be realized while the people do not physically perform the coming together.

Another example of de-physicalizing the rights is the right to liberty and security. The right to liberty and security in the ICCPR protects people against arbitrary arrest and detention. It aims to ensure the physical and mental integrity of individuals. Translated to the internet, the right to liberty and security, provided by the IRP Charter, includes '[p]rotection against all forms of crime' committed on or using the internet, and '[s]ecurity of the Internet'.<sup>52</sup> More concretely, the IRP Charter claims that '[e]veryone has the right to enjoy secure connections to and on the Internet. This includes protection from services and protocols that threaten the technical functioning of the Internet, such as viruses, malware and phishing'.<sup>53</sup> By translating the right to liberty and security into the security of the internet infrastructure, the right is significantly de-physicalized.

But the assumed dichotomy of the offline and the online has also made translation from one to the other impossible for certain bodily rights. We see that some human rights in the UDHR which derive from the human body are excluded in the IRP Charter, such as the right to life,<sup>54</sup> prohibition of torture,

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49 IRP Charter (n 1) 20.

50 ECOSOC (n 48), para 16.

51 IRP Charter (n 1) 17.

52 Ibid 15.

53 Ibid.

54 The right to life is dealt with in a very curious manner. The title of the Article in the IRP Charter is 'Right to Liberty and Security on the Internet' which is said to be derived from

cruel, inhuman or degrading treatment, and prohibition of slavery. This exclusion or the failure to articulate an online version of these rights means that, for the drafters of the IRP Charter, the physical human body indeed bears unique normative importance for conceiving human rights in some circumstances. Even if a person's identity in the cyberspace is sometimes metaphorically described as enjoying a life, to bring into the IRP Charter a right to life in the form of an online identity which is divorced from the human body seems to reduce the moral and ontological significance of this right. For the right to life, the drafters of the IRP Charter do not consider the distinctiveness of the human body as something that can be translated to the digital. In fact, this inability to translate suggests that value hierarchy has sneaked in and places the offline in a higher order by denying a right to life online. The same can be said about the prohibition on torture, cruel, inhuman or degrading treatment. Although it is quite obvious that this prohibition stresses the integrity of the human body, there is also a psychological aspect of ill-treatment.<sup>55</sup> However, despite the fact that mental pain such as humiliation can also happen online (the new social media makes humiliation easier and more swift with no less severe consequences), the prohibition on torture and other forms of ill-treatment is not given expression in the IRP Charter, which again suggests a higher moral order of the offline due to the special importance of the human body.

We see that the way in which the IRP Charter deals with the human body is not coherent in itself. That the IRP Charter includes the right to online assembly and excludes the right to life, for instance, shows that the drafters consider the physical nature as necessary and not translatable for certain rights while disposable for others. The IRP Charter and the Dynamic Coalition should determine how the differentiation is made and whether a line can be drawn at all. I would argue that the difficulties in translating the bodily element of certain rights ultimately lie in the online-offline dichotomy. A possible way to address the bodily nature is to think of the human subject in digital times as a cyborg whose existence relies upon the human body but not exclusively upon the

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Article 3 of the UDHR 'everyone has the right to life, liberty and security of person'. Why the right to life does not appear in the title is not explained anywhere in the Charter or the commentary. While the Charter does not include the right to life on the internet, the IRP Dynamic Coalition also sets out 10 internet rights and principles, which include 'the rights to life, liberty, and security must be respected, protected and fulfilled online. These rights must not be infringed upon, or used to infringe other rights, in the online environment'. See IRP Charter (n 1) 7.

55 See the definition of torture given in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art 1.

human body. Simultaneously, the normative importance of the human body for human rights should be conceptualized as a sliding scale according to the experience of the cyborg subject.

On the other hand, foreignization also happens when certain rights in the IRP Charter do not exist in other human rights instruments, such as the UDHR. The most remarkable is Article 1 on the right to access to the internet. This right, which enables all the other rights in the IRP Charter, was claimed by the drafting members as not a new right in itself, since the drafters sought to 'translate' not to 'create'.<sup>56</sup> The Centre for Law and Democracy commented that the right to access to the internet flows from the right to freedom of expression which protects the right to seek, receive and impart information and ideas through any media.<sup>57</sup> In this sense, the right to access to the internet can be seen as a translation of a right to read or publish a book or a newspaper. However, there seems to be a conflict of how the internet is framed. The Centre for Law and Democracy frames the internet as a new form of communication medium, an instrument for free speech. But as a right which enables all the other rights in the IRP Charter, the access to the internet suggests more than the access to an instrument. As the metaphor of cyberspace implies, the internet creates a new social domain in which interpersonal connection and power relation are reconstructed. And it is this new social domain that creates the need for translation. Therefore, the access to the internet is not only derived from the freedom of opinion and expression, as an enabler to receive information or to impart opinions; it is a prior right to get into the new social domain.<sup>58</sup>

However, if we admit that the access to the internet is also a right to engage in the new digital social domain, it is not entirely obvious how the source right is articulated in the human rights law treaties. A rough online-offline dichotomy may suggest that the access to the physical world functions as an offline counterpart, but having access to the physical world means to be born, which, unlike access to the internet, is a fact, not a right.<sup>59</sup> If the internet is perceived as a social space which is constituted and in the meantime constituting people's daily practice online, I would hypothesize that this digital

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56 Franklin (n 19).

57 The Centre for Law and Democracy, 'Commentary on the Charter of Human Rights and Principles for the Internet' (2011) <<http://www.law-democracy.org/wp-content/uploads/2011/10/Charter-Commentary.pdf>> accessed 7 March 2017.

58 Franklin (n 19) 162.

59 International human rights law does not recognize the fetus's right to be born. An exception is the American Convention on Human Rights, which refers explicitly to the moment of conception when declaring the right to life.



social space should be analogized with other pre-existing social domains that are co-constitutive of human practice, such as a political or juridical space as it is commonly understood to legal academics. So, if we do take translation seriously and try to trace back the source right of the right of access to the internet, perhaps we can look at the right to a nationality which is recognized in a number of human rights treaties. Both rights involve the prior right for individuals to enter a particular humanly constructed social domain: both can be seen as the right to have rights. Such a translation, not at the meta-level between the physical and the digital, but between different artificial social domains, casts another doubt on the simple dichotomy between the online and the offline.

Another right in the Charter of which the source right is not directly recognizable in existing human rights law<sup>60</sup> is the right to consumer protection on the internet.<sup>61</sup> To be sure, consumer protection is not something unique of the internet. The lack of explicit expression of the right to consumer protection may be explained by its characterization as a part of the 'second generation' of human rights which is generally deemed a policy objective rather than a subjective legal right.<sup>62</sup> But, the fact that some consumer protection cases are dealt with by applying the protection of the fundamental rights<sup>63</sup> suggests that the homo economicus is integrated into a more general human rights legal subject. It seems that, however, the relation between these two legal subjects is ambiguous in the context of the internet. While the Charter and its commentary by the Centre for Law and Democracy is largely focused on consumer protection in e-commerce, some other proposals suggest to enhance the protection of individuals' right to privacy on the internet by reinforcing consumer protection and perfecting the terms of service and privacy policies of the internet service providers.<sup>64</sup> This suggestion points to the fact that every individual using the internet, no matter whether his activities involve buying goods online or not, is already a user and a consumer of the internet service. And it is unique of the internet that the constant identity overlapping of being a user, a consumer and a human rights subject makes it possible to change the absorption of homo economicus by the human rights legal subject.

As argued earlier, such a suggestion should not set aside the basis of informational self-determination. Reversing the absorption of the legal subject

60 Iris Benöhr, *EU Consumer Protection and Human Rights* (Oxford: Oxford University Press, 2013) 46.

61 IRP Charter (n 1) s 16.

62 Iris Benöhr (n 60) 94.

63 Ibid 93–102.

64 Emily Taylor, 'The Privatization of Human Rights: Illusions of Consent, Automation and Neutrality' (2016) Global Commission on Internet Governance, Paper Series No. 24.

or replacing the human rights subject with consumer can be problematic, because while consumer protection shifts the burden from internet users to the data controllers, it also strengthens the managerial power of the latter and disregards the agency of internet users. While it is beyond the scope of this paper, I imagine a convergence between the two legal subjects which requires responsible data collection, retention and use by internet service providers and meanwhile respects the users' self-determination.

In short, the source-target dichotomy underlined in the translation metaphor raises the question whether the metaphor is appropriate when the two sides, the offline and the online, have certain features that are too special. If too much is lost in translation, or too much needs to be recreated anew, translation will lose its practical utility.

### 3.3 *Translating Managerialism in Human Rights Regime*

Although the orthodox hierarchy between the source text and the translation is no longer true, it is still largely assumed that the translation needs to be faithful to the source text. The consequence of translating the offline to the online is that the pre-existing human rights legal regime, with all its success and failures, becomes the reference frame. I argue that this consequence of translation tends to immediately bring the problems of existing human rights law into the way we understand digital human rights. The problem I want to discuss in this subsection is the mind-set of managerialism in international human rights law and its prevalence in the current discourse on human rights and the internet.

Despite the ideal that the modern human rights law is created to 'trump' and restrain political discretion,<sup>65</sup> managerialism has now become omnipresent in human rights law. The prevalence of the words such as proportionality and balancing shows that rights discourse is not a trump but a trap. The problem as described by Duncan Kennedy is that rights discourse can provide justification for almost any result.<sup>66</sup> Unfortunately, the trap of the rights discourse is introduced to the way of conceiving human rights in the digital age as we elevate the existing human rights law to function as a frame of reference. The immediate popularity of managerialism is evident in almost every discussion about human rights on the internet, from the UN level,<sup>67</sup> to the

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65 John Finnis, 'Human Rights and Their Enforcement', *Human Rights and Common Good: Collected Essays Volum III* (Oxford University Press 2011).

66 Duncan Kennedy, 'Legal Education as Training for Hierarchy' in David Kairys (ed), *The Politics of Law, 2nd ed.* (Pantheon Book 1990) 46.

67 E.g. Office of the High Commissioner for Human Rights, 'The Right to Privacy in the Digital Age: Report of the OHCHR' (UNHRC 2014) UN Doc A/HRC/27/37.

regional multi-stakeholder platforms:<sup>68</sup> conflicts between rights are admitted, and words such as proportionality, necessity, transparency and balancing keep popping up all the time. The technicality of the internet exacerbates the tendency of managerialism and more importantly shifts the managerial power from states to companies.<sup>69</sup> However, the discussions usually only go as far as recognizing proportionality and necessity as the conditions to resolve the conflicts of rights without explaining what proportionality and necessity really mean in the digital context.<sup>70</sup> If any consensus is achieved with the popularity of the concepts of proportionality and necessity, it will be a consensus on the impossibility of coming up with concrete explanations as assessment changes case by case.

The managerial power of sovereign states is usually relied on as the solution for conflicts of rights. In (offline) human rights law, states are given the margin of appreciation when limitations are imposed on non-absolute rights. But both the margin of appreciation and the tests of necessity and proportionality are connected with an important qualification, i.e. 'a democratic society'.<sup>71</sup> This requirement of a democratic society highlights the territorial limitation implied in a state's margin of appreciation as well as the requirements of proportionality and necessity. Such managerial power is confined within a sovereign state, and has now been transcended by the internet. In the digital context, restrictions on human rights imposed by one state often take effect extraterritorially. An example is transnational cyber surveillance, which interferes with the rights of non-citizens abroad. It is problematic to continue relying on states' managerial power without further asking for whom (in which society, to what demo) the restrictive measures should be necessary and proportionate, and what the objects of balancing are.

The managerial power of companies is discussed earlier with respect to the problem of using the legal regime of consumer protection for data protection. The offline human rights law has worked hard to come up with solution to

68 E.g. EuroDIG 2016, Transcript: 'From Cybersecurity to Terrorism – Are We All under Surveillance?' (Brussels, 10 June 2016) <[http://eurodigwiki.org/wiki/Transcript:\\_From\\_cybersecurity\\_to\\_terrorism\\_-\\_are\\_we\\_all\\_under\\_surveillance%3F](http://eurodigwiki.org/wiki/Transcript:_From_cybersecurity_to_terrorism_-_are_we_all_under_surveillance%3F)> accessed 3 November 2016.

69 E.g. Taylor (n 64): 'Companies need to differentiate between private and public communications in their terms, and to limit their intrusion into private communications to what is necessary, proportionate and pursuant to a legitimate aim'.

70 E.g. Office of the High Commissioner for Human Rights (n 67); EuroDIG 2016 (n 68).

71 E.g. UN Commission on Human Rights, 'The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (UN Commission on Human Rights 1984) UN Doc E/CN.4/1985/4, Annex.

deal with human rights violations committed by private corporates; the flagship contribution is the UN Guiding Principles on Business and Human Rights. But the effect of these principles on human rights promotion in the business sector remains ambivalent. Not only do human rights become the object of business management balanced with commercial interests, or part of management strategies and tools in business. Human rights concepts are also often incorporated into corporate governance discourses by corporates to show the corporates' adherence to good business and to absorb criticisms about corporate social responsibilities in globalization, without actual improvement of the business practice. Consequently, human rights concepts are disarmed of the normative power.<sup>72</sup>

Resorting to the managerial power of internet intermediaries is not necessarily a consequence of direct translation, but it is informed by the same assumption behind translation that the offline human rights regime provides a reference frame for the online human rights regime. By transposing corporates' human rights responsibility to the cyberspace, internet intermediaries are now increasingly requested to conduct a privacy impact assessment when they collect or use personal data, or remove certain content requested by internet users. The IRP Charter also includes the right to a fair trial for actions involving the internet, and claims that when internet intermediaries are 'asked to make judgments about whether content is illegal and encouraged to remove content without a court order. It is [...] necessary to reiterate that procedural rights must be respected, protected and fulfilled on the Internet as they are offline'.<sup>73</sup> While the IRP Charter seems ambiguous regarding who are addressed in this clause to fulfil users' procedural rights, an inference is that when the internet companies are making their own judgments and are removing content, they are expected to follow procedures that ensure responsible decision-making. While mechanisms, such as private impact assessment or other procedures envisioned by the IRP Charter, seek to minimize human rights violation by these internet intermediaries, they may also standardize human rights violation as part of business management.<sup>74</sup>

In the *Google Spain* case, the Court of Justice of the European Union confirms the right to be forgotten, placing on the search engine companies the duty to no longer list certain information about a person in the search engine

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72 Christian Scheper, "From Naming and Shaming to Knowing and Showing": Human Rights and the Power of Corporate Practice' (2015) 19 *The International Journal of Human Rights* 737.

73 IRP Charter (n 1) s 18(b).

74 Christian Scheper (n 72).

results. The search engine companies are required to seek a fair balance between the fundamental rights of the data subject and the interest of internet users in having access to that information.<sup>75</sup> The ruling has been criticized for not setting out the content and the reach of the right to privacy, to which the right to be forgotten is ascribed, as it may conflict with other rights such as the freedom of expression and access to information.<sup>76</sup> Companies like Google will have to conduct their own balance.<sup>77</sup> The problem of having companies doing their balance are two-fold: first, the content of the rights online will be reconstituted through the business practice of the internet intermediaries, and whether the process is legitimate and appropriate is an open question; second, the exercise of balancing rights can be incorporated into a company's management and risk assessment without actually giving effect to the normative content of the rights.

In brief, in the discussion about human rights on the internet, there is a clear tendency to rely on the managerialist reasoning in international human rights law. While managerialism has been prevalent without invoking the metaphor of translation, translation can exacerbate this tendency by reinforcing the assumption that the offline human rights law is the frame of reference and the approaches developed in the existing human rights regime should be brought to the online. Not only will rights balancing become the sole thinkable solution to the problem of the conflicting rights discourses, the managerial power in balancing rights will be privatized and commercialized, which will undermine the normativity of human rights.

## 4 Processual Advantages and Concerns of Translation

### 4.1 *The Strategic Appeal of Being a Translator*

The previous section demonstrates the problems arising from the metaphor of translation: translation presumes the dichotomy of the source text and the target text which corresponds to the offline-online dichotomy. And I argue that there are many conceptual blocks in the mediation between the online and

75 Case C-131/12 *Google Spain SL and Google Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [Grand Chamber, 13 May 2014], para 81.

76 E.g. Eleni Frantziou, 'Further Developments in the Right to Be Forgotten: The European Court of Justice's Judgment in Case C-131/12, *Google Spain, SL, Google Inc v Agencia Española de Protección de Datos*' (2014) 14 *Human Rights Law Review* 761.

77 'How Google's New "Right To Be Forgotten" Form Works: An Explainer' (*Search Engine Land*, 30 May 2014) <<http://searchengineland.com/google-right-to-be-forgotten-form-192837>> accessed 8 March 2017.

the offline spheres. Furthermore, despite the deconstruction of the value hierarchy in the dichotomy, the offline-online dichotomy is still accompanied by a hierarchy that elevates the pre-existing offline human rights law. This section departs from the substantive questions of translation. Because translating existing human rights law to the internet context is the task assumed by the IRP Dynamic Coalition in the broader internet governance project, this section looks at translation from the perspective of participatory governance. While the development of internet governance is much more complex, the institutional trajectory largely changes from a state-led multilateralism with non-state actors being given passive consultation roles, towards the direction of multi-stakeholderism where non-state actors become full participants.<sup>78</sup> The notions of legitimacy and authority in the multi-stakeholder participation of internet governance, as argued below, have unique meanings. It is necessary to have a closer look at this self-appointed role of translator by the IRP Dynamic Coalition that seeks to bring human rights to the agenda of internet governance.

Apart from creating an intellectual common ground, neutralizing the differences and making the novelty of the internet comprehensible, translation also seems to be useful for advocacy. The strategic appeal of translation and being a translator may come from a common but problematic perception of translation as a process of transparent and semantically equivalent reproduction of the source text. But even dismissing such a view of translation, it is argued that one important distinction between translatorship and authorship is that translators are not required to attest the truth of the source texts.<sup>79</sup> Such a difference of responsibility between the translator and the author shows that the self-appointed translator in human rights advocacy seems to be a role both inspiring and moderate. This is inspiring, because translation has the potential to bring human rights to internet governance and to redefine and humanize the ethos of the internet. However, it is moderate because it does not create new rights.<sup>80</sup> As mentioned earlier with respect to the right to access to the

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78 See the table comparing international regime to global governance, in Michèle Rioux, Nicolas Adam and Biel Company Pérez, 'Competing Institutional Trajectories for Global Regulation – Internet in a Fragmented World' in Roxana Radu, Jean-Marie Chenou and Rolf Weber (eds), *The Evolution of Global Internet Governance: Principles and Policies in the Making* (Springer 2014).

79 Anthony Pym, 'The Translator as Non-Author, and I Am Sorry about That' in Claudia Buffagni, Beatrice Garzelli and Serenella Zanotti (eds), *The Translator as Author: Perspectives on Literary Translation: Proceedings of the International Conference, Università per Stranieri of Siena, 28–29 May 2009* (LIT Verlag 2011). 35.

80 Avoiding the claim of creating new rights seems a common strategy in human rights advocacy. See also Mégret (n 30).

internet, the IRP Charter is claimed not to create new rights. The member of the IRP Dynamic Coalition admitted the tactical reason for 'saying that everything in the charter derives from Human Rights standards contained in the UDHR':<sup>81</sup> firstly, creating new rights could jeopardize the standing and sustainability of the IRP Charter in the international human rights community; secondly, in order to be taken seriously to work within the existing international human rights institutions, the IRP Charter has to be anchored in the existing international human rights law.<sup>82</sup> It is therefore an interesting case of the civil society group drawing on argumentative forces from a pre-existing legal regime. And the question mentioned in Section 3.1, whether the so-called translation of human rights is colonization of the cyberspace in the name of human rights, indeed bears certain relevance.

Furthermore, the role of translator is moderate because it is not even an interpretation of human rights treaties which were created out of tense negotiations between states. As closely connected linguistic disciplines, translation and interpretation are often used together or interchangeably. But in the legal contexts, interpretation has special meanings and purposes other than facilitating cross-lingual communication. Typically, the interpretation of international treaties, including human rights treaties, follows the rules in the Vienna Convention on the Law of Treaties. This is different from translation, as the parties in need of interpretation would already have the treaty in their own languages but still dispute its substance. Interpretation therefore needs to be done by authoritative institutions entrusted by states to clarify and determine the substance of treaties and to resolve disputes. By choosing translation instead of interpretation, the IRP Dynamic Coalition does not assume the same authority and legitimacy required by rules of treaty interpretation.

In the context of internet governance where multi-stakeholderism is professed as the norm, the authority and legitimacy of the self-claimed translatorship are not to be understood in the same way as those of treaty bodies or international tribunals interpreting human rights treaties. States' recognition is important to the promotion of human rights in the cyberspace, but is not the sole source of legitimacy of the work of the IRP Dynamic Coalition. The way that the Dynamic Coalition achieves its authority and legitimacy is more Habermasian: it is by engaging in discussion and coordination with various actors in the multi-stakeholder participatory process of internet governance. The IRP Dynamic Coalition understands the decentralized and bottom-up characteristics of legitimacy well, as they set their direct objective after having their initial draft of the Charter, not to seek states' recognition, but first to obtain

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81 Franklin (n 19) 160.

82 Ibid 232.

endorsement from the ‘epistemic community’<sup>83</sup> of the international human rights lawyers: ‘to keep the project serious in the eyes of the larger international human rights community’.<sup>84</sup> So the earlier question whether the translation is colonization of the cyberspace in the name of human rights can be addressed here by rethinking about the decentralized and communicative characteristics of the translator’s authority: translation will be the starting point of a collective project of humanizing the internet, rather than a blunt imposition of the state-based human rights law in the offline on the cyberspace.

#### 4.2 *Accountability of Being a Translator*

The claim that no new rights are created and everything comes from the existing human rights law is not unique of the IRP Charter and the IRP Dynamic Coalition. Other initiatives make similar claims without invoking the metaphor of translation. An interesting comparison can be made with the Recommendation on a Guide for Human Rights of Internet Users (CoE Guide), adopted in 2014 by the Council of Europe’s Committee of Ministers. The CoE Guide was prepared by the Committee of Experts on Rights of Internet Users (MSI-DUI) which worked in cooperation with the Dynamic Coalition on Internet Rights and Principles, and took the IRP Charter as its starting point.<sup>85</sup> The CoE Guide is created as a toolbox to empower internet users to exercise their rights and freedoms on the internet by informing them about the human rights online and other available remedies. It states clearly that it ‘does not establish new human rights and fundamental freedoms. It builds on existing human rights standards and enforcement mechanisms’.<sup>86</sup> And its understanding of the right to access to the internet is also similar to the IRP Charter which considers it as deriving from the freedom of opinion and expression.

Due to its task of providing internet users with a usable human rights law toolbox, the CoE Guide seems to be truer than the IRP Charter to the claim of not creating new rights. The lack of recourse to the metaphor of translation

83 Jean d’Aspremont, *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation* (Elgar 2015) 16.

84 Franklin (n 19) 160.

85 Nanette Levinson and Meryem Marzouki, ‘Internet Governance Institutionalization: Process and Trajectories’ in Michèle Rioux and Kim Fontaine-Skronski (eds), *Global Governance Facing Structural Changes: New Instructional Trajectories for Digital and Transnational Capitalism* (Palgrave Macmillan 2015) 22.

86 Steering Committee on Media and Information Society, Council of Europe, ‘Recommendation CM/Rec (2014) 6 of the Committee of Ministers to Member States on a Guide to Human Rights for Internet Users – Explanatory Memorandum’ (Council of Europe 2014) CM/Rec (2014) 6 <[https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c6f85#P118\\_25200](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c6f85#P118_25200)> accessed 26 October 2016.



in the Guide can be explained by the fact that the toolbox is a compilation of *lex lata*: the ECHR, the jurisprudence of the ECtHR, and other relevant legally-binding instruments of the Council of Europe. The Guide seems to suggest that although the novelty of the internet has created human rights problems, the law we have now is not ontologically deficient to address these problems.

Compared with the MSI-DUI who compiled the CoE Guide, translators bear important but different responsibilities, despite the perceived moderateness of being a translator. The responsibilities are real even for a self-appointed translator, since the translator seeks to reframe internet governance by bringing human rights language through the multi-stakeholder participatory process. Implicit in the decision to translate human rights to the internet context is a normative assessment that the offline human rights law has conceptual difficulties when applied online, which differs from the approach of the CoE Guide. These difficulties were demonstrated in the previous section (if we preserve the dichotomy between the online and the offline), and are dealt with by techniques like domestication or foreignization.

But in the process of translation, there are both significant losses during the reformulation and reconstruction, which forces us to question the appropriateness of calling the IRP Charter a work of translation even in a loosely metaphorical sense. This adds another layer of normative implications to the translator's decision-making. As with any normative decision, the decision to translate and the choice made during the translation need to be accountable. The accountability cannot be assumed simply by paying tribute to the source text, the UDHR and other human rights law instruments. Considering the role of the IRP Dynamic Coalition and its mandate, its accountability should be understood as a mixture of the accountability of civil society groups in global internet governance and the accountability of the translator. The translator, therefore, is engaged in a purposeful activity.<sup>87</sup> Essential questions about accountability of the purposeful translator needs to be thought about. Who forms the body of translators and where does the translators' authority come from? For whom is the translation produced and to whom should the translator be faithful? How does the decision-making of the translator achieve the purpose of the translation?

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87 The Skopos theory of translation may be relevant here, according to which the target-side purpose (Skopos) is the dominant factor in translation, and a translator should work to achieve the Skopos, see Anthony Pym, *Exploring Translation Theories* (Routledge 2014) 43–45.

The body of translators, in the case of the IRP Dynamic Coalition, comprises mainly academics in the field of international law, human rights, social science, media policymaking etc. Their authority and legitimacy, as argued earlier, are not from the recognition of states, but gained through the communication and coordination with various actors in the multi-stakeholder process of internet governance. However, multi-stakeholderism also appears to create a problem for translation: the readership of the translation is more loosely targeted since the translator seeks to broker communication with different audiences. As a charter for human rights on the internet, individuals indeed are the ultimate addressees of the IRP Charter. But unlike the CoE Guide, which was made to directly benefit the individual internet users,<sup>88</sup> the IRP Coalition and the Charter have also indirectly influenced various events at the level of international organizations such as the UN and the Council of Europe since the birth of the IRP Charter 1.1 in 2009.

The IRP Charter has now been translated into more than 25 languages, which shows that the Coalition aims to raise awareness and mobilize collaboration with various social groups and political communities. The diffused readership of the Charter may pose questions regarding the self-coherence of the purpose of the translation: whether translating the existing human rights legal regime should keep intact, or strengthen, or even restructure the state-centric system of existing international human rights law, or whether it should instead promote the role of internet intermediaries in the process of norm- and policy making, or whether it should enhance the role of the human rights community to oversee the practice of both states and companies. There is difficulty in defining the mission and identity of such a civil society group, but the potential conflict of purposes of the translation would also create problems to the substantive work of translation, for instance, whether to choose the technique of domestication or foreignization discussed in the previous section.

## 5 Conclusions

Admittedly, the IRP Dynamic Coalition claims translation in a metaphorical sense, and there may be doubts to what extent the metaphor of translation should be taken seriously. Linguists have told us that we all live by metaphors

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88 It directly addresses the individual: 'This guide is a tool for you, the Internet user, to learn about your human rights online, their possible limitations, and available remedies for such limitation'. See also Steering Committee on Media and Information Society (n 86).

which shape our understanding and action without catching our attention<sup>89</sup> and that a metaphorical description may be transformed into a literal description through repeated usage of the metaphor.<sup>90</sup> Instead of taking for granted the appropriateness of the metaphor of translation, it is important to firstly understand what the metaphor will bring to us. In this paper, I have tried to demonstrate that the metaphor of translation provides a unique perspective to engage with human rights in the digital age and more generally to conceive the relation between law and technology. Invoking the metaphor of translation is to recognize the distinctiveness of the online, and in the meantime to assert that the distinctiveness is translatable and comprehensible. It ultimately aims to achieve the protection and realization of human rights online as much as it does offline.

However, as I have argued, the logic of translation also shapes the way we approach human rights in the digital era: to divide the online from the offline, instead of integrating the two as an augmented reality. The division creates difficulties to the exercise of translation itself in terms of how to deal with the distinctiveness of subject matter that is difficult to translate or even untranslatable. More importantly, the division is disconnected from peoples' real daily experience and fragments the human rights subject into the online as well as the offline. The translation metaphor also reinforces the ubiquitous managerialism in human rights discourse. While there might be strategic reasons for avoiding new approaches to conceiving human rights, entrenching the dominant managerialist discourse of human rights may ultimately reduce the strength of human rights norms.

Being aware of these problems of using the metaphor of translation is necessary for the IRP Dynamic Coalition who has appointed itself as a translator. The work of the IRP Dynamic Coalition is done in a bottom-up and policy-hacking way to get the human rights protection and the internet policy making into one another's agenda, which may be facilitated strategically by the approach of translation. But as I have argued, the role of the translator is actually more than moderate because the translator is engaged in important normative decision-making and has to be accountable for the decision. The metaphor of translation should therefore be taken seriously.

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89 George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press 2003).

90 Boaventura de Sosa Santos, 'Law: A Map of Misreading – Toward a Postmodern Conception of Law' (1987) 14 *Journal of Law and Society* 279, 286.