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**Meta's Oversight Board and Transnational Hybrid Adjudication
– What Consequences for International Law ?**

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Meta’s Oversight Board and Transnational Hybrid Adjudication – What Consequences for International Law ?

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Abstract:

Meta, formerly the Facebook Company, faces immense pressure from users, governments and civil society to act transparently and with accountability. Responding to such calls, in 2018, it announced plans to create an independent oversight body to review content decisions. Such a forum is now in place in the form of the Oversight Board. To Meta’s credit, the speed at which the Oversight Board has been established is remarkable. Within two years, a global consultation process was completed with input obtained from users as well as experts, the regulatory infrastructure for the Oversight Board built, its members selected, and the first decisions of the Board already rendered in January 2021. No expense has been spared. Facebook has created a trust worth 130 million US dollars to fund the Oversight Board. With its institutional structure in place, and plenty of resources to tap into, the Oversight Board could have a real impact on how some transnational disputes are resolved. Thus, the Oversight Board may very well be setting the direction for how tech companies in particular, and multinational corporations in general, go about providing grievance mechanisms to individuals who their actions adversely impact. Through a study of the Oversight Board, this paper considers whether we are witnessing the birth of a special type of ‘transnational hybrid adjudication’. The paper first clarifies what is meant by the phrase ‘transnational hybrid adjudication’. And then using the example of the Oversight Board, it considers whether the Oversight Board can properly be characterised as a transnational adjudicative body that joins the myriad of other international dispute resolution mechanisms that exist today. Giving an affirmative answer to that question, the paper finally discusses whether the Oversight Board is a new type of adjudicative mechanism that could have a systemic impact on international law, or an experiment with limited relevance.

¹ Fellow at the Berlin Potsdam Research Group “International Rule of Law – Rise or Decline?”.

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1. Introduction

Meta, formerly the Facebook Company,² is a private enterprise that has been worth more than 1 trillion US dollars.³ Meta's Facebook App ('Facebook') is the world's dominant social media platform which has more than 2.8 billion global users.⁴ Facebook is the public square where people around the world exchange ideas. And in many countries, Facebook constitutes the principal source of news and information.⁵ Meta, through its applications, exercises extraordinary power over individuals in the digital world. It is the most powerful arbiter of online speech,⁶ with such power not always being exercised conscientiously. As has been well reported, accusations of differential treatment favouring the rich and famous,⁷ indifference to harm caused to young adults,⁸ and its role in spreading and amplifying fake news,⁹ are just some prominent scandals Meta has been confronted with. Tellingly, the award of the 2021 Nobel Peace Prize to journalist Maria Ressa shown a light on Facebook's failings, with Ressa saying that Facebook's algorithms 'prioritise the spread of lies laced with anger and hate over facts.'¹⁰

It is hardly surprising that Meta faces immense pressure from users, governments and civil society to act transparently and with accountability. Responding to such calls, in 2018, it announced plans to create an independent oversight body to review content decisions.¹¹ Such a forum is now in place in the form of the Oversight Board.¹² Explaining the need for the Oversight Board, Meta states that the 'Oversight Board was created to help Facebook answer some of the most difficult questions around freedom of expression online: what to take down, what to leave up and why'.¹³ This is a far cry from the infrastructure present at Facebook in its early days where content moderation was done

² On 28 October 2021, it was announced that the Facebook Company is changing its name to Meta: see, <https://about.fb.com/news/2021/10/founders-letter/>; in this paper, Meta refers to the company, and Facebook and Instagram refer to the product and policies attached to the specific apps.

³ See <https://companiesmarketcap.com/facebook/marketcap/>; <https://www.zdnet.com/article/meta-lost-over-a-quarter-of-its-value-in-a-single-day/>, last access 6 February 2022.

⁴ See, <https://www.statista.com/statistics/346167/facebook-global-dau/> (last access 20 August 2021); although, Facebook's user-base recently witness a slight decline, see, <https://www.theguardian.com/commentisfree/2022/feb/06/first-time-history-facebook-decline-has-tech-giant-begun-crumble>, last access 6 February 2022; Meta operates several apps. In addition to Facebook, it owns Instagram, WhatsApp, etc: see, <https://www.investopedia.com/articles/personal-finance/051815/top-11-companies-owned-facebook.asp>.

⁵ Oversight Board, Case decision 2021-014-FB-UA, section 3;; and also see, <https://www.washingtonpost.com/opinions/2021/10/09/maria-ressa-nobel-prize-indictment-of-facebook/>.

⁶ Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, Vol 129 No 2, Yale Law Journal (2020) 2421-2499 at 2422.

⁷ As the Wall Street Journal reported in 2021, through a program known as XCheck, Meta has built a system that has exempted millions of 'high-profile users from some or all of its rules', see <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353>.

⁸ See <https://www.reuters.com/technology/facebook-research-shows-company-knew-instagram-harm-teens-senators-say-2021-09-30/>.

⁹ See <https://www.washingtonpost.com/technology/2021/09/03/facebook-misinformation-nyu-study/>.

¹⁰ See <https://www.washingtonpost.com/opinions/2021/10/09/maria-ressa-nobel-prize-indictment-of-facebook/>; <https://www.reuters.com/world/philippine-nobel-winner-ressa-calls-facebook-biased-against-facts-2021-10-09/>.

¹¹ Mark Zuckerberg, A Blueprint for Content Governance and Enforcement (2018), available at https://www.facebook.com/notes/751449002072082/?hc_location=ufi, (last access 20 August 2021).

¹² See, <https://oversightboard.com/> (last access 20 August 2021).

¹³ *Ibid.*

according to a general platform ethos of ‘if it makes you feel bad in your gut, then go ahead and take it down.’¹⁴

To Meta’s credit, the speed at which the Oversight Board has been established is remarkable. Within two years, a global consultation process was completed with input obtained from users as well as experts, the regulatory infrastructure for the Oversight Board built, its members selected, and the first decisions of the Board already rendered in January 2021.¹⁵ No expense has been spared. Facebook has created a trust worth 130 million US dollars to fund the Oversight Board.¹⁶ With its institutional structure in place, and plenty of resources to tap into, the Oversight Board could have a real impact on how some transnational disputes are resolved. Thus, the Oversight Board may very well be setting the direction for how tech companies in particular, and multinational corporations in general, go about providing grievance mechanisms to individuals who their actions adversely impact.

Through a case study of the Oversight Board, this paper considers whether we are witnessing the birth of a special type of ‘transnational hybrid adjudication’. The paper commences by clarifying what is meant by the phrase ‘transnational hybrid adjudication’ (2). Using the example of the Oversight Board, I consider whether it can properly be characterised as a transnational adjudicative body that joins the myriad of other international dispute resolution mechanisms that exist today (3). Giving an affirmative answer to that question, it is finally considered whether the Oversight Board is a new type of adjudicative mechanism that could have a systemic impact on international law, or an experiment with limited relevance (4).

2. Transnational hybrid adjudication

Clarifying at the outset what is meant by the phrase ‘transnational hybrid adjudication’ is important for it is the lens through which the Oversight Board is assessed. Focusing on the word ‘adjudicative’ in ‘transnational hybrid adjudication’ first, broadly speaking, adjudication presently refers to a court or tribunal, arbitral mechanism, or any other dispute resolution mechanism (‘DRM’) comprising of an independent and impartial decision-maker empowered to determine legal disputes based on articulated standards in a final and binding way.¹⁷

Second, ‘the term transnational’, when used in a legal sense, refers to the process of all manner and form of cross-border ‘interactions between multiple actors, norms and institutions that characterizes much of contemporary legal practice.’¹⁸ As Zumbansen puts it, ‘[u]sually, “transnational” is taken to describe, quite literally, that which crosses as well as bridges national borders.’¹⁹ In this context, the blunt binary between international and national law does not capture the legal reality with the necessary nuance. As early as 1956, Jessup had famously coined the term ‘transnational law’ to include ‘all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard

¹⁴ Klonick, n 6.

¹⁵ The decisions of the Oversight Board are available at <https://oversightboard.com/decision/>.

¹⁶ See further section 3 below.

¹⁷ Gary Born, *A New Generation of International Adjudication*, Vol 61 No 4 Duke Law Journal (2012) 781.

¹⁸ See Antoine Duval, *What Lex Sportiva Tells You About Transnational Law in Peer Zumbansen* (ed), *The many lives of transnational law. Critical engagements with Jessup’s bold proposal* (CUP, 2020) 270.

¹⁹ Peer Zumbansen, *Transnational Law: Theories and Applications in Peer Zumbansen* (ed) *Oxford Handbook of Transnational Law* (OUP, 2021) 11-12.

categories'.²⁰ More recently, commenting on his work on 'transnational legal process', Harold Koh explained:

Transnational legal process describes the theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.²¹

Transnational adjudication thus occurs whenever a neutral third party determines any legal dispute that transcends national frontiers (see further 3 b below). Obviously, this is a broad concept including within its purview the work of a large number of DRMs found in distinct legal orders. First, taking a broad view, the international legal order consists of adjudicative mechanisms such as the International Court of Justice, International Criminal Court (ICC), the International Tribunal for the Law of the Sea, the Appellate Body of the World Trade Organisation, regional human rights courts, and courts of regional integration.²² Of course, the particularities as to their personal, territorial and subject matter jurisdiction, as well as institutional design differ considerably. The universe of international dispute resolution at the international level is fragmented with more than 40 adjudicative mechanisms now in existence resolving various types of transnational disputes, including inter-state disputes, human rights claims, and the prosecution of individuals alleged to have committed international crimes.²³

Second, private modes of dispute resolution, principally international arbitration, have constituted the forum of choice in resolving transnational disputes in certain subject matters. For example, disputes in the sphere of international investment law, international commercial law, and sport, are generally subjected to investment, commercial and sports arbitration respectively.²⁴ International arbitration is now heavily institutionalised and judicialised, forming a crucial part of the landscape created to resolve transnational disputes.²⁵ Third, national courts increasingly adjudicate

²⁰ Philip Jessup, *Transnational Law* (Yale University Press, 1956) 2.

²¹ Harold Hongju Koh, *Transnational Legal Process*, 75 *Nebraska Law Review* (1996) 183.

²² The Appellate Body of the WTO is dysfunctional at the date of writing: see generally, Rishi Gulati, *Judicial Independence at International Courts and Tribunals: Lessons Drawn from the Experiences of the International Court of Justice and the Appellate Body of the World Trade Organisation* in Eric de Brabandere (ed), *International Procedure in Interstate Litigation and Arbitration: A Comparative Approach* (CUP, 2021) 51-88.

²³ As Alter notes, prior to the end of the cold war in 1989, there were only six permanent international courts, but now well in excess of twenty international courts and tribunals exist: Karen J. Alter, *The Multiplication of International Courts and Tribunals After the End of the Cold War* in Cesare P. R. Romano et al (eds), *The Oxford Handbook of International Adjudication* (2013) 64; if all types of international courts and tribunals created through international agreements are counted, the list would be significantly longer with more than 20 international administrative tribunals having being created by international organisations to provide their employees access to justice: see generally, Rishi Gulati, *An International Administrative Procedural Law of Fair Trial: Reality or Rhetoric?*, 21 *Max Planck Yearbook of United Nations Law* (2018) 210-270.

²⁴ See generally, Born, n 17; Duval, n 18; international investment arbitration has come under sustained criticism from several quarters and some states are suggesting the creation of a permanent Multilateral Investment Court. For a short analysis, see: Rishi Gulati and Nikos Lavranos, *Guaranteeing the independence of the judges of the Multilateral Investment Court: A must for building the court's credibility*, *Columbia FDI Perspectives* (2019).

²⁵ See Alec Stone, *Sweet and Florian Grisel, The Evolution of International Arbitration: Judicialization, Governance, Legitimacy* (OUP 2017), 49.

transnational disputes and help advance the international rule of law.²⁶ The role of national courts in resolving such disputes goes far beyond typical cross-border civil and commercial disputes between private parties which national courts have decided for centuries using private international law techniques.²⁷ The narrowing of the rules on state and international organisations immunities over the previous decades,²⁸ reduced relevance of the concept of non-justiciability,²⁹ the explosion of litigation before national courts concerning human rights, climate change and environmental law,³⁰ international criminal law,³¹ etc, has meant that more and more, domestic courts adjudicate highly contentious transnational disputes as well.

What is more, while the various forms of transnational adjudication are well-observed, what is increasingly of interest to legal scholars is transnational adjudication being *hybridised*. Hybridisation describes the phenomenon of institutional and normative churn presently occurring in transnational adjudication. The concept of hybridisation goes beyond mere interaction between legal orders, institutions and norms,³² but concerns the outcome of this ongoing interaction, potentially leading to the creation of 'hybrid legal spaces'.³³ As a result, we now have DRMs applying hybrid law which cannot be characterised as merely international or domestic, public or private law. Rather, it is a body of law which is composed of legal elements that relate to each of these categories.

²⁶ See generally, Andre Nollkaemper, *National Courts and the International Rule of Law* (OUP, 2011); for a discussion of national court decisions in virtually all branches of international law, see Andre Nollkaemper *et al*, *International Law in Domestic Courts: A Casebook* (OUP, 2018).

²⁷ The three pillars of private international law, namely, jurisdiction, applicable law, and recognition and enforcement of foreign judgments, are increasingly attracting global agreement, seeking to streamline transnational adjudication at the national level: see generally, Rishi Gulati, Thomas John and Ben Kohler (eds), *Elgar Companion on the Hague Conference on Private International Law* (Edward Elgar, 2020).

²⁸ For the leading work on the evolution of the law of state immunities, and a discussion of the move from the absolute to the restrictive doctrine, see H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP 2015), 25-72; R Van Alebeek, *Immunity of States and Their Officials in International Criminal Law and International Human Rights Law* (OUP 2008) 11-102; Article 10(1) United Nations Convention on Jurisdictional Immunities of States and Their Property (opened for signature 2 December 2004, not yet in force) UNGA Res 59/38; for a discussion on the immunities of international organisations, see Rishi Gulati, *Access to Justice and International Organisations: Coordinating Jurisdiction between the National and Institutional Legal Orders* (CUP, 2022) 131-167.

²⁹ See *Belhaj and another v Straw and others* [2017] UKSC 3, [2017] 2 WLR 456 and *Rahmatullah (No 1) v Ministry of Defence and another* [2017] UKSC 1, [2017] UKSC 3, para 41; also see, C McLachlan, *Foreign Relations Law* (CUP 2014), 5 (at section 1.05).

³⁰ See for example, jurisprudence discussed in International Bar Association, Model Statute for Proceedings Challenging Government Failure to Act on Climate Change, *An International Bar Association Climate Change Justice and Human Rights Task Force Report* (February 2020) 3.

³¹ The very structure of modern international criminal law is based on complementarity: see UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 17.

³² The term 'hybrid' has sometimes been used to refer to hybrid, internationalized or mixed criminal tribunals which are 'half national, half international in nature'. This can be discerned from the way they were established (e.g. agreement between the host state and the UN), their subject matter-jurisdiction (both international crimes and national crimes) and their staff (both local judges/prosecutors and international staff). Tribunals which are in this category are the Special Panels and Serious Crimes Unit in East-Timor; Regulation 64 Panels in the Courts of Kosovo; Special Court for Sierra Leone; Extraordinary Chambers in the Courts of Cambodia; Special Tribunal for Lebanon; Extraordinary African Chambers and the recently established Kosovo Specialist Chambers and Specialist Prosecutor's Office: <https://www.asser.nl/nexus/international-criminal-law/the-history-of-icl/hybrid-courts/> last access 20 August 2021; this paper goes beyond models of hybridisation that are nothing more than coming together of national and international state-based structures into one entity.

³³ Paul Schiff Berman, *Understanding Global Legal Pluralism: From Local to Global, from Descriptive to Normative*, in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020), 1-35. On hybridisation, see Mireille Delmas-Marty, *Ordering Pluralism - A Conceptual Framework for Understanding the Transnational Legal World* (Hart, 2009) 59-76; Dana Burchardt, *Intertwinement of legal spaces in the transnational legal sphere*, 30 *Leiden Journal of International Law* (2017), 305-326.

Thus, transnational hybrid adjudication occurs whenever an independent and impartial DRM adjudicates a legal claim that cross-cuts state boundaries in a final and binding way, applying a hybrid body of law. There are three key features in transnational hybrid adjudication:

- The presence of an independent and impartial adjudicative mechanism that takes binding decisions;
- The dispute adjudicated must transcend national frontiers. In other words, it must contain a cross-border element; and
- The law applied to resolve the dispute must be of a hybrid nature.

In varying degrees, transnational hybrid adjudication has been occurring for some time, whether or not this is expressly acknowledged. Examples include international sports arbitration by the Court of Arbitration for Sports which applies a hybrid body of Swiss law, human rights law and EU law³⁴ and dispute resolution at international commercial courts which is based on the hybrid set of rules termed *lex mercatoria*.³⁵ In this paper, I argue that we are witnessing an intensification of such forms of adjudication. Using the Oversight Board as an example, I show how private actors drive transnational hybrid adjudication globally. This movement has the potential to create new types of DRMs that may have a systemic impact on how transnational disputes are resolved in particular, and on international law in general.

3. The Oversight Board: a novel experiment in transnational hybrid adjudication

The creation of the Oversight Board is one of the most innovative developments in transnational adjudication in recent times. It is the first significant DRM set up by a private actor to enhance its accountability and act more transparently.³⁶ Of most interest is the Oversight Board's role in providing users impacted by Facebook's content moderation decisions some form of access to justice. Highlighting that it is engaged in transnational hybrid adjudication, in this section, I identify the key characteristics of the Oversight Board which acts as an appellate review mechanism for user content at Facebook and Instagram. In particular, it is an adjudicative mechanism that can make binding decisions and sits outside of Meta's company structure to facilitate its independence (3. a). Further, the Oversight Board resolves disputes having a cross-border element (3. b). Finally, the law applied is of a hybrid nature (3. c).

a) The Oversight Board: an adjudicative mechanism mandated to act independently

For the Oversight Board to constitute a true adjudicative mechanism, it should be able to make binding determinations, both on questions of jurisdiction and the merits (3 aa).³⁷ As is discussed below, the Oversight Board possesses competence-competence, that is, the jurisdiction to

³⁴ Antoine Duval, *Transnational Sports Law: The Living Lex Sportiva* in Peer Zumbansen (ed) Oxford Handbook of Transnational Law (OUP, 2021) 511-512.

³⁵ On this body of law Galf-Peter Calliess, *Lex Mercatoria*, in Encyclopedia of Private International Law (J. Basedow et al., eds.) 1120-1129 (2017).

³⁶ Other private entities have also started to create mechanisms to help strengthen efforts to ensure respect for human rights although they do not constitute formal grievance mechanisms for victims yet: see for example, the creation of the FIFA Human Rights Advisory Board in 2017: <https://old.business-humanrights.org/en/fifa-human-rights-advisory-board>.

³⁷ The criteria relevant to assess a court's independence are discussed in Gulati, n 22; for a detailed account, see Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP, 2021) 66-151.

conclusively determine questions about its own jurisdiction.³⁸ And the Oversight Board's decisions on the merits are binding on Meta. This demonstrates that the Oversight Board can be classified as a true adjudicative mechanism. The discussion then shows the considerable innovation in ensuring the Oversight Board's independence (3 bb).

aa) Power to make binding determinations on jurisdiction and merits

First, on matters of jurisdiction, it is worth emphasising that as of now, the personal jurisdiction of the Oversight Board is truly vast, however, its subject matter jurisdiction is narrow. The Oversight Board's constituent arrangements allow Facebook and Instagram users to challenge content decisions on individual posts.³⁹ Meta can also self-refer content decisions going beyond individual pieces of content,⁴⁰ including on de-platforming a user, as it did when referring the decision to exile Donald Trump from Facebook (see 3 c below). While the Oversight Board is potentially available to billions of users, the subject matter it can rule on is fairly limited at this stage. Within the sphere of that jurisdictional scheme though, the Oversight Board's competence to determine its own competence should not be doubted. It has already demonstrated its willingness to make robust jurisdictional determinations. For example, in a case where its automated systems wrongly removed an Instagram post showing women's nipples in the context of breast cancer awareness, Facebook argued that the Oversight Board lacked authority because no dispute existed once the post was restored after Facebook realised its error.⁴¹ Upholding its power to adjudicate, the Oversight Board said:

The panel has the power to review Facebook's decision under Article 2 (Authority to Review) of the Oversight Board's Articles of Association and may confirm or revoke this decision under Article 3, Section 5 (Review Procedure: Resolution) of the Articles of Association. Facebook has neither presented reasons for excluding the content in accordance with Article 2, Section 1.2.1 (Content Not Available for Board Review, dt. : content that is not available for review by the board) of the rules of procedure of the Oversight Board, nor has Facebook stated that it does not consider the case to be qualified in accordance with Article 2, Section 1.2.2 (Legal Obligations) of the Rules of Procedure.⁴²

The Oversight Board has shown that it is not hesitant to exercise authority where doing so is consistent with its constituent arrangements. Within its jurisdictional scheme, the Oversight Board makes final and binding decisions as to its own competence. Second, on the question relating to the bindingness of the Oversight Board's decisions on the merits, as has been said, Meta has endowed it with the power to make binding verdicts on moderation decisions concerning individual pieces of content. When the Oversight Board instructs that a given post should be reinstated or removed, Meta has committed to implement the decision within seven days unless doing so could violate national

³⁸ See *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (1995) Case No IT-94-1-AR72; 35 ILM (1996).

³⁹ Aggrieved Facebook or Instagram users can appeal to the Oversight Board to either reinstate a piece of content that either platform took down (Article 2.1, Oversight Board Charter ('Charter'); and Oversight Board Bylaws ('Bylaws'), Article 3, section 1.1.1), and as of 13 April 2021, appeal to remove a piece of content that the platform allowed to remain posted: see, <https://www.oversightboard.com/news/267806285017646-the-oversight-board-is-accepting-user-appeals-to-remove-content-from-facebook-and-instagram/>, last access 20 August 2021.

⁴⁰ Article 2.1, Charter; Article 2, section 2.1, Bylaws.

⁴¹ See Oversight Board, Case decision 2020-004-IG-UA.

⁴² Oversight Board, Case decision 2020-004-IG-UA, section 3.

law.⁴³ A significant carve out from enforcement of Oversight Board decisions therefore exists. While this could limit the practical value of an Oversight Board decision, ultimately, Meta is a private company and must comply with the laws of the countries where it provides its services. So, it cannot be entirely blamed for including such a carve out. Interestingly, the Oversight Board also possesses advisory jurisdiction, and can issue non-binding policy recommendations.⁴⁴ While these recommendations are not binding as such, Meta must consider how they may be operationally implemented, and respond publicly and transparently to such guidance.⁴⁵ In sum, as the Oversight Board's decisions are of a binding quality, it does constitute a true adjudicative mechanism. So far, there do not appear to be compliance shortfalls with the decisions of the Oversight Board. This consolidates the Oversight Board's status as the adjudicative mechanism intended to be the final arbiter on content moderation decisions at Meta.

bb) Independence

Independence and impartiality are the cornerstone of any DRM's legitimacy and credibility. While judicial independence demands that judges make their decisions free from any external pressures (external independence), impartiality requires that judges are not objectively or subjectively biased in their decision-making in a particular case (internal independence).⁴⁶ For a DRM to be considered independent in general, it must enjoy institutional independence, and judges, whatever they might be called, must be personally independent.⁴⁷ And for impartiality to be secured, judges must avoid conflicts of interest where objective or subjective bias is manifest.⁴⁸ These are the very basic standards of independence expected of a modern DRM. A perusal of the Oversight Board's constituent arrangements indicate that much effort has been made to ensure its independent functioning.

First, as to institutional independence, a DRM must possess both administrative and financial autonomy.⁴⁹ Concerning the Oversight Board, such independence must be vis-à-vis Meta, who has created it. Had the Oversight Board been placed within Meta's company structure, its independence would have been highly suspect. However, in a novel and creative solution, private law instruments have been adopted to create a separation between Meta and the Oversight Board. Creating and irrevocably granting assets initially amounting to USD 130 million to a non-charitable purpose trust under the laws of the state of Delaware (Oversight Board Trust), Meta has ceded a portion of its authority to the Oversight Board to review its content moderation decisions.⁵⁰ The purpose of the Oversight Board Trust is set out in clause 2.1 of the agreement creating it, which states:

⁴³ Article 4, Charter; Article 2, sections 1.2.2, 2, 2.2.3 and 2.3.1, Bylaws.

⁴⁴ Article 3.7.3, Charter; Article 2, section 2.1.3, Bylaws.

⁴⁵ Article 4, Charter; Article 2, section 2.3 Bylaws.

⁴⁶ CJEU Opinion 1/17, Full Court, (30 April 2019), paras. 202-203; also see, Clooney and Webb, n 36.

⁴⁷ See Gulati, n 22, 56.

⁴⁸ For a discussion on impartiality at international courts and tribunals, see, C. Giorgetti, *The Challenge and Recusal of Judges of the International Court of Justice*, (2015), 3; and G.J. Spak and R. Kendler, *Selection and Recusal in the WTO Dispute Settlement System* in C. Giorgetti (ed) *Challenges and Recusals of Judges and Arbitrators in International Courts and Tribunals* (2015), 164.

⁴⁹ Gulati, n 22, 56-58.

⁵⁰ See clause 2.2, Oversight Board Trust; Article 4, Bylaws; Klonick, n 4; for an understanding of this trust arrangement, see, Vincent C. Thomas et al, *Independence With a Purpose: Facebook's Creative Use of Delaware's Purpose Trust Statute to Establish Independent Oversight*, <https://businesslawtoday.org/2019/12/>

“The purpose of the Trust...is to facilitate the creation, funding, management, and oversight of a structure that will permit and protect the operation of an Oversight Board (the "Oversight Board" or "Board"), the purpose of which is to protect free expression by making principled, independent decisions about important pieces of content and by issuing policy advisory opinions on Facebook's content policies. The Board will operate transparently and its reasoning will be explained clearly to the public, while respecting the privacy and confidentiality of the people who use Facebook, Inc.'s services, including Instagram.”

The trustees of the Oversight Board Trust, comprising of one corporate trustee and several individual trustees, are required to help fulfil its purposes.⁵¹ To this end, the trustees have formed a Delaware limited liability company (LLC). The LLC allows the trustees to administer the Oversight Board through a distinct corporate entity that they manage independently of Meta.⁵² In particular, the LLC has entered into a service agreement to provide content review services to Meta.⁵³ These content review services are ultimately performed by the Oversight Board which comprises of a diverse group of members. Oversight Board members are retained pursuant to contracts between the LLC and each board member.⁵⁴ Thus, a legal separation between Meta/Facebook and the Oversight Board is immediately apparent.⁵⁵

Moreover, the management structure employed at the LLC also enhances the Oversight Board's institutional independence. The LLC is managed by individual managers (the individual trustees of the Oversight Board Trust) who direct the day-to-day financial and administrative operations of the Oversight Board.⁵⁶ The individual managers deal with matters such as the appointment and removal of Oversight Board members, their compensation, and employment of staff to support the Oversight Board (including the Director of the Oversight Board).⁵⁷ With Meta/Facebook not involved in day-to-day administration and financial operations, '[a]t least in regard to administrative matters and operation, the Board and Trust largely self-govern' and are independent.⁵⁸

Second, to maximise the personal independence of Oversight Board members, it is necessary to ensure that their selection is based on merit and is undertaken transparently.⁵⁹ Security of tenure also facilitates personal independence. In general, non-renewable judicial terms that are relatively lengthy promote individual independence,⁶⁰ judges should only be removed in cases of proven misconduct following a fair process, and financial security for judges reduces the possibility of undue

[independence-purpose-facebooks-creative-use-delawares-purpose-trust-statute-establish-independent-oversight/](#), last access 20 August 2021.

⁵¹ See section 4, Oversight Board Trust.

⁵² See the introduction to the Bylaws and Article 4, Bylaws.

⁵³ Section 5.3, LLC Agreement.

⁵⁴ Section 5.3(a)(i), LLC Agreement.

⁵⁵ The details of the relationship amongst the Oversight Board, Facebook, Oversight Board Trust, and the LLC are set out in Article 5, Charter and Article 4, Bylaws.

⁵⁶ Article 4, section 1.1, Bylaws.

⁵⁷ Article 1, section 2.1 (the LLC must appoint the Director of the Oversight Board who is its head of administration); Article 4, sections 1.1 and 2, Bylaws.

⁵⁸ See Klonick, n 6.

⁵⁹ See Gulati, n 22, 64-65.

⁶⁰ See generally, J.L. Dunoff & M.A. Pollack, *The Judicial Trilemma*, (2017) 111 AJIL 225, at 225-276 (especially at 237-238).

external pressures.⁶¹ The personal/individual independence of Oversight Board members seems relatively weak. Regarding the selection of Members, the Oversight Board plays a key role in the appointment of members.⁶² However, the precise criteria based on which Oversight Board members are to be appointed are somewhat unclear.⁶³

That being said, the ability of users to suggest candidates for membership of the Oversight Board,⁶⁴ and the need for diversity and geographical representation going beyond the conventional categories followed in the United Nations system,⁶⁵ are novel features and constitute positive developments. In practice, initial appointments indicate that a highly competent group of individuals has been selected. The Oversight Board consists of several prominent individuals from all around the world, including a retired US Federal Court of Appeals judge, several law professors, a former Prime Minister of Denmark, a former special rapporteur for freedom of expression to the Inter-American Commission on Human Rights, and a former winner of the Nobel Peace Prize.⁶⁶

It is one thing to appoint meritorious persons as judges, but yet another to ensure their personal independence through security of tenure. Regarding the security of tenure, weaknesses are evident. Members are appointed for a three-year term, which is renewable twice.⁶⁷ Oversight Board members are tantamount to contract judges. Noting that Oversight Board Members seem to receive a six figure salary for approximately 15 hours of work per week,⁶⁸ creating significant financial incentive for renewal, one may question whether such short terms of appointment undermine the Oversight Board's independence, especially as Meta is the respondent in every case before it. Finally, legally speaking, Oversight Board members are hired and fired by the individual members of the LLC. With no detailed process laid down for Member removal, security of tenure is further impacted.⁶⁹

⁶¹ Gulati, n 22, 67-68.

⁶² Article 1, section 1.2.2, Bylaws: although the members are formally appointed by the LLC, it is provided that those 'candidates who receive a majority vote of the board will have their names presented to the trustees for formal appointment'.

⁶³ Some general guidance is provided in the Oversight Board's governing documents. Oversight Board members will range between 11 and 40 and they must exercise their functions independently and impartially (Article 1, Charter). 'Members must not have actual or perceived conflicts of interest that could compromise their independent judgement and decision-making. Members must have demonstrated experience at deliberating thoughtfully and as an open-minded contributor on a team; be skilled at making and explaining decisions based on a set of policies or standards; and have familiarity with matters relating to digital content and governance, including free expression, civic discourse, safety, privacy and technology' (Article 1, Charter).

⁶⁴ Article 1, section 1.2.2, Bylaws: recommendations for candidates can be made by users, Facebook and members of the Oversight Board.

⁶⁵ Article 1, section 1.4.1 of the Bylaws states that at all times the board must include a globally diverse set of members. In particular, this means that board membership should encompass the following regions: United States and Canada; Latin America and the Caribbean; Europe; Sub-Saharan Africa; Middle East and North Africa; Central and South Asia; and Asia Pacific and Oceania.

⁶⁶ The list of Oversight Board members is available at <https://oversightboard.com/meet-the-board/>, last access 20 August 2021.

⁶⁷ Article 1.3, Charter.

⁶⁸ See, <https://www.newyorker.com/tech/annals-of-technology/inside-the-making-of-facebooks-supreme-court>, last access 20 August 2021; the contracts between the LLC and Oversight Board Members do not appear to have been made public.

⁶⁹ Article 1, section 1.2.2 of the Bylaws simply provides that '[r]emovals require a two-thirds vote of the board (not counting the member(s) in question), subject to approval of the trustees (as described in Article 4 "The Trust"); and may be considered only for a violation of the code of conduct'.

Finally, concerning guarantees of impartiality, a Statement of Conduct stating that Oversight Board members must avoid conflicts of interest has been adopted.⁷⁰ Its breach can lead to a member's removal.⁷¹ To an extent, judicial impartiality is guaranteed at the Oversight Board. However, a user cannot raise questions of impartiality because so far, cases have been decided by a panel of five Members anonymously.⁷² This means that a user does not know the identity of the member/s who determined their case. However, one cannot be overly critical of the Oversight Board's design because anonymity can be independence enhancing in certain respects. By not identifying who took a particular decision, the chances of individual member/s suffering retribution are not fully eliminated, but considerably reduced.

Overall, it is the Oversight Board's institutional characteristics that are truly novel. As opposed to a treaty-based DRM set up by states, or a typical arbitral body, the Oversight Board is akin to a permanent adjudicative body created by a private actor. Ensuring its independence from its creator, Meta, demanded out of the box thinking. Significant effort has been made to guarantee the institutional independence of the Oversight Board through the Oversight Board Trust and the LLC. However, structurally, issues with Oversight Board members' independence are evident.

Still, the actions of Oversight Board members, inside and outside of the 'court room', so far appear to be consistent with independent decision-making.⁷³ Initial indications are that the Oversight Board is not hesitant to regularly rule against Meta.⁷⁴ By the end of its first full year of operation in 2021, the Oversight Board decided against Meta in sixteen out of twenty-two cases, with roughly two-thirds content moderation decisions appealed by Facebook and Instagram users decided in their favour, and half of referrals made by Meta were decided against it.⁷⁵ It may be concluded that by and large, the Oversight Board can be said to constitute an independent and impartial adjudicative mechanism based on its constituent instruments and practice so far. Whether this continues to be the case in the future remains to be seen.

⁷⁰ Article 1 of the Code of Conduct states that Oversight Board members must avoid conflict of interests; Article 2 states that any member with a conflict must recuse themselves in a relevant case.

⁷¹ Article 11, Code of Conduct.

⁷² Article 3.2, Charter; Article 1, section 3.1.3, Bylaws.

⁷³ See, Transcript of interview of co-chair of the oversight board, Jamal Greene (January 2021) <https://www.npr.org/transcripts/959985616>, last access 20 August 2021.

⁷⁴ In its first decisions rendered in January 2021, the Oversight Board ruled against Facebook in four out of the five cases it considered: <https://oversightboard.com/news/165523235084273-announcing-the-oversight-board-s-first-case-decisions/>, last access 20 August 2021.

⁷⁵ See Presentation by Catalina Botero in Alexandra Kemmerer, Catalina Botero-Marino, Erik Tuchtfield, Matthias C. Kettmann and Martin Eifert, Livestream – Heidelberger Salon digital: Discussion on 10 February 2022 at 17:00 CET by the Max Planck Institute for Comparative Public Law and International Law in cooperation with Global Freedom of Expression, Columbia University, Völkerrechtsblog, available at, <https://voelkerrechtsblog.org/livestream-heidelberger-salon-digital-2/>. The content moderation decisions overturned include: Oversight Board Decisions, Case Decision 2020-002-FB-UA; Case Decision 2020-004-IG-UA; Case Decision 2020-005-FB-UA; Case decision 2021-003-FB-UA; Case decision 2021-004-FB-UA; Case decision 2021-005-FB-UA; Case decision 2021-006-IG-UA; Case decision 2021-007-FB-UA; Case decision 2021-010-FB-UA; Case decision 2021-012-FB-UA; Case decision 2021-013-IG-UA. The content moderation decisions upheld are: Case Decision 2020-003-FB-UA; Case decision 2021-002-FB-UA; Case decision 2021-009-FB-UA; Case decision 2021-011-FB-UA; Case decision 2021-014-FB-UA. No decision was rendered in Case Report 2020-001-FB-UA due to user action. The Oversight Board further overturned content moderation decisions in cases referred to it by Meta in Case Decision 2020-006-FB-FB; Case Decision 2020-007-FB-FBR. It upheld moderation decisions in Case decision 2021-001-FB-FBR (but see section 3. c below); and Case decision 2021-008-FB-FBR: decisions of the Oversight Board are available at, <https://oversightboard.com/decision/>.

b) The cross-border element

The second element pointing to the occurrence of transnational hybrid adjudication relates to the ‘transnational’ nature of the Oversight Board’s core work. As was stated earlier (2 above), this means that a DRM’s work should transcend national frontiers. In other words, there should be a cross-border element present. Private international law provides for a neat list of situations in which a dispute can said to be cross-border in nature. Specifically, where the parties to a dispute are located in different countries, the subject matter of a dispute cross-cuts state boundaries, or a judgment has transborder implications, a cross-border element will be present.⁷⁶ Any dispute that reflects one or more of the aforementioned elements can said to be transnational in nature.

The Oversight Board hears appeals from users located across the globe, with Meta headquartered in California. The vast majority of the Oversight Board’s work is thus likely to be inherently transnational just based on the location of the parties to the dispute. What is more, the Oversight Board is a DRM established under US law. But it adjudicates issues arising in numerous jurisdictions. The legal and factual issues the Oversight Board resolves thus transcend one domestic jurisdiction. Finally, the effect of Oversight Board decisions is not limited to any one domestic jurisdiction. If a post is removed or maintained following an Oversight Board decision, then it is visible on the relevant platforms to any user who is able to access it regardless of where that user is located.

Moreover, the effect of a ruling is not limited to individual users only. Due to the case prioritization practice of the Oversight Board, and given that Oversight Board decisions have precedential value,⁷⁷ similar cases will be decided similarly, regardless of where the facts occurred. Indeed, Oversight Board decisions, whether binding or advisory, are meant to have a systemic and multi-country effect on Facebook’s content moderation decisions.⁷⁸ For example, the Oversight Board’s decision in response to Facebook’s self-referral concerning Donald Trump’s exile from its platform will have a global impact on the limits that may be placed on political speech, at least in the digital sphere. The cross-border implications of Oversight Board decisions can thus be serious and consequential.

Therefore, the Oversight Board is engaged in adjudication that is inherently transnational. When we take into account that the sources of law the Oversight Board is required to apply stem from no singular legal order, the conclusion that adjudication at the Oversight Board transcends state boundaries becomes inescapable. It is the third element of transnational hybrid adjudication concerning questions of applicable law that I now turn to.

c) A Hybrid law

The final element in transnational hybrid adjudication that remains to be examined concerns the concept of ‘hybrid’ law. As was clarified earlier (see section 2 above), hybrid law cannot be characterised as merely international or domestic, public or private. It is a body of law which is composed of legal elements that relate to each of these categories. An examination of the Oversight

⁷⁶ See the discussion carried out in Gulati, n 27, 168.

⁷⁷ Article 2.2, Charter; see further 4 below.

⁷⁸ Article 4 of the Charter provides in part: ‘In instances where Facebook identifies that identical content with parallel context – which the board has already decided upon – remains on Facebook, it will take action by analysing whether it is technically and operationally feasible to apply the board’s decision to that content as well. When a decision includes policy guidance or a policy advisory opinion, Facebook will take further action by analysing the operational procedures required to implement the guidance, considering it in the formal policy development process of Facebook, and transparently communicating about actions taken as a result.’

Board's governing documents demonstrates that the applicable law is 'hybrid' in nature. Article 2.2 of the Oversight Board Charter provides:

Facebook has a set of values that guide its content policies and decisions. The board will review content enforcement decisions and determine whether they were consistent with Facebook's content policies and values.

For each decision, any prior board decisions will have precedential value and should be viewed as highly persuasive when the facts, applicable policies or other factors are substantially similar.

When reviewing decisions, the board will pay particular attention to the impact of removing content in light of human rights norms protecting free expression.

Thus, the substantive standards pursuant to which the Oversight Board adjudicates disputes refer to (1) Facebook's own values and community standards,⁷⁹ (2) the Oversight Board's own pronouncements, and (3) international human rights law (IHRL). The first two sources belong to the realm of non-state law and form an aspect of what has been referred to as platform law.⁸⁰ The third source belongs to public international law. Given that IHRL is expressly mentioned as a source of applicable law for the Oversight Board, the difficult conceptual question of the direct applicability of IHRL to private entities has been rendered academic for present purposes. In addition, Facebook has voluntarily agreed to adopt the UN Guiding Principles on Business and Human Rights 2011.⁸¹ The role IHRL is to play in the Oversight Board's decision-making is somewhat ambivalent in terms of whether it provides for binding standards or is merely informational.⁸² The applicability of IHRL thus warrants brief reflection.

Content decisions can engage a range of human rights, including of course the freedom of expression,⁸³ but also the right to democratic participation, the right to a fair public hearing, and the

⁷⁹ See Klonick, n 6, p. 2422.; 'through its 'semipublic rules' called 'Community Standards', Facebook has created a body of 'laws' and a system of governance that dictate what users may say on the platform'.

⁸⁰ See David Kaye (Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), U.N. Doc. A/HRC/38/35, T 1 (Apr. 6, 2018), paras. 1 and 24; Molly K. Land, *The Problem of Platform Law: Pluralistic Legal Ordering on Social Media*, in Paul Schiff Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020), 975-994, section 36.3 where she defines the elements of platform law as consisting of 'four central elements: contract law, substantive law, procedural law, and technical law. Contract law includes the terms of service that govern the relationship between user and company. Substantive law includes both "legislation" (such as community standards or rules) and "common law" (the communications and practices of companies that elaborate and interpret those standards or rules). Technical law includes the design and technical choices that enable, nudge, and constrain the behavior of users on social media platforms' also see generally, Orly Lobel, *The Law of the Platform*, *Minnesota Law Review* 101 (2016): 87-166.

⁸¹ Oversight Board, Case decision 2021-001-FB-FBR, section 3 ('Trump case') where the Oversight Board observed: 'On March 16, 2021, Facebook announced its corporate human rights policy, where it commemorated its commitment to respecting rights in accordance with the UN Guiding Principles on Business and Human Rights (UNGPs). The UNGPs, endorsed by the UN Human Rights Council in 2011, establish a voluntary framework for the human rights responsibilities of private businesses. As a global corporation committed to the UNGPs, Facebook must respect international human rights standards wherever it operates. The Oversight Board is called to evaluate Facebook's decision in view of international human rights standards as applicable to Facebook.

⁸² See, <https://www.krwg.org/post/facebook-oversight-board-co-chair-future-trumps-account>, last access 20 August 2021.

⁸³ Article 19 of the ICCPR enshrines the right to freedom of expression. Article 19(2) specifically stipulates that the right to freedom of expression applies regardless of frontiers and through any media of one's choice, and includes internet-based modes of communication: OHCHR, General Comment No. 34, para. 12; also see, UNHRC, Resolution on the promotion, protection and enjoyment of human rights on the internet, A/HRC/32/L.20 (2016) at para. 1. Moreover, it has been noted that: 'While freedom of expression is clearly protected by a considerable

right to bodily security.⁸⁴ The issues the Oversight Board determine regularly engage a range of human rights, and it is suggested that IHRL provides, or should provide, the core standards based on which the Oversight Board ought to adjudicate the disputes brought before it.⁸⁵ As David Kaye, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression explained in 2018:

“Human rights principles...enable companies to create an inclusive environment that accommodates the varied needs and interests of their users while establishing predictable and consistent baseline standards of behaviour. Amidst growing debate about whether companies exercise a combination of intermediary and editorial functions, human rights law expresses a promise to users that they can rely on fundamental norms to protect their expression over and above what national law might curtail. Yet human rights law is not so inflexible or dogmatic that it requires companies to permit expression that would undermine the rights of others or the ability of States to protect legitimate national security or public order interests. Across a range of ills that may have more pronounced impact in digital space than they might offline – such as misogynist or homophobic harassment designed to silence women and sexual minorities, or incitement to violence of all sorts – human rights law would not deprive companies of tools. To the contrary, it would offer a globally recognized framework for designing those tools and a common vocabulary for explaining their nature, purpose and application to users and States.⁸⁶”

The role IHRL is playing in the Oversight Board’s initial decisions is notable, with the Oversight Board invariably using IHRL as the determinative standard. In fact, it is an application of IHRL on which Oversight Board decisions ultimately appear to turn. For example, the Oversight Board reversed Meta’s decision to remove a comment in which a supporter of Russian opposition leader Alexei Nawalny called another user a ‘cowardly bot’. Meta/Facebook removed the comment for using the word ‘cowardly’ which was considered to constitute a negative character claim. The Oversight Board determined that while the removal was in line with Facebook’s Bullying and Harassment Community Standard, the Standard as it then read was an unnecessary and disproportionate restriction on free expression under IHRL.⁸⁷

Similarly, in its most prominent pronouncement thus far, in a case triggered by Donald Trump’s indefinite suspension from Facebook and Instagram, the Oversight Board’s decision was underpinned by IHRL considerations. The facts are well known. On 6 January 2021, during the counting of the 2020 electoral votes in the US presidential elections, a mob forcibly entered the Capitol Building in Washington DC, threatening the constitutional process. Five people died and many more were injured during the violence. During these events, then-President Donald Trump posted two pieces of content that amongst other things, praised the rioters, and spread misinformation that the

body of treaty law it can also be regarded as a principle of customary international law’: Richard Carver, *Training manual on international and comparative media and freedom of expression law* (2018) 5; and for the international instruments protecting this right, see <https://www.ohchr.org/en/issues/freedomofopinion/pages/standards.aspx>.

⁸⁴ BSR, 2019. Human Rights Review: Facebook Oversight Board, section 3.1.

⁸⁵ See a previous comment by this author at, <https://voelkerrechtsblog.org/the-facebook-oversight-board-and-its-trump-test/>, last access 20 August 2021; also see, <https://www.ejiltalk.org/the-facebook-oversight-board-made-the-right-call-on-the-trump-suspension/>, last access 20 August 2021.

⁸⁶ Kaye, n 80, para. 43.

⁸⁷ See Oversight Board, Case decision 2021-004-FB-UA.

2020 US Presidential elections was stolen from Mr Trump, an allegation that has not been substantiated.⁸⁸

On 6 January 2021, Meta/Facebook removed Donald Trump's posts for violating its Community Standard on Dangerous Individuals and Organizations.⁸⁹ The next day the block was extended indefinitely. Meta then referred this case to the Oversight Board. One of the key questions it asked the Oversight Board was 'whether Meta correctly decided to prohibit Mr. Trump's access to posting content on Facebook and Instagram for an indefinite amount of time.'⁹⁰ With no evidence behind Donald Trump's assertions as to electoral fraud,⁹¹ the Oversight Board readily concluded that by praising persons engaged in violence, he had breached Facebook's community standards and Instagram's Community Guidelines on dangerous persons. The removal of the offending posts was thus justified.⁹² However, applying IHRL, the Oversight Board asked Meta/Facebook to reconsider Trump's indefinite suspension imposed for it was not provided for in Facebook's rules and was thus arbitrary. The Oversight Board thus ordered Facebook to either impose a time-limited suspension or to permanently ban Trump from Facebook.⁹³ For present purposes, of significance is the central role IHRL assumed in the Oversight Board's decision-making. Examining Facebook's human rights obligations, it said:

"The Board analyzes Facebook's human rights responsibilities through international standards on freedom of expression and the rights to life, security, and political participation. Article 19 of the ICCPR sets out the right to freedom of expression. Article 19 states that "everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."⁹⁴

It is therefore apparent that IHRL, as understood and applied by the Oversight Board, constitutes the core legal standard on which cases are ultimately determined. Further, akin to a human rights court or monetaring mechanism the Oversight Board regularly conducts a 'proportionality' analysis when determining whether expression is being limited justifiably,⁹⁵ has emphasised the importance of due

⁸⁸ Trump case, n 81.

⁸⁹ At the time of writing, Facebook's Community Standard on Dangerous Individuals and Organizations prohibits "content that praises, supports, or represents events that Facebook designates as terrorist attacks, hate events, mass murders or attempted mass murders, serial murders, hate crimes and violating events." It also prohibits "content that praises any of the above organizations or individuals or any acts committed by them," referring to hate organizations and criminal organizations, among others. Instagram's Community Guidelines state that "Instagram is not a place to support or praise terrorism, organized crime, or hate groups," and provide a link to the Dangerous Individuals and Organizations Community Standard: These standards are available at, https://www.facebook.com/communitystandards/dangerous_individuals_organizations, last access 21 August 2021.

⁹⁰ Trump case, n 81, section 2.

⁹¹ Trump case, n 81, Section 2.

⁹² Trump case, n 81, section 8.1.

⁹³ For a brief analysis of this decision, see, <https://www.ejiltalk.org/the-facebook-oversight-board-made-the-right-call-on-the-trump-suspension/>, last access 20 August 2021.

⁹⁴ Trump case, n 81, section 8.3.

⁹⁵ In the Trump Case, n 81, para. 8, the Oversight Board stated the three-part test to analyze Facebook's actions when it restricts content or accounts. This test is based on IHRL and allows for 'expression to be limited when certain conditions are met. Any restrictions must meet three requirements – rules must be clear and accessible, they must be designed for a legitimate aim, and they must be necessary and proportionate to the risk of harm'; see OHCHR, General Comment No. 34, paras. 33-36.

process for users where their posts are removed,⁹⁶ repeatedly said that community standards and content moderation decision should be clear and accessible in line with IHRL standards,⁹⁷ relying on the provisions of the ICCPR. The Oversight Board has especially sought to protect political speech,⁹⁸ and emphasised the need for heightened scrutiny correctly allowing for limiting speech where real world harm may ensue as a result of content decisions in the context of an armed conflict.⁹⁹

While IHRL seems to constitute the core standard against which platform law is assessed, in line with its mandate, it is notable that compliance with Meta's own Community Standards and Values are always first scrutinised by the Oversight Board before it turns to IHRL.¹⁰⁰ Consequently, the applicable legal regime for the Oversight Board is truly hybrid. We are perhaps witnessing the initial stages of a convergence of platform law, IHRL, and potentially even national law which can influence the content of platform law.¹⁰¹ Such a normative churn may lead to a distinct branch of human rights law which could be referred to as digital human rights law.¹⁰² Therefore, the transnational hybrid adjudication occurring at the Oversight Board may end up having substantive implications for international law in general. Whether or not this occurs depends on how viable adjudicative mechanisms like the Oversight Board will be in the long run. While it is too early to determine the systemic impact the Oversight Board may have, some initial observations can be made.

4. Will the Oversight Board have a systemic impact?

The creation of the Oversight Board has the potential to have an impact on transnational dispute resolution specifically, and international law generally. Given that Meta is one of the most powerful, wealthy and influential social media companies globally, the creation of the Oversight Board is likely to already impact the standards of free speech in the digital sphere, including who determines those standards. The Oversight Board's impact can be more structural as well. As the brief discussion below points out, this impact can be access to justice enhancing (4 a), on institutional design (4 b), and on the structures of international law more generally (4 c).

⁹⁶ Oversight Board, Case decision 2021-006-IG-UA, section 9.

⁹⁷ Oversight Board, Case Decision 2020-005-FB-UA, section 9.

⁹⁸ In the Trump Case, n 81, para. 8, the Oversight Board stated: 'Political speech receives high protection under human rights law because of its importance to democratic debate. The UN Human Rights Committee provided authoritative guidance on Article 19 ICCPR in General Comment No. 34, in which it states that "free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential" (para. 20).'; also see, Oversight Board, Case decision 2021-006-IG-UA, section 8.3.

⁹⁹ In its Case decision 2021-014-FB-UA, the Oversight Board upheld Meta's original decision to remove a post alleging the involvement of ethnic Tigrayan civilians in atrocities in Ethiopia's Amhara region.

¹⁰⁰ A perusal of Oversight Board decisions shows that every decision first considers compliance with Meta's community standards, then its values, and finally, IHRL.

¹⁰¹ See Alexandre De Streel *et al*, *Online Platforms' Moderation of Illegal Content Online, Study for the committee on Internal Market and Consumer Protection*, Policy Department for Economic, Scientific and Quality of Life Policies, European Parliament, Luxembourg, 2020, 65, where it is mentioned that: 'Terms of Service/Terms of Use and Community Standards/Guidelines of the online platforms generally restrict more the freedom of expression than the international fundamental rights standards, in particular because they are based on the lowest common denominator between the different national legislations applicable to content.'

¹⁰² Dafna Dror-Shpoliansky and Yuval Shany, *It's the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology*, *European Journal of International Law*, 2021, chab087, <https://doi.org/10.1093/ejil/chab087>.

a) Access to justice

First and foremost, the Oversight Board provides a forum for Facebook and Instagram users to seek independent review of content decisions made by Facebook. This, on its own is a unique development where a private entity has created what could end up becoming a permanent autonomous adjudicative mechanism accessible to persons it adversely impacts. Permanent courts and tribunals have traditionally been created by states or international organisations, and thus belong to the public realm. We are perhaps witnessing the privatisation of justice delivery, at least in the digital sphere. The creation of the Oversight Board may inspire other multinational corporations to create similar DRMs. In this regard, the question is why other private actors would be willing to incur the considerable expense of creating DRMs, giving up aspects of their authority. A response to this question requires a more nuanced understanding of the multiplicity of reasons behind the creation of the Oversight Board, and considering whether other private companies may also have similar motivations.

The motivation for the creation of the Oversight Board is multifaceted. Its setting up is perhaps a response to a number of factors that include reputational reasons; satisfying calls for enhanced accountability by users, governments and NGOs; attempts by Meta to avoid regulatory intervention or threats of such intervention,¹⁰³ and the ever-increasing pressure on multinational corporations to comply with human rights standards. Amongst other things, these principles state that multinational corporations should act with accountability, an aspect of which is to provide access to justice to persons harmed by corporate conduct.¹⁰⁴

Other technology firms, such as Google which owns Youtube and Twitter, are not immune to the aforementioned pressures. With ever-increasing calls on them to act accountably and transparently,¹⁰⁵ not just Facebook, but other digital companies are subject to regulatory intervention, or threats of such intervention in jurisdictions around the world. What is more, national courts are starting to make decisions requiring such companies to comply with users' human rights.¹⁰⁶

¹⁰³ For example, in the United States, efforts are being made to amend the rules on intermediary liability of platforms contained in the Communications Decency Act 1996 which provides immunity to platforms from civil liability for speech posted by users: see De Streel, n 101, section 4, for a discussion of regulatory standards in various jurisdictions. Another issue relates to anti-trust issues. Attempts to counter Meta's alleged monopoly through anti-trust proceedings have so far failed in the United States: see, Federal Trade Commission v Facebook, INC, Civil action no. 20-3590 (jeb), United States District Court for the District of Columbia, 2021; in the European Union, significant reforms are underway through the Digital Services and Markets Acts package: see, <https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>, last access 20 August 2021; and as the Cambridge Analytica saga demonstrated, Meta in particular has also faced very serious questions on matters of privacy and data protection triggering calls for more robust state action: see, <https://www.bbc.com/news/business-49099364>.

¹⁰⁴ See especially Principles 11, 15, 22 and 29 of the UN Guiding Principles on Business and Human Rights 2011; on the procedural side, a DRM such as the Oversight Board is akin to DRMs created by public international organisations to provide access to justice to individuals who those organisations adversely impact. International organisations create such DRMs to comply with their access to justice obligations under international law: Gulati, n 22, 38.

¹⁰⁵ See for example, <https://www.theguardian.com/technology/2017/dec/21/internet-giants-such-as-facebook-and-twitter-must-be-made-accountable-for-content-they-publish>; <https://www.forbes.com/sites/rebeccabellam/2020/09/22/facebook-google-twitter-youtube-need-to-take-responsibility-for-election-integrity/>.

¹⁰⁶ See for example the series of right to be forgotten cases, Case C-136/17 GC and Others EU:C:2019:773; Case C-507/17 Google v CNIL EU:C:2019:772; and Case C-131/12 Google Spain and Google EU:C:2014:317 = GRUR Int 2014, 719. For a decision specifically concerning Facebook, German courts have required Facebook to reinstate

Thus, the motivation for technology firms to ensure just treatment for users who have been harmed by their actions is apparent. In the future, we may witness more and more technology firms joining the jurisdiction of the Oversight Board, or alternatively, creating their own DRMs. Indeed, multinational corporations operating outside of the technology sector could also choose to set up independent and tailored DRMs to provide justice too individuals they adversely impact.

Setting up independent adjudicative mechanisms would assist the private sector to comply with human rights standards that apply to them, as well as result in other benefits that would most certainly flow due to enhanced accountability. There are indeed significant advantages for the private sector in choosing to embrace hybrid transnational adjudicative bodies. The most obvious one is the need to ensure access to justice for persons they harm. Often, DRMs at the national level are unable to deliver effective justice to the victims of corporate conduct due to procedural hurdles as well as the great expense of seeking justice against multinational corporations. And there are no international courts or tribunals directly accessible to individuals where they can seek justice against private corporations. Transnational hybrid adjudicative mechanisms can help address this justice gap.

Moreover, by creating their own DRMs, private corporations can influence the standards according to which disputes are resolved. A hybrid body of law would allow a corporation to compile its own applicable law picking and choosing from self-created and existing norms stemming from distinct legal orders. The possibility to use international law as an element of the applicable law can help promote the consistent delivery of justice according to international standards regardless of borders. In the process, global standards of corporate behaviour will be developed and enforced. The greater use of international law to resolve transnational disputes would naturally promote the international rule of law. Finally, the institutional design of the Oversight Board demonstrates that it is perfectly possible for corporations to create independent DRMs. Private models of adjudication that goes beyond the much criticised arbitration based framework could provide more stable and consistent forms of decision-making. If more private companies create independent and impartial DRMs, justice delivery could become more and more privatised. This could be a positive structural impact of DRMs like the Oversight Board. But only if the quality of justice rendered at such DRMs is consistent with international standards.

b) Institutional design

It is the novel institutional design of the Oversight Board that could have a systemic impact on how transnational disputes against corporations are resolved. It could provide inspiration to other corporations in designing their own DRMs. The trust structure to separate the Oversight Board from Meta, thereby ensuring the former's independence from the latter, is truly unique and could be worth replicating in one form or another. Moreover, whether or not one agrees with the outcome of individual cases, it is undeniable that the quality of the Oversight Board's work is high. With no expense spared to fund it, unlike international courts and tribunals that are constantly under budgetary pressures, the Oversight Board is in an enviable position. It comes as no surprise that very quickly, it is establishing itself as a reputable adjudicative mechanism. With an attractive and accessible website; all decisions published; judgments rendered in English as well as the language

closest to the user;¹⁰⁷ public submissions welcomed and easily accessible; ready access to cultural and language expertise provided to Oversight Board members;¹⁰⁸ the quality of adjudication at the Oversight Board in many respects is remarkable.

The institutional design of the Oversight Board could significantly influence the type of DRMs other technology companies may create in the future. With appropriate adaptations, its institutional design could also form a blueprint for corporations generally. This does not mean that significant challenges do not exist. A key challenge concerns the jurisdictional design that should be employed for such DRMs. Given their global connections, determining their personal and subject matter jurisdiction is a highly difficult task. Obviously, if a DRM's jurisdiction is designed narrowly, what it can do in practice is limited, potentially impacting its overall effectiveness in terms of the number and type of disputes a DRM can actually adjudicate. The Oversight Board appears to have met this challenge well with respect to personal jurisdiction, but questions may be asked about its narrow subject matter jurisdiction.

The Oversight Board's personal jurisdiction is unique when compared to other transnational DRMs. With its more than 2.8 billion users, all aggrieved users are able to access the Oversight Board's independent review function in theory. There is perhaps no other transnational DRM accessible to such a vast number of individuals regardless of their territorial links. In the digital world at least, the Oversight Board has deterritorialised the rules on personal jurisdiction, being rules which historically have been primarily based on the connecting factor of territoriality.¹⁰⁹

With millions of posts potentially open to challenge, a solution had to be found to make the Oversight Board's work-load manageable. That is why the Oversight Board operates akin to a Supreme Court. An aggrieved user can only file a case if they have exhausted review possibilities within the Facebook company itself, making Facebook the first instance review mechanism.¹¹⁰ This model is often adopted at DRMs created by public international organisations as a result of their access to justice obligations to third parties.¹¹¹ Parallels between the Oversight Board and other transnational grievance mechanisms are thus evident. Moreover, assuming internal remedies at Facebook are exhausted, the decision whether to accept an appeal from Facebook lies with a rotating subset of Oversight Board Members. A Case Selection Committee evaluates and selects 'cases by a majority vote.' It "prioritize[s] cases that have the potential to impact many users around the world, are of critical importance to public discourse, or raise important questions about Facebook's policies."¹¹² By selecting the most influential cases for review, the idea is that the Oversight Board's independent review function benefits as many users as possible and on issues of the greatest significance. A genuine attempt has been made to ensure that the Oversight Board's work-load is manageable. This however means that the vast number of users whose cases are not selected by the Oversight Board are in practice unable

¹⁰⁷ Users can submit an appeal in a language of their choice and judgments are translated into at least 18 languages: Article 1, sections 3.2 and 4.3 of the Bylaws.

¹⁰⁸ Article 1, section 3.1.4, Bylaws.

¹⁰⁹ See the discussion in Gulati, n 27, 168-238.

¹¹⁰ Article 3, section 1, Bylaws.

¹¹¹ Gulati, n 27, 38.

¹¹² See the Overarching Criteria for Case Selection of the Oversight Board, <https://oversightboard.com/sr/overarching-criteria-for-case-selection#:~:text=The%20overarching%20criteria%20are%20set,Facebook's%20Community%20Standards>.

to access an independent review body when aggrieved by Facebook or Instagram’s content decisions. For such users, the Oversight Board does not provide access to justice.

While the personal jurisdiction of the Oversight Board is vast, this cannot be said about its subject matter jurisdiction. As of now, the Oversight Board can only make determinations on whether content posted on Facebook or Instagram should be allowed. This jurisdiction is narrow, excluding amongst other things, decisions regarding account suspensions and arguably, the use of the Facebook algorithm which significantly impacts the visibility of posts.¹¹³ Although, Pickup has argued that a ‘careful reading of the Board’s Charter reveals that it already has the authority to both access Facebook’s algorithms as part of its standard review process and to make recommendations about algorithms’ impact on Facebook.’¹¹⁴ What approach the Oversight Board takes to this issue remains to be seen. Be that as it may, as Douek observed, the board’s limited jurisdiction is the ‘biggest disappointment in the process of its establishment so far’.¹¹⁵ Even though the Board’s limited competence significantly impacts what it can presently do, eventually the Board’s jurisdiction may be expanded, thus blunting the criticism about its limited capacities. It is nevertheless important to emphasise that such DRMs cannot be expected to be a panacea which will ensure access to justice to every single person who is directly or indirectly impacted by corporate conduct in all situations.

Thus, the Oversight Board’s systemic impact would probably be limited in terms of the type of disputes it decides. Where its systemic impact could be most compelling concerns the Oversight Board’s institutional design. If other corporations use the Oversight Board as a blue print for their own DRMs in the future, private justice will look more and more like publicly administered justice. In some respects, the quality of private justice may actually be far superior to the standard observed in many national jurisdictions, thus promoting the international rule of law.¹¹⁶

c) Structures of international law

To conclude, it is pertinent to make some observations on what impact the creation of transnational hybrid adjudicative bodies such as the Oversight Board can have on the structures of international law in general. First, we are witnessing an intensification of private law making in the digital sphere. The emerging body of digital human rights law is shaped, to a considerable extent, by private actors such as the Oversight Board. This body of law is not being developed by states, the key actors in international law, but by Big-Tech, the key players in the digital sphere. Given their immense power and influence, it should not come as a surprise that technology companies seek to drive the development of regulatory standards. With nation states unable to agree on the rules that should govern the digital sphere, the law-making space has been filled by private actors to some degree. While such forms of private law-making are occurring in the digital sphere in a significant way, similar developments may occur in other sectors too. There is no reason why the process of private law-

¹¹³ See, <https://hbr.org/2019/10/facebooks-oversight-board-is-not-enough>, last access 20 August 2021.

¹¹⁴ Edward L. Pickup, The Oversight Board’s Dormant Power to Review Facebook’s Algorithms, Yale Journal on Regulation (7 September 2021), <https://www.yalejreg.com/bulletin/the-oversight-boards-dormant-power-to-review-facebooks-algorithms/>.

¹¹⁵ See, <https://www.lawfareblog.com/facebook-oversight-board-should-review-trumps-suspension>, last access 20 August 2021.

¹¹⁶ Access to justice is a core component of the international rule of law: see, See R McCorquodale, *Defining The International Rule of Law: Defying Gravity?* (2016) 65 International & Comparative Law Quarterly 2.

making could not intensify even more. Thus, private adjudication based on hybrid standards poses a real challenge to the prescriptive authority of the state in a practical sense.

Second, by starting to create judicialised mechanisms, private actors are steadily encroaching into the space conventionally occupied by states and international organisations in terms of who creates transnational adjudicative mechanisms. How states and courts respond to this encroachment will impact the extent to which transnational hybrid adjudication structurally impacts international law. There will be an ever-increasing opportunity for interaction among DRMs such as the Oversight Board, and international and national courts. In particular, the dialogue between classical international courts and transnational hybrid courts could hybridize the human rights discourse in particular, and international law discourse in general. The Oversight Board already applies IHRL in its decisions. If conventional courts start referring to Oversight Board decisions, true hybridity may be achieved in time. Whether or not this would result in a watering down or strengthening of IHRL is a question that is too early to answer. All the same, the Oversight Board, or similar DRMs created in the future, could very well impact the forum of choice for accessing justice.¹¹⁷ Where justice at such DRMs is delivered consistently with international procedural and substantive standards, conventional courts may very well respect and recognise the decisions of such DRMs, which is important to shape their global influence and to build credibility. Should this occur, access to justice for the victims of corporate conduct could be enhanced. This is because there will exist a greater number of forums where corporate conduct can be effectively challenged.

The creation of more and more courts will result in even greater fragmentation than presently is the case. To avoid conflicting claims to regulatory authority in a pluralist legal world, tools to coordinate authority are needed. If robust tools to coordinate regulatory authority across all types of DRMs based in distinct legal orders can be implemented, an issue I discussed elsewhere,¹¹⁸ such fragmentation should not be frowned upon. If regulatory coordination can be achieved, the structural impact of DRMs such as the Oversight Board could be significant and positive for transnational dispute resolution will become more streamlined, more accessible, and ultimately more effective.

If the Oversight Board proves to be a viable DRM, with its viability depending on its sustainability, quality of justice delivered, the broad recognition of its decisions, user satisfaction, and impact on corporate behaviour,¹¹⁹ we could be at the cusp of a new wave of transnational hybrid adjudication. In the 1990s and early 2000s, several new courts and tribunals, such as the Appellate Body of the WTO and ICC were created. The Appellate Body is presently dysfunctional, the ICC faces serious challenges, and a backlash against international courts and tribunals has been much too evident.¹²⁰ It is perhaps privately driven transnational hybrid adjudication that may end up promoting the international rule of law in this third decade of the 21st century, thereby seriously challenging the

¹¹⁷ Note, the EU's Digital Services Act package, if passed, would require big technology companies to provide independent grievance mechanisms to users: See especially Articles 17 and 18 of a Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC.

¹¹⁸ Gulati, n 27.

¹¹⁹ The Oversight Board is already impacting Meta's behaviour. After the Oversight Board selected several cases for review, Meta reconsidered its conduct prior to the decision being rendered: see for example, Oversight Board Decisions, Case decision 2021-009-FB-UA; Case Decision 2020-004-IG-UA; Case decision 2021-006-IG-UA; Case decision 2021-003-FB-UA.

¹²⁰ See generally, Avidan Kent *et al*, *The Future of International Courts Regional, Institutional and Procedural Challenges* (Routledge, 2019).

idea of a self-contained international law, and at the same time raising the prospects of further fragmentation.

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The Kolleg-Forschungsgruppe “The International Rule of Law – Rise or Decline?” examines the role of international law in a changing global order. We assume that a systemically relevant crisis of international law of unusual proportions is currently taking place which requires a reassessment of the state and the role of the international legal order. Do the challenges which have arisen in recent years lead to a new type of international law? Do we witness the return of a ‘classical’ type of international law in which States have more political leeway? Or are we simply observing a slump in the development of an international rule of law based on a universal understanding of values? What role can, and should, international law play in the future?

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