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EDITORIAL

SOME THOUGHTS ON ACADEMIC PUBLISHING FOR EARLY CAREER RESEARCHERS

Helga Molbæk-Steensig* and Alexander Gilder†

The European Journal of Legal Studies (EJLS) is an open access journal catering to a broad audience interested in legal theory, international-, European-, or comparative law, but it is also a journal with a particular focus on emerging scholars. As the reader may already be aware, the EJLS is managed by PhD-candidates at the European University Institute, and large parts of the editorial board and many of our peer reviewers are also early career researchers in a broader sense. At the journal, we consider this to be a strength, as it has allowed us to gain insights into the particular needs of early career researchers which are often not taken into account in academic publishing in general. This in turn has allowed us to become a particularly popular outlet for up-and-coming researchers without ever having to compromise on the quality of submissions or indeed publications.

First, we focus on speed. Early career researchers needing to secure funding for postdocs, to gather publications for securing tenure, or otherwise stuck in the precarity of early academic careers, are particularly exposed when journals take many months to review and publish articles. While peer review inevitably takes time, and we at the EJLS experience the same limited availability of peer reviewers that appears to be endemic in academia as a whole,[1] we aim to

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1 Lynn E. DeLisi, 'Editorial: Where have all the reviewers gone?: Is the peer review concept in crisis?' (2022) 310 Psychiatry Research 114454; Maria Petrescu and Anjala S. Krishen, 'The evolving crisis of the peer-review process' (2022) 10 Journal of Marketing Analytics 185.

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conduct desk reviews quickly, usually within a week, and we have been lucky enough to be able to retain a dedicated pool of reviewers that share our goal of conducting peer reviews within weeks rather than months. Second, we focus on feedback. Publishing your first (or second or third) academic article can be a daunting endeavour since academic articles are a different genre than term papers or thesis chapters, and academia is ripe with horror stories about rude and cruel rejections with little explanation or feedback. At the EJLS we have therefore aimed to foster a kinder environment. Rejections remain an everyday occurrence, some seventy percent of the articles we receive are eventually rejected, but we aim to always provide feedback and guidance for authors wishing to improve their work. Third, we are true open access, meaning that not only are our articles always freely available to readers, we also do not charge publication- or open access fees which can be prohibitively expensive for emerging scholars whose affiliated institutions may not provide funds for such fees, or who might be between affiliations while transferring from PhD to post-doc, between post-docs, or from post-doc to assistant professorships.

In addition to these three points which are general for the journal as a whole, and which in practice benefit more senior authors as well, the EJLS is focused on emerging scholarship through its New Voices section. New Voices pieces are short-form articles by researchers who are either still enrolled in their PhD, JD, JSD, or similar programmes or who have completed their latest degree less than five years before submission. In this issue we have taken this a step further and are proud to present a special section curated in collaboration with the Society of Legal Scholars. In this section we have four short-form contributions by PhD-candidates who took part in the Society of Legal Scholars' International Law Section's Workshop on Responding to Complex Relationships in International Law, held on 13 May 2022.

The International Law Section of the Society of Legal Scholars holds an annual PhD workshop to promote emerging and early career researchers who make an invaluable contribution to the overarching research environment in which we all work. The co-convenors, Arman Sarvarian and Alexander Gilder, started the tradition to provide better opportunities for early career researchers to discuss and develop their work. In much of Europe, there are regular postgraduate

conferences for legal scholars held at a variety of institutions. However, a postgraduate conference focusing purely on international law is a rarer occurrence. There are also opportunities for PhD researchers to present at major conferences in international law, such as those held by the European Society of International Law and the American Society of International Law, but when submitting abstracts alongside established scholars (with some conferences requiring a CV) and registration fees extending into the hundreds of Euros, opportunities can be limited. Attending a major conference in the field can result in valuable new relationships, but the convenors wanted to create an accessible space tailor-made for creating a network for PhD researchers.

By hosting an annual PhD workshop, a community can be built for PhD researchers in international law, meeting both their peers and more established researchers who can provide feedback and mentorship. The Workshop on 'Responding to Complex Relationships in International Law' was the second convened by the Society of Legal Scholar's International Law Section. Retaining the online format from the first workshop in 2021, we were able to welcome 14 speakers based in the UK, China, Canada, the Netherlands, Belgium, Germany, and Denmark. Kasey McCall-Smith, Ivano Alogna, Caleb Wheeler, and Asaf Lubin generously commented on the draft papers and provided a truly supportive environment for those participating. Alexander Gilder also gave a session on publishing and the job market for early career academics. By partnering with the EJLS, the workshop has also been able to provide a publication opportunity alongside feedback and mentoring.

Staying briefly on the topic of academic publishing for early career researchers, Gilder's session focused on how writing for an academic journal requires different considerations from say a chapter of the PhD thesis. For instance, for most European law journals, that typically ask for shorter form articles than American law journals, the author must convey a succinct argument that importantly pushes the discussion forward in the field. The best articles clearly stake their claim in the introduction and do not devote valuable space to unnecessarily lengthy coverage of background information. They establish what gap in the literature they fill whilst avoiding lengthy literature reviews. Subsequent sections then do not merely recount the law applicable to the area

of discussion but examine it with the initial claim in mind. Articles where each section clearly further supports the argument being made are both the most forceful in terms of convincing the reader (and reviewer) of the author's position and the ones where the author's voice shines through from start to finish. Useful techniques to keep a lengthy piece of research readable and to engage the reader include avoiding unnecessary jargon and overly long sentences, varying the size of paragraphs, and regularly and succinctly restating the main argument.

Another aspect to consider is how publishing links to the academic job market. Most applications for Assistant Professorships (and equivalent) will ask candidates to outline a research plan that will necessarily include a plan of outputs, such as monographs, articles, book chapters, and the like, as well as grants to apply for and much more. As part of constructing the research plan, the applicant will need to target specific journals, deciding the best place for their research while accounting for norms in their academic jurisdiction and specific field of law. For instance, if a candidate's research crosses the boundaries of EU law, public policy, and political science, they will need to carefully consider the target audience as well as potential requirements by future employers. Similarly, an invitation by a prestigious figure to contribute to an edited collection may at first glance be something an early career researcher should jump at, but in some jurisdictions, a book chapter will carry less weight in habilitation or tenure bids than a peer-reviewed article, meaning that early career scholars must decide where best to spend their valuable research time.

Planning one's research trajectory early will aid in balancing these competing demands, but knowledge about what publication plan would benefit the progression of one's career is not always readily available. By holding an annual PhD workshop with colleagues willing to share their experiences in publishing, applying for jobs, and navigating academia, the convenors hope that those who participated will be able to discuss their research trajectory with their peers. By partnering with the EJLS, the workshop also allowed the participants to get direct hands-on experience with the peer review and publishing process in a general scope European law journal.

IN THIS ISSUE

This issue starts out with a particularly interesting empirical contribution by **Moshe Bar Niv and Ran Lachman**. In this article, the authors question and test the persistent assumption in constitutional and international law, that higher monetary compensation for judges in general improve the quality and independence of the judiciary, by attracting more qualified individuals. The study conducts a survey experiment spanning more than a decade taking advantage of a real-life reduction of judicial stipends and pensions in Israel creating two groups of judges with two different compensation packages at the same bench at the same time. The article finds that both the judges themselves and the lawyers they work with have not found any diminishing in the quality of the judicial or the motivation to become judges after the reform.

From the maintaining of quality courts to problems with court shopping, the second article in this issue deals with standard essential patent (SEP) litigation. **Giuseppe Colangelo and Valerio Torti** map the complexities that arise when border-crossing patent disputes are litigated in various national courts, both in geopolitical terms and in light of the need for a global movement towards standardisation in the modern tech economy. A potential solution to end such costly and politically sensitive parallel litigation has been anti-suit injunctions which are orders that restrain a party from pursuing foreign proceedings. Colangelo and Torti demonstrate however, that such orders have been countered by anti-anti suit injunctions which in turn have been countered by anti-anti-anti suit injunctions, resulting not in less court shopping, but in more. Following this mapping the authors suggest that rather than waiting for complex international coordination ending litigation on SEPs in national courts, to tweak the licensing policies currently issued by standard development organisations (SDOs).

Following these general articles, the issue continues with the **Special Section** on the role of non-state actors in international law written by participants in the Society of Legal Scholars' International Law Section's PhD workshop. Participants were asked to consider the role of non-state actors in international

law-making, the future functions of international organizations, and the continuing legitimacy of the state. Individuals, civil society, multinational corporations, and other non-state actors have not traditionally been included in the making and enforcement of international law nor in the study of these processes.[2] Instead the international system has been viewed through the prism of sovereignty and equality of territorial states.[3] In practice however, the international legal system is increasingly attempting to regulate a diverse range of cross-border problems needing to incorporate a range of public and private actors interacting across the globe. This is the case for attempts to regulate governance, development, and human rights law, where horizontal relationships can have as great influence on the realisation of rights as vertical relationships. It is also the case for attempts to regulate the global commons, such as in the prevention of pollution or overfishing, or the halting of global warming. Even in the most traditional inter-state fields such as warfare, security, and violent conflict, various non-state actors are playing key roles, often falling through responsibility gaps in an international legal system designed for regulating relationships between equal states.

To address this gap in both literature and practice on international law, the special section brings together several perspectives on the relationships future international law-making must consider, including how international organisations and non-state actors interact and how non-state, not to mention non-human, interests can be taken into account. First, **Rita Guerreiro Teixeira** examines how the decision-making processes of international organisations influence the authority of instruments they adopt. Looking specifically at international environmental law, Guerreiro Teixeira argues that by viewing non-binding instruments from organisations as an exercise of public

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2 Andrew Clapham, 'The Role of the Individual in International Law' (2010) 21 *European Journal of International Law* 25-30. For more expansive studies of the international legal personality of individuals see, Kate Parlett, *The Individual in the International Legal System* (Cambridge University Press 2011); Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (OUP 2018); Alexander Gilder, 'International law and human security in a kaleidoscopic world' (2021) 59 *Indian Journal of International Law* 111-137.

3 Daniel Bethlehem, 'The End of Geography: The Changing Nature of the International System and the Challenge to International Law' (2014) 25 *European Journal of International Law* 9-24, 10-1.

authority we can better understand their normative relevance and how they shape the conduct of other actors.

Continuing the discussion of international organisations, **Danielle Reeder** explores the legitimacy of international organisations as actors in the collective security architecture. Reeder queries the authority with which international organisations gain credibility as guarantors of international peace and security. This contribution is of relevance to those interested in how complex relationships result in differing practices in international law but also to those how see the future of international law as one of disentanglement and a retreat from the international stage for many.

Returning to international environmental law, but from a different angle, **Daniel Akrofi, Peixuan Shang, and Jakub Ciesielczuk** assess the adequacy of current non-state actor participation in the negotiations for a global plastics treaty. The authors argue for a model that widens the scope of participants engaged in realising such a treaty. The reasoning behind such an inclusion of a wide variety of private and non-governmental actors, is in part normative as a way to bridge the North-South divide, and in part pragmatic, gaining access to field-specific knowledge that states parties do not necessary possess, and to include the perspectives of the actors that will in many cases be the ones directly tasked with implementing the rules brought on by the treaty.

Lastly, **Kilian Roithmaier** discusses the use of non-state armed groups by states to conduct proxy warfare. Roithmaier unpacks the complexities that make governing proxy warfare difficult and suggests the current laws on state responsibility are inadequate given the threat posed by proxy warfare. Roithmaier explores the prospects of the concept of complicity as a framework for state responsibility to account for these challenges. Each of these contributions present novel arguments and, as a collection, shed new light on relationships that will gain more and more importance in the new global landscape of international law and law-making.

As usual the issue closes with a book review. This time **Paulien Van De Velde-Van Rumst** reviews the *The EU and its Member States' Joint Participation in International Agreements,* edited by Nicolas Levrat, Yuliya Kaspiarovich,

Christine Kaddous, and Ramses A Wessel. She finds that the volume successfully demonstrates the wide variety of issues pertaining to EU's system of mixed agreements but that it misses a coherent view on how to address these issues as well as insights on the concrete implementation of mixed agreements in practice.

THE EJLS

As a very final remark, we at the EJLS wish to thank all authors, editors and reviewers who have devoted valuable time and attention to making this issue a reality, and it is my pleasure and privilege as incoming Editor-in-Chief to welcome Livia Hinz and Raghavi Viswanath as new Managing Editors, Daniel Rozenberg as Executive Editor, and Niklas Reetz as Head of Section for International Law. Additionally, we have recruited eight new junior editors this fall, demonstrating the enduring support from the EUI community for our now fifteen-year-old journal.

GENERAL ARTICLES

TO RAISE OR NOT TO RAISE: THIS IS THE QUESTION OF JUDICIAL COMPENSATION

Moshe Bar Niv* and Ran Lachman†

The issue of raising judicial compensation as a cornerstone for improving (or at least maintaining) the quality of the judiciary has been the subject of a longstanding debate engaging judges, politicians and scholars. Some argue strongly for raising compensations in order to attract highly qualified people to the bench while others argue that higher compensations are not a major concern for the judiciary. A "natural experiment" design was used here to examine the effect on judges of a rather unique real-life case of a reduction in judicial compensation in Israel. A group of presiding judges, who received reduced compensations, served as a "study group" and was compared to a group of presiding judges whose compensations were not reduced, serving as a "control group". Thus, this paper analyzes empirically a unique actual case of a change in judicial compensations, using a "natural" experimental design lending validity to the results.

The results indicate that the lowered compensations did not affect the courts' quality and were not a major consideration for judges and lawyers (potential candidates) in their decision to join the bench. The results shed important empirical light on the "raising or not raising of judicial compensation" debate.

Keywords: judicial compensation; judicial quality; satisfaction with compensation; judges; lawyers; natural experiment; judicial motivation

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I. INTRODUCTION

1. *General Background*

This paper aims to understand the impact of changes to the level of judicial compensation on the quality of adjudication systems. To investigate such impacts the paper examines an actual and rare case of a decrease in judicial compensation. Utilized here are a "natural field experiment" methodology and a longitudinal research approach covering a period of ten years, to assess the implications of the compensation decrease.

A suitable level of judicial compensation is critical for insulating judges and preserving their independence from external influences and financial pressures. It is considered essential for maintaining judicial proper functioning, integrity, and quality. Judicial independence and quality are foundational concerns in democratic societies.[1] For example, they were regarded by the European Union as a general concept to be adopted by all

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[1] For example, the American Constitution acknowledges its importance by stating in the Compensation Clause that judges: "receive for their services, a compensation, which shall not be diminished during their continuance in office." U.S. Const. art. III, § 1; see also, James E. Pfander, 'Judicial Compensation and the Definition of Judicial Power in the Early Republic', 107 (2008) Michigan Law Review 1. Other constitutions also secure judicial compensation; see for instance, Article 35 section 5 of the Constitution of Ireland: "The remuneration of judges shall not be reduced during their continuance in office save in accordance with this section," <http://www.irishstatutebook. ie/eli/cons/en/html> (accessed 22.2.2017). Similar provisions are part of states constitutions, e.g., New York State Constitution's Compensation Clause, see *Matter of Maron v. Silver*, 925 N.E.2d 899 (N.Y. 2010). In a case dealing with temporary and general salary in economic emergency circumstances the European Court of Justice declared that "every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection", Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117 (Feb. 27, 2018). The ECJ, actually declared the maintaining judicial independence (including protection of judicial salaries) is a general EU principle that direct all state members and the legislation.

member states[2]. Yet, empirical research analyzing the impacts of judicial compensation on the judiciary is quite scarce.

Given its importance, the issue of the level of economic compensation for judicial staff (hereafter: judicial compensation) has been deliberated for decades by prominent members of the judiciary[3] and scholars.[4] It has been long debated whether or not higher levels of judicial compensation are vital for maintaining a well-functioning and high-quality judiciary. As described in further detail below (section II: The Debate), proponents of judicial compensation claim that a higher level of judicial compensation is mandatory for facilitating the recruitment and retention of high-quality judicial cadre. On the other hand, there are scholars who argue that an increase in compensation is not necessary for attaining these ends, as higher compensation is not a major consideration in potential candidates' decision

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2 See Case C 619/18 *Commission v. Poland*, EU:C:2019:531; *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas*, (n 1); See also, Leloup Mathieu 'Who Safeguards the Guardians? A Subjective Right of Judges to their Independence under Article 6 (1) ECHR' (2021) 17 European Constitutional Law Review 394.Judicial independence is also a cornerstone of the Israeli legal system, see HC"J 188/96 *Tsirinski v. Sharon*, PD"I 52 (3), 721, 732-3 (in Hebrew); see also BASIC LAW: THE JUDICIARY (5748 - 1984), (<https://main.knesset.gov.il/EN/activity/Documents/BasicLawsPDF/BasicLawTheJudiciary.pdf>).

3 Already in the mid-1980s, "Chief Justice William H. Rehnquist submitted his first year-end report. He specifically focused on the inadequacy of judicial compensation," Chief Justice Roberts, *2006 Year-End Report on the Federal Judiciary*,p. 4 (hereinafter: *Roberts, 2006 end year report*), <https://www.supremecourt.gov/publicinfo/year-end/2006year-endreport.pdf> (accessed 25.1.2017). See Paul M. Bator, 'The Judicial Universe of Judge Richard Posner', (1985) 52 University of Chicago Law Review 1146, 1148 , stating that the federal judiciary as a group "complain more about their pay than any other group I have ever encountered."

4 See for example, Stephen J. Choi, Mitu G. Gulati, and Eric A. Posner, 'Are Judges Overpaid?: A Skeptical Response to the Judicial Salary Debate,' (2009) 1 Journal of Legal Analysis, 47 (hereinafter - 'Are Judges Overpaid') ; Anderson James M. and Eric Helland, 'How Much Should Judges Be Paid-An Empirical Study on the Effect of Judicial Pay on the State Bench', (2012) 64 Stanford Law Review 1277 (hereinafter – 'How Much Should Judges'); Scott Baker, 'Refining the Judicial Salary/Judicial Performance Debate: A Response to Professors Cross, Czarnezki, Henderson, Marks, and Zorn,' (2008) 88 Boston University Law Review, 855.

whether to join the bench or not. Hence a rise might not have the proposed effects.

Either way, there are important implications of the quality of the judiciary on societal welfare, social order, conduct and more. For example, the perceived judicial quality may affect the propensity of individuals to commit crimes or behave fraudulently. Recent research surveying 25 European countries showed that the individuals' perception of higher judicial quality serves as deterrence to illegal activity. [5]

2. The Present Study

Despite its importance, neither side to the debate on judicial compensation have sufficient convincing empirical evidence to support their arguments. While the theoretical and practical significance of the issue is high, the systematic empirical research investigating it is insufficient.[6] With few exceptions,[7] the available scholarly empirical research on judicial compensation has not directly examined the perceptions of the judges themselves on this issue. Rather, the impact of judicial compensation on judges has been mostly inferred or derived from indirect sources where effects of judicial compensation on aspects of judicial behavior and courts' quality may have been suggested rather than directly measured.[8]

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5 Mocan Naci, Samantha Bielen, and Wim Marneffe. 'Quality of Judicial Institutions, Crimes, Misdemeanors, and Dishonesty.' European Journal of Political Economy, (2020): 61 101815.

6 "So far neither theory nor evidence has played a large role in the public debates", 'Are Judges Overpaid,' (n 4), 48.

7 See for example, Thomas Cheryl, *2016 UK Judicial Attitude Survey - Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals* UCL Judicial Institute, February 2017, <https://docs.google.com/viewer?url=https%3A%2F%2Fwww.judiciary.gov.uk%2Fwp-content%2Fuploads%2F2017%2F02%2Fjas-2016-england-wales-court-uk-tribunals-7-february-> (accessed 1.4.2017).

8 See for example, 'Are Judges Overpaid', (n 4), 48, showing that salary has little influence of the performance of state courts, using citations as an indicator to estimate the impact of judicial salary impacts; 'How Much Should Judges', (n 4); Scott Baker, 'Should We

This is the purpose of the present study: to examine judicial compensation empirically and directly based upon the rather unique, standalone case of actual judicial compensation reduction that occurred in Israel. The relationships between compensation reduction and judicial behavior and perceptions were studied here. This case of the actual remuneration-cut has bearing on the compensation debate. If following the compensation-cut the functioning of the judiciary is impaired, it may support the raise-proponents' argument that compensation does play an important role, and a raise may improve the judiciary. If on the other hand the reduction does not impair judiciary's functioning (e.g., law retention rats) it may, even more so, support the position that compensation rise is not required to maintain a well-functioning judiciary, at least where judicial compensation is significantly higher than average income. Examining the consequences of the reduction in compensation over a period of ten years, as done here, allows to test the impacts of decrease compensation upon the quality of the court-system and examine if new judges could be hired and whether those hired after the reduction were of lower quality or not.

Although rare, this case is valuable from two aspects: a) unlike many studies it entailed a real and authentic reduction in judicial compensation;[9] b) the longitudinal perspective adopted here allows to establish time-order (cause-effect relations: i.e., the change in compensation is the cause of the effect). Whereas other studies use correlation analyses that can establish correlational

Pay Federal Circuit Judges More?' (2008) 88 Boston University Law Review 63, 65 , concluding that low pay has no effect on judicial performance in terms of voting patterns, opinion quality, etc.; Albert Yoon, 'Love's Labor's Lost? Judicial Tenure Among Federal Court Judges: *1945-2000*,' (2003) 91 California Law Review 1029, showing that the value decline in judicial pay, compare to partners in law firms did not affect the tenure of presiding judges; see also: Stefan Voigt and Nora El-Bialy, 'Identifying the determinants of aggregate judicial performance: taxpayers' money well spent?' (2016) 41 European Journal of Law and Economics 283.

[9] The only other case of compensation reduction we know of, was in the United Kingdom, a reduction that was later reversed and compensation reinstituted. See *McCloud v. Lord Chancellor*, <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/mccloud-v-moj.pdf>(accessed 15.4.2017).

relations among them only. Such correlations may be due to other external variables and coincidental. The research design here, allows for the examining of the consequences and reactions of presiding judges to the compensation change under relatively controlled conditions.

Thus, the study here focuses on two main research questions:

a) Does lower judicial-compensation affect willingness to serve on the bench?

b) Does lower judicial-compensation affect the quality of the judiciary?

To examine these questions the natural experiment design[10] compared a "study-group" – judges who received reduced compensation - to a "control-group" of judges whose compensation remained unchanged. The comparison is made a decade after the reduction was introduced so one can examine the long-term effects of the reduced compensation on judges, as well as the implications for the quality of the judiciary. The two judges' groups were identical in their work on the bench and their exposure to real-life judicial as well as societal environments, except for the different compensation packages they received based on their tenure: before or after the cut (see Appendix A). The analyses of the effects over time are based on statistical data and data collected through attitude-survey among presiding judges, conducted a decade after the reduction introduction.

Also examined are the perceptions of lawyers re the quality of the judges as measured before the reduction, compared with lawyers' perceptions of judicial quality a decade after the reduction as measured through identical attitude surveys before and ten years after the reduction (for details see Appendix A). Further, since lawyers are the cadre for recruitment to the

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[10] For an elaborated description of the surveys, see Appendix A: Research Methods; for an elaborated description of the natural experiment research approach see: Earle R. Babbie, *The Practice of Social Research*, Cengage Learning Pub. (2015), 242; or Frederick J. Gravetter and Lori-Ann B. Forzano, *Research Methods for the Behavioral Sciences*, (3rd ed. Cengage Learning 2009).

bench the consequences of the reduction for their judicial aspirations were measured.

There is almost no research utilizing this meticulous methodology in the context of judicial compensation.[11] Hence, the results of the present study in Israel may contribute significantly to the understanding of these important issues.

II. THE DEBATE ON JUDICIAL COMPENSATION

As suggested above, the core question of the debate is: will a significant raise in judicial compensation substantially affect the quality of the court system? Proponents of the call to raise compensation argue that present compensations are not high enough. They claim that a substantial raise in judicial compensation is crucial for attracting high quality candidates to the bench and to assure the quality of the court-system.[12] In the U.S.A for example, it has been argued (even by Supreme Court Justices) that the level of judicial compensation has reached the level of a threat to the independence of the judicial system and its quality and therefore, a raise is a necessity.[13]

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11 E.g., Jennifer M. Jensen, 'Career Satisfaction and State Trial Court Judges' Plans to Leave the Bench', (2011) 95 Judicature116. See also, Richard A. Posner & Albert H. Yoon, 'What Judges Think of the Quality of Legal Representation,' (2011) 63 Stanford Law Review 317, 338-339.

12 See quotes in 'Are Judges Overpaid' (n 4), 48. In Israel, demands to raise judicial salary in order to facilitate recruitment of quality candidates to the bench, were presented by a representative of the judiciary to the Knesset's (Israeli parliament) finance committee in 2007, following the decrease in compensation discussed in this paper, see report in <https://www.ynet.co.il/articles/0,7340,L-3427302,00.html>, visited 5.11.21, (in Hebrew)

13 Roberts, *2006 Year-end report*, (n 1), 1: "the issue has been ignored far too long and has now reached the level of a constitutional crisis that threatens to undermine the strength and independence of the federal judiciary. I am talking about the failure to raise judicial pay." Justice Breyer stated that without a pay increase, the judicial system will lose quality and predicated the results to be "truly extraordinary and frightening," as quoted in Michael J. Frank, 'Judge Not, Lest Yee Be Judged Unworthy of a Pay Raise: An Examination of the Federal Judicial Salary Crisis', (2003) 87 Marquette Law Review 55, 56 (hereinafter – 'Unworthy of a Pay Raise'). Similarly, the U.S.A Bar supported the call for a judicial pay raise, see for example, James Podgers, 'Time for Raise', (2007) March issue, A.B.A. Journal 63.

Demands for increase of judicial compensation were also made on behalf of the Israeli judges[14] and were supported by the Minister of Justice that reasoned such requested increase as necessary to protect judicial independence and quality.[15] Judges' demands for a raise of salaries were also raised in several European Union countries.[16] High levels of dissatisfaction may reduce motivation to perform the judicial work or lead even to judges resigning from the bench for higher pay options. In such a case, less qualified candidates who do not have high-pay options would be attracted to the bench, thus eroding judicial quality.

In essence, the proponents of a compensation rise assume that high compensation is a most significant factor in judges' utility function. The underlying argument assumes that as rational decision-makers, people are sensitive to price changes and react to them. Thus, a judge or judicial candidate facing several similar employment opportunities will opt for the one that provides the highest compensation. However, utility may also be a function of non-pecuniary rewards, hence the argument that without substantial compensation increase the quality of the court will decline is not necessarily correct.

Notwithstanding, it has been argued that judicial compensation must reflect the distinct nature of the judicial office. Judicial pay is determined with the

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14 See judges' request to the Israeli parliament raise their salaries, in 2010, and during 1994-1995: <https://main.knesset.gov.il/Activity/committees/Finance/News/Pages/pr_2976_09022010.aspx>, and, <https://fs.knesset.gov.il/13/Committees/13_ptv_470438.DOC> (both in Hebrew).

15 See <https://knesset.gov.il/tql/knesset_new/knesset14/HTML_27_03_2012_06-21-01-PM/19941121@19941121015@015.html> (Hebrew).

16 Examples are, G. Szabó, Dániel: *A Hungarian Judge Seeks Protection from the CJEU – Part I, VerfBlog,* 2019/7/28, <https://verfassungsblog.de/a-hungarian-judge-seeks-protection-from-the-cjeu-part-i/, DOI: 10.17176/20190728-200951-0>; See also, Platon, Sébastien, and Laurent Pech. " Court of Justice Judicial independence under threat: The Court of Justice to the rescue in the ASJP case." *Common Market Law Review* (2018) 55.6; Torres Pérez, Aida. "From Portugal to Poland: The Court of Justice of the European Union as watchdog of judicial independence." *Maastricht Journal of European and Comparative Law* (2020) 27, 105-119.

aim of establishing and maintaining judicial independence and impartiality, since judicial independence is a cornerstone of the court system.[17] Judges' decisions should follow only their objective judgment and their assessment of the facts and the law. Hence, they have to be free from any external pressures, influences, or constraints including income issues. To assure that judges are indeed independent in their rulings and free from personal economic concerns, judicial compensation should be high enough to secure a respectable standard of living. Inadequate compensation may jeopardize judicial independence.[18] The proponents of compensation raise argue it ought to be raised beyond this. As indicated above, however, these lines of arguments have not been substantiated by sufficient empirical evidence. [19]

The counter contention in the debate argues that judges and judicial candidates are not necessarily attracted to the bench by the level of pecuniary compensation only. Scholars have claimed that a raise is unnecessary since it will not have a meaningful impact on the quality of the courts.[20] Lawyers aspiring to become judges are not driven just by pecuniary remuneration but may also have other motivations such as altruistic values of service to the

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17 "Judicial independence is a cornerstone of American constitutionalism," Michael D. Gilbert, 'Judicial Independence and Social Welfare', (2014) Michigan Law Review 112, 575, 577. See also, *United States v. Will*, 449 United States 200, 217-18 (1980). "A Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government." This is well known, and the compensation clause in the American constriction was interpreted as aimed to secure judicial independence: "This Court has recognized that the Compensation Clause also serves another, related purpose. As well as promoting judicial independence, it ensures a prospective judge that, in abandoning private practice–more often than not more lucrative than the bench–the compensation of the new post will not diminish.", 220–21 (1980); See also, Van Elsuwege, Peter, and Femke Gremmelprez. "Protecting the Rule of Law in the EU Legal Order: A Constitutional Role for the Court of Justice." *European Constitutional Law Review* (2020) 16 8-32.

18 See 'How Much Should Judges', (n 4) at 1381 and references there.

19 See 'How Much Should Judges', (n 4), showing a small significant effect of salary upon the resignation of judges.

20 Scott Baker, 'Should We Pay Federal Circuit Judges More?', (n 8); 'Unworthy of a Pay Raise' (n 13); Blake Denton, 'The Federal Judicial Salary Crisis, Drexel Law Review (2009) 2 152. As suggested later, in Civil Law judicial systems this issue may be different.

community, the challenges involved, interest in the judicial work, status, ideology, job security, and more.[21] For each individual, the relative weight of such motivations may vary.

Furthermore, some have emphasized the potential negative effects associated with a raise. They claim that a substantial increase in compensation may provide an incentive for candidates that value mostly pecuniary consideration over the "aptitude of the job and attract them to the bench."[22] Hence, reasonable, not too low, judicial compensations serve as a "filtering" mechanism that differentiates candidates that are price motivated from candidates that are motivated by the judicial task.[23] Therefore, it was argued, the compensation should be high enough to attract qualified candidates, but not too high as to fill the bench with opportunists whose interest is solely the compensation. From a societal perspective, raising judicial compensation significantly without enhancing judicial quality may be considered a social waste. Moreover, as most judicial systems are public, they cannot afford to raise compensation to the level of the compensation at the private market. Therefore, the public system cannot compete with the private market based on compensation anyways.

However, as indicated earlier, neither side of the debate provides sufficient empirical and reliable evidence to support their claims. Hence, it is important to study empirically the impact of judicial compensation on judges and on

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21 See for example, Richard A. Posner, 'What Do Judges Maximize? (The Same Thing Everybody Else Does),' (1993) 3 Supreme Court Economic Review, 2; Richard A. Posner, *Overcoming Law*, Harvard University Press (1995), 109-144; Fredrick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, (2000) 68 University of Cincinnati Law Review, 615.

22 Thomas J. Forr, 'Want Less Ideology on the Federal Bench? Pay Judges More.' (2010) 158 University of Pennsylvania Law Review, 859; Richard A. Posner, *How Judges Think*, Harvard University Press (2008) 162; see also, Moshe Bar Niv, Ran Lachman, 'Justice You Shall Pursue': The Motivation of Judges to Join the Bench' (2017) 24 Hamishpat, 139-172 (In Hebrew).

23 Paul E. Greenberg & James A. Haley, 'The Role of the Compensation Structure in Enhancing Judicial Quality', (1986) 15 Journal of Legal Studies, 417.

the judicial quality in order to better understand this issue and clarify its implications. The Israeli case provides an opportunity for doing that.

III. THE JUDICIAL COMPENSATION IN ISRAEL

As the focus of this study is the judicial compensation in Israel it ought to be described in more detail. The Israeli judicial system is an adversary one and in essence, is based upon the Common Law court pattern.[24] It is built on three instances' hierarchy: Magistrate (First instance), District (Second instance) and Supreme courts. [25] The district court serves as a trial court for matters that are beyond the jurisdiction boundaries of the first instance, as well as a court of appeals over the judgments of the magistrate court (first instance). Judges are all law-school graduates and are required to have at least five years' experience practicing law before being considered for nomination to the bench.

As for the judicial compensation, as government employees, Israeli judges and their judicial compensation are subjected to the general compensation policies for all government employees. As a result, Judges' direct wages have been rather limited. To circumvent this limitation, and allow for higher judicial compensation their compensation included unique and generous (if not exceptionally high) government financed social benefits, such as a very

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[24] The Israeli court system resembles common law countries such as the United Kingdom and Canada. See for example, Mary L. Clark, Judges Judging Judicial Candidates: 'Should Currently Serving Judges Participate *in* Commissions *to* Screen *and* Recommend Article III Candidates Below *the* Supreme Court Level?' (2009) 114 Penn State Law Review 49, 59; see also, Bruce Peabody (ed.), *The Politics of Judicial Independence: Courts, Politics, and the Public* (CG Geyh, 2011) 208-9, "The United States and Israel share some features (they are both democracies with a common law tradition". See also, "courts based on the British derived common law adversarial system practiced in Israel", Angeline Lewis, Judicial Reconstruction and the Rule of Law, 96 (2012); Yoav Dotan, *Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel,* (Oxford University Press 2013)18ff.

[25] There are other courts and tribunal systems in Israel, such as religious courts, industrial relations tribunals etc., but these are considered special courts systems, while the main criminal and private litigations, as well as the residual jurisdiction are the jurisdiction of the general court system.

lavish pension plan, an exclusive lifetime healthcare plan, etc. Further, the compensation was linked to the cost-of-living index and included additional individual allowances and increments (e.g., tenure and seniority increments, overtime increment) to further increase it. Of these, the most significant benefit was the very generous government budgetary pension plan.[26] Several features made this an exclusive plan. First, the judges' pension accumulation rate has been an exceptional rate of 7% per year (as compared to 2% among other employees). Second, pension payments were based upon the judge's last salary in office (rather than upon the average salary during the service). Third, it was a budgetary "risk-free" pension plan fully paid by the government with no exposure to the risks of financial markets fluctuations. The judges themselves did not contribute to this budgetary pension plan.[27] Considering all these the average judicial compensation in Israel has risen beyond that of the other government employees, and far over the average labor market compensation.

In order to examine the issue of compensation raise using Israel as a "case study" it is important to assess the actual level of the judicial compensation. The perspective on the issue may be different if the compensation is indeed low. It is difficult to determine whether a nominal compensation level is "high" or "low". To assess that a comparative "yard-sticks" ought to be used, preferably a comparison which judges themselves may use in assessing their own compensation level. One may be their compensation relative to others in Israel: i.e., the ratio of judicial compensation relative to the average wage in the Israeli labor market. Another, most probably more relevant for judges is the compensation of private law firms' lawyers.

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26 No other group in the public sector received such generous terms.

27 It ought to be noted that federal judges in the US enjoy similar pension rights and also do not contribute to their pensions; federal judges can retire at the age of 65 after 15 years on the bench, or after 10 years at the age of 70, and obtain a full lifetime salary. See: Richard A. Posner *How Judges Think*, (n22) 166; Albert Yoon, 'Federal Judicial Tenure', in: Lee Epstein, Stefanie A. Lindquist (ed.) The Oxford Handbook of US Judicial Behavior, (Oxford University Press 2017) 96.

Incidentally, such parameters can also assist in comparing judicial compensation levels across judicial systems, a perspective where the nominal judicial compensation is of no value. Such a comparison may perhaps also help support the generalizability of the results here.

It was not possible to obtain the exact compensation of judges in Israel. The official data on governmental employees' salaries, published by the Director of Wages and Labor Agreements, in the Ministry of Finance, reports judges' base salary only, so it is difficult to know what the precise average compensation (including the various increments and benefits) is.[28] Hence, approximations were used here. The salaries of judges in 2010, in terms of the ratio of average wage over the national average salary, were (approximately): for a magistrate (First Instance) 3.8 times the national average wage; for a District Court judge (Second Instance) 4.3 and for a Supreme Court justice 4.9 the average wage in Israel. Unfortunately, in Israel there is no formal data on the compensation of senior partners in private law firms so it cannot be compared to that of the judges.[29] Hence, perhaps another relevant comparison, within Israel, is that with the average earnings of the top decile of the Israeli market wages: for a magistrate 1.1 times the average at the top decile, for a District Court judge 1.2 and for a

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[28] We have requested this information from the Director of the Court System, under the Freedom-of Information Act, but were turned down based on the Personal Privacy clause. Hence, the figures here are estimates calculated based on data published on government employees' salaries and the incremental rates following the official directives of the Director of Wage and Labor Agreements, the Israeli Ministry of Finance, see: <hozrim.mof.gov.il/doc/sachar/sachar_hozrim.nsf/.../$file/2010-9.doc> (accessed 9.1.2017). The estimates may deviate from the actual figures by approximately 10%. In addition to their base salaries, judges are entitled to various individual allowances and additional payments. In estimating the compensation, we assume that, on average, these additional pay-increments may raise the monthly base salary by 10-15%.

[29] Few private surveys indicate that senior partners in leading law-offices earn substantially more than first and second instance judges, e.g. <http://www.glawbal.com/upload/Year%202010%20-%20Short%20Summarize.pdf>, (2010 data – in Hebrew); a similar result is reflected in a different private survey, <https://www.themarker.com/law/1.1938123> (2010 data- in Hebrew) .

Supreme Court justice 1.4 the average.[30] Either way, judicial compensation in Israel is among the highest in the Israeli labor market as well as among the highest compensations in the government service.

Incidentally, the ratio to the labor market average can also assist in comparing judicial compensation levels across judicial systems, a perspective where the nominal judicial compensation is of no value. A cross-cultural perspective with other similar judicial systems may perhaps also help support the generalizability of the results. Thus, a succinct cross-cultural perspective can be presented. For example, in the US, the average salary of a US Federal District Court judge in 2010[31] was 4.18 times the average US wage; the ratio for a Circuit Judges was 4.42, and that for Supreme Court justices was 5.13 times the US average wage.[32] To wit, the level of judicial compensation (relative to the labor market) in Israel is not much lower than the US one. In the UK, the ratio of judicial compensation of high-level-courts justices reached a peak of 7.7 times of the UK labor market average wage.[33]

Given this perspective, the judicial compensation level in Israel (in relative terms) is not low at all, relative to the earnings in Israel, and in line with that in the US but lower than the UK one.

As indicated, Israel constitutes a good Test-case of reducing judicial compensations. In 1999 a new governmental policy to eliminate budgetary pensions for all governmental sector employees was introduced. The new

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30 The ratios were calculated based on the above estimation of the judicial compensation on the one hand and the published (the Israeli Central Bureau of Statistics) average monthly wage for a salaried worker in Israel as on the other, <http://www.cbs.gov.il/www/y_labor/e4_01.pdf> (accessed on 9.1.2017).

31 We refer to this year as the base for discussion since the data we analyzed was collected during the end of 2010 and the beginning of 2011.

32 <http://www.uscourts.gov/judges-judgeships/judicial-compensation> (accessed 15.1.2017)

33 For information regarding US salaries see, <https://www.ssa.gov/oact/cola/AWI.html>, (accessed 15.1.2017); for compensation re UK justices salaries see, European judicial systems Efficiency and Quality of Justice, CEPEJ STUDIES No. 23, p.20 <https://rm.coe.int/european-judicial-systems-efficiency-and-quality-of-justice-cepej-stud/1680788228> (visited 5.11.21).

policy eliminated all budgetary pension plans for employees and replaced them with accumulative plans. Thus, in 1999, like all government and public sector employees, judges' compensation had changed into a conventional cumulative financial pension fund to which both the employer (governmental entities) and the employee (judges) made monthly contributions. This new pension plan constituted a considerable reduction in judicial compensation as its unique features were drastically changed, as well as a cut in the monthly pay[34] However, this drastic reduction in compensation was adopted only for future judges to be recruited after mid-1999. Judges already presiding were not subjected to this change and continued to enjoy the previous compensation terms.[35] This differential adoption resulted in the segmentation of the judiciary into two compensation "tiers":

1) The "old-time" veteran judges who retained their previous compensation (tier A);

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[34] The drop in pension entitlement for Tear B meant a significant loss on their part. For example, Tear B judges have to serve 35 years in office to gain the maximum pension of 70%, rather than 15 years at the previous budgetary pension program. Further, the new pension program is calculated based on each judge's average salary over the years in service rather than the previous basis determining the pension according to pre-retirement salaries that were much higher. The new pension program is no longer risk-free and is a function of investments in financial markets. Also, new judges now have to contribute approximately 7% of their monthly salary to their pension, directly deducted from the gross monthly payments reducing their net fluent income. In addition, management fees are deducted from their pension fund reducing the net accumulation of the pension at least by 6-7%. The financial value of these cuts has been very significant and means that the budgetary pension could be valued more the twice than the new program. This difference may amount to a cut of about 25% of the total compensation flow (including retirement) of a tier B judge. The budgetary judicial pension provided also for 100% pension to the spouse of a deceased judge which is also a meaningful decrease of the net value of the judicial pension program.

[35] A similar pattern of differentiation between judges has been implemented recently in England: Newly appointed judges were entitled to an accrual pension (unlike the previous budgetary one that is still payed to previously appointed judges). The newly recruited judges sued the government on the basis of age discrimination in their pension schemes. See, *Judges sue UK government over pension reform*, Financial Times 15.11. 2016 (accessed 24.1.2017). The judges won the case, <https://www.judiciary.gov.uk/wp-content/uploads/2017/01/mccloud-v-moj.pdf> (access 1.6.2017).

2) The newly recruited judges, joining the bench after mid-1999 under the scheme (tier B), who receive reduced compensation, even though they are performing precisely the same functions as their veteran colleagues, even sit, at times, on the same bench.

It comes as no surprise that the judges objected to this change and tried to reverse it.[36] However, as of now, the reduced compensation remains unchanged.[37]

The decrease in judicial compensation, calls for an examination of whether or not, as a result, the Israeli court system faced a shortage of judicial candidates; erosion in the quality of the new judges; and an increased dissatisfaction of tier B judges with the compensation.

Hence, it is hypothesized that:

1) Tier B judges will be less satisfied with their compensation than tier A judges;

2) The quality of tier B judges (who were willing to be appointed under a reduced compensation) will be lower than that of tier A judges.

The reduction in judicial compensation, as described above, was substantial enough to allow for testing these hypotheses by comparing tier A and tier B judges. The methodology adopted for the comparison is a "natural experimental design".[38] The reactions of a "study-group" (tier B) exposed to

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[36] The Israeli judges objected this change and tried to reverse it. In response to the judges' resistance and complaints, two public committees were appointed: one in 2007 and the second in 2012, to review the issue and submit recommendations. Both committees acknowledged that tier B judges suffered a very significant financial loss that can reach the amount of several million NIS. Both committees concluded that the judges' pension arrangements ought to be improved.

[37] Recently the justices' struggle against the reduced pension plan has reached the point of a threat of a strike for the first time ever (which eventually was not realized), See, <http://www.ynetnews.com/articles/0,7340,L-4942101,00.html> (accessed on 1 Apr. 2017) (in Hebrew)

[38] For a description of the "natural experiment", see appendix A: research methods.

the compensation change were compared to those of a "control-group" (tier A) who were not, in a case where the "experimental intervention" was a real-life and significant compensation reduction, not a simulated laboratory experimental manipulation.

In sum, an important question in the study is whether or not the new, reduced level of judicial compensation is sufficiently high to enable the recruitment of the necessary number of justices. An even more important question is: do current levels of reduced judicial compensation (that were claimed to be insufficient for maintaining quality) erode the quality of the judiciary? More precisely, do current levels of compensation and even more so reduced one, enable the recruitment of quality judges or not.

IV. THE STUDY RESULTS

The impact on judges of the actual reduction in the judicial compensation in the Israeli Court System in 1999 which provided a rare opportunity to examine it in "real-life" situation, is examined here.[39] First, the availability of qualified judicial candidate was examined. Second, the judges' reactions and attitudes regarding the compensation and judicial quality were measured by the responses to a survey of a sample of presiding judges in Israel a decade after the change was introduced.[40] Third, the quality of presiding judges was also assessed by the lawyers; and lastly, judicial compensation as a factor of judicial motivation was examined.

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[39] Indeed, as indicated above, the judges' objection to the change necessitated the appointment of two committees to deal with it, which means the change left an impact

[40] Since the change in compensation was implemented only for newly recruited (after 1999) judges, we had to allow time for a sufficient number of novice judges to join the court. Therefore, the satisfaction with the judicial compensation and quality were measured in 2011, about a decade after the change was implemented. For details, see Appendix A: research methods.

1. The Availability of Candidates

The first issue to be examined here is whether or not following the reduction in judicial compensation the court system faced difficulties in recruiting judges. This can be tested by examining if indeed there are enough candidates for the open judicial positions, despite the lower compensations.

A survey we conducted on a large representative sample of Israeli lawyers (N=2897), in 2011 (a decade after the reduction), shows that even under the reduced judicial compensation many lawyers said they were willing to be nominated as judges.[41] Asked if they were prepared to be nominated to the Magistrate court (First Instance, usually the entry level to the bench) 29% said they are definitely willing to join the bench and additional 26% said they are almost certainly willing to do so; i.e., half the lawyers answered affirmatively. The response regarding nomination to the District court (Second Instance) was even more enthusiastic: 33% said they definitely were willing to join the bench. Given that in 2010, there were over 40,000 lawyers in Israel it appears that at least 12,000 lawyers were willing to join the bench. Moreover, of the more senior lawyers (over 15 years of practice experience) 37% said they were willing to become judges.[42]

At the same time, a rather small number of judicial positions were opened: in the decade at hand, on average 14 positions opened each year, mainly due to retirement of judges. That means, more than ten thousand lawyers were ready to compete over the few available positions.[43] However, not all the interested lawyers actually applied for the positions. Each year between the years 2000 and 2010 there were, on average, 110 "contending candidates"[44]

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41 For detail on this survey, see, Moshe Bar-Niv and Ran Lachman, 'Lawyers' Satisfaction with the Court's Functioning: A Three Decades Perspective', Hapraklit, (2016) 54, 413 (in Hebrew).

42 ibid.

43 Upon our request, the Director of the Courts provided the total number of judges who had left the bench in the last 25 years

44 "Contending candidates" are candidates that after initial screenings have formally been considered for candidacy. This means that on average there were almost ten, prima facie, qualified candidate per vacant judicial position.

for the a few judicial openings.[45] Very seldom, new judicial positions were opened due to expansions of the courts' system and therefore are not relevant for this study. Given that, the court system has had, on average, about eight contending-candidates (and potentially even more) for each opening to select from. And indeed, all the new vacancies were filled by new judges who joined the court system in spite of the lower judicial compensation offered to them. It appears therefore, that the Court-System did not face any difficulty in recruiting new judges: the reduction in judicial compensation did not hinder the recruitment of a considerable number of qualified candidates to the bench.

This conclusion is further supported by the statistics that during the 27 years (1989-2016), only 11 judges have left the system before their retirement time.[46] That is, 0.4 judges per year (1.2 judges per three years) have left office early. This rather surprising statistic suggests that current judicial compensation may suffice for retaining the judges in their judicial positions.

One possible interpretation to these findings is that judges, who joined after the new judicial compensation scheme was implemented, knew what their judicial compensation would be and consented to it. Those who did not like the reduced judicial compensation scheme probably did not apply for the nomination. Hence, those who decided to accept the nomination as a judge were content with the reduced level of compensation and were found here to be satisfied with it (see below). If this interpretation is correct, it means that there are sufficient candidates, as shown here, who are ready to accept a judicial nomination even though the compensation is lower than that of their veteran colleagues and of their "market value", would they pursue a career as partners in law firms.

This in itself suggests one of two interpretations: One, the new judges were lawyers of lesser quality who had no better alternatives and were ready to accept the lower compensations; two, judicial compensation was not the

45 The figures were provided by the Director of the Courts in Israel.
46 The figures were provided by the Director of the Courts.

most important motivator for candidates. As for the first interpretation, given the fairly large number of potential and actual candidates, it is not very likely that the quality of the bench was diminished by selecting "under-qualified" new judges from all these candidates. The other possible interpretation may be that the judicial compensation was not the most important motivator for candidates to the bench and hence, they were prepared to join the bench even for a lesser pay. These interpretations are empirically tested and discussed later.

2. Judges' Satisfaction with Their Compensation.

The first research question was: how will reduced judicial compensation affect judicial satisfaction? We hypothesized that the judges who received lower compensation, will be less satisfied with compensation than judges whose compensations remained unchanged.[47]

The judges' satisfaction with their compensation was measured using a question that was part of the opinion-surveys we conducted early in 2011 among all presiding judges in the trial courts of Israel. The judges were asked to rate their satisfaction with their judicial compensation. The response-range was: 1. *Very satisfied*; 2. *Satisfied*; 3. *fairly satisfied*; 4. *Not so satisfied*; 5. *Not satisfied at all*.

First examined here was the level of satisfaction with compensation of all the judges together. The results show that overall, the judges in Israel in 2011 were rather satisfied with their compensation: Only 17% said they were not satisfied with the compensation whereas 45% said they were fairly satisfied and 38% were satisfied with their compensation (Table 1). Given that the vast majority of the judges are fairly satisfied with their compensation, the question is: are tier B judges less satisfied than tier A judges?

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[47] It is important to emphasize though, that the newly recruited judges knew upon recruitment that their compensation would be lower than those of the "old-timers." In this sense, they have not experienced a reduction of their previous compensation but had to contend with a lower level of compensation relative to their colleagues.

A. Judicial satisfaction among tier A and tier B judges (2011)

We compared the judicial compensation satisfaction of tier B judges (37 judges) who received the reduced compensations to that of tier A judges (34 judges).[48] The comparison shows that there are hardly any differences between the two groups, even though the judicial compensations of tier B are lower than those of tier A judges (Table 1).

Table 1: Judicial compensation satisfaction of Tier A & B judges

How satisfied are you with your compensation?	Tier B judges (0–10 years)	Tier A judges (11 and over)	Total
Very satisfied	5 13.5%	1 3%	6 8%
Satisfied	7 19%	14 41%	21 30%
Fairly satisfied	18 49%	14 41%	32 45%
Not so satisfied	5 13.5%	5 15%	10 14%
Not satisfied at all	2 5%	0	2 3%

[48] A total of 86 judges answered the questionnaire. However, 7 did not respond to the question on tenure as a judge, so it was not possible to classify them by tiers. Of the remaining 79, 8 did not respond to the question on satisfaction with the compensation. See Appendix A for a discussion of is issue.

Total	N=37 100%	N=34 100%	N=71

The observed differences between the two groups of judges are not statistically significant and therefore, cannot be considered different.[49] A more valid presentation would be one where categories with small numbers of responses are combined.[50] Combining such categories, the differences appear even smaller. Among the tier B judges 18.5%, compared to 15% of tier A judges, were not so satisfied with the judicial compensation; 41% of tier B and 49% of tier A judges were fairly satisfied; and 32.5% of tier B as compared to 44% among tier A were satisfied with their judicial compensation. These are minor statistically insignificant differences.[51] They show that the satisfaction distributions of the two groups are essentially not different from each other.[52] To wit the satisfaction of tier B judges with their judicial compensation is not different from that of their much higher

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49 The reader ought to bear in mind that these percentile differences are reflecting small numbers of judges, and a shift of few judges from one category to the next may lead to a fairly large difference in percentage. The χ^2 value indicates that the observed differences were not statistically significant: p= 0.12, i.e., the probability that these differences reflect an error is too high to be relied upon. However, the χ^2 calculation here can be distorted as some cells in the table have less than 5 observations.

50 To avoid empty or cells with less than 5 respondents, the response of "very satisfied" can be combined with that of "satisfied", as both reflect satisfaction with income and a judge's choice to answer one or the other may also reflect personal style of expression. The same may be true for "not satisfied at all" and "not so satisfied."

51 The χ^2 value for the combined categories (which is a more reliable value) was: $\chi^2 = 1.04$, d.f.=2; p= 0.59 i.e., not statistically significant.

52 It can be argued that the small N (86) here is insufficient for obtaining significance. However, in a study of the motivation to join the bench conducted on the same data and the same sample (N=86), significant differences were found. For example, there was a difference in viewing compensation as a motivation to join the bench between judges who came from the public sector and those coming from the private one. This indicates that the sample at hand has sufficient statistical power. See, Bar Niv (Burnovski) Moshe and Ran Lachman 'Judges' Perspective on Level of Punishment' European Journal of Legal Studies, (2017) 9, 171-208.

compensated colleagues (tier A), although they do the same judicial work and serve on the same bench as their tier A colleagues.

Thus, our hypothesis that judges who received lower remunerations for doing the same work would be less satisfied, was not supported. The significant reduction in judicial compensation for the newly recruited judges (tier B) did not affect their actual satisfaction with it. It ought to be stressed here that the lower compensation is lower relative to tier A judges: this lower compensation is still very decent and falls within the upper 5% of the income distribution in Israel.[53] Hence, even though they may experience deprivation relative to their tier A colleagues and certainly relative to partners in law firms, the tier B judges were still satisfied with their compensation.

The "natural-experiment" design used here lends credibility to these results as they reflect a real-life situation. The comparison between a "study group" and an identical "control group" in a non-laboratory situation makes the findings more robust and valid. Also, this design rules out any compounding effects of other external variables that might have affected the result.

3. Reduced Compensation and The Quality of Judges.

An important question raised here is: does the reduction in judicial compensations affect the quality of the judges? Or, is a raise in judicial compensation needed in order to attract capable lawyers to the bench as well as retain them? As indicated earlier, the proponents of compensation raise claim that unless compensation is raised the "capable" lawyers who can earn a much higher income in private practices would be reluctant to give up their lucrative income for a much lower compensation as a judge. This would be all the more so if compensations are reduced, as was the case here.

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[53] The research unit of the Israeli parliament: https://www.knesset.gov.il/mmm/data/pdf/m03346.pdf.

A. The quality of the newly recruited judges

Tested here is the hypothesis that the estimated quality of the newly recruited judges will be lower than that of the veterans. There are various ways, but no commonly accepted one, to gauge empirically judicial quality.[54] Hence, we chose to gauge judiciary quality here using the perception and assessment of presiding judges and Lawyers. Judges and lawyers are highly skilled Judicial professionals who know the judiciary well and could be used to evaluate the quality of the Judiciary as a whole, and changes in quality, if any, that took place over the five preceding years (the possible response-bias in such assessment is discussed below). We find the judges themselves as the most qualified to assess the quality of the judicial decisions as this is what they themselves do. It is particularly true in our case as most Second Instance judges are veterans (tier A) and the Second Instance also serve as an appeal instance on First Instance court decisions. Most First Instance judges are tier B judges, as this is usually the entry level to the system. Hence, as an appeal instance, Tier A judges evaluate First Instant decisions regularly and are familiar with judicial quality.

In the 2011 judges' attitude-survey, the judges were also asked to assess the quality of the first and second instances' judges (in general not their own quality) during the five years preceding the survey. The possible responses were: the judges' quality *1. Risen to a large extent; 2. Risen somewhat; 3. Did not change; 4. Lowered somewhat; 5. Lowered to a large extent*.[55]

Given this question, we can examine the quality of the newly recruited judges as estimated by the judiciary itself.[56] Almost Two-thirds (62%) of the judges suggested that the quality of the judiciary had risen (at least

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54 See 'How Much Should Judges Be Paid', (n 4), 1282.

55 In the question, the judges were asked to respond regarding the First Instance and Second Instance separately. The data here is presented for the First Instance, as it is, in most cases, the "entry point" of new judges to the system.

56 We wish to reiterate here that these judges are the most qualified to assess the quality of the judicial decisions, particularly in the Israeli case where the Second Instance judges also serve as an appeal instance on First Instance court decisions.

somewhat) during the five years preceding the survey (Chart 1). If we add to these the judges who felt the quality of the judges did not decline ("has risen" combined with "has not changed") then one can see that the vast majority of the judges did not think the quality of the judiciary was compromised due to tier B judges joining the bench under lower compensation.

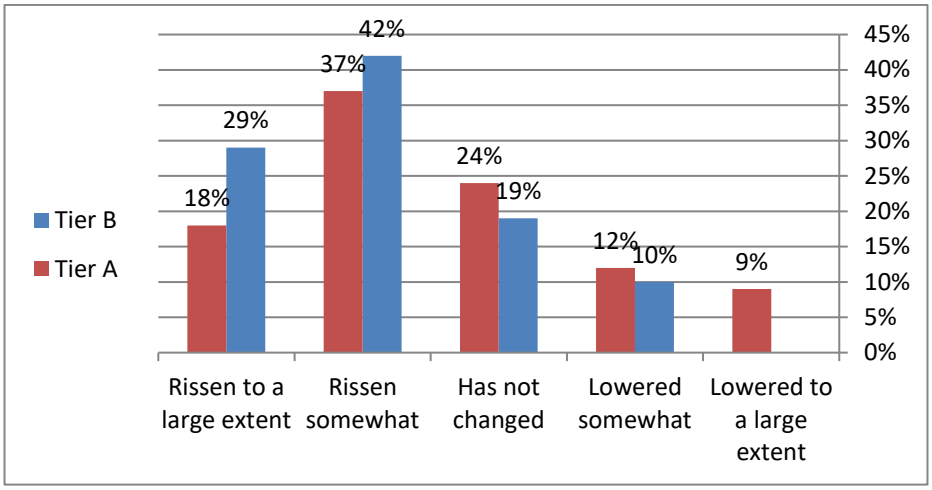
Arguably, the results may be favorably biased as the tier B judges' assessment implicitly included "their own" quality as part of the overall judicial quality. While in the survey judges were not asked to assess their own quality as judges, but changes (if any) in the general quality level of the judiciary, there is a chance, however small, that their responses might have been biased. Yet, it is unlikely that in answering this question, judges (who were categorized by us as tier B) did associate judicial quality with the fact that in analyzing the data (10 years later) it will be correlated with the fact that they received lower compensation as a group. Therefore, it is unreasonable that these judges would overly "praise" the judicial quality to appear of high quality. Nonetheless, to test for this unlikely bias, we have singled out the responses of tier A judges, and compared their quality assessments to those of tier B judges (Chart 1).

The findings show that tier A judges' assessments of the change in judicial quality were not statistically different from those of tier B judges: over a half (55%) of them thought the quality of the judiciary has risen (somewhat or to a large extent) during the five preceding years.[57] If we add to that judges who felt the level of quality did not change (i.e., was not lowered), we see that the vast majority (79%) of tier A judges thought that the quality of the judiciary was not compromised over the preceding five years (the time when

[57] To calculate the significance of the differences using χ^2 the category of "lowered to a large extent" was combined with "lowered somewhat", to avoid empty cells and minimize cells with count of less than 5, who may distort the calculations (Fisher correction was applied). The differences are statistically insignificant: $\chi^2 = 4.01$, d.f. =3, $p>0.25$. The differences in percentages appear quite large but given the relatively small N a change in cell count by a single judge could change the percentage by 3-4%.

the tier B judges joined the court). Only 21% of tier A judges, and 10% of tier B judges, thought the quality level has dropped.

Chart 1: Judges' assessment of judicial quality in the five preceding years (2011 data)



These results do not support the proposition that unless raised, the compensation would lead to a decrease in judges' quality. Hence, the call to considerably raise judicial compensation in order to attract good lawyers to the bench is not supported by the results here. The Israeli case indicates that good candidates can be, and evidently were, attracted to the system even when the compensation was lower than that of their veteran colleagues and much lower than the income of senior partners in law firms. Yet, these judges were found to be as qualified and satisfied with the lower compensation as were the judges with higher pay. These unexpected findings merit further examination.

B. Judicial Quality from the Lawyers' Perspective

An important perspective on judicial quality is that of the lawyers. Lawyers are legal professionals who are in a position to evaluate the quality of the judges they appear before. Therefore, their perspective on the issue provides a valid, independent assessment of a possible change in the judiciary's quality. How do they see the level of judicial quality after the compensation was reduced?

Parallel to the 2011 judges' survey, we conducted an opinion survey among Israeli lawyers.[58] One of the questions in this survey referred to the quality level of the judiciary as they, the lawyers, assessed it. A decade earlier, in 1999, we also conducted a similar opinion-survey of a representative sample of Israeli lawyers, where the identical question regarding the quality level of the judiciary was asked.[59] Given that the same question was asked we can compare the lawyers' assessments of the judges' qualifications before and after the change in judicial compensation (Table 2).

Table 2: Lawyers' assessments of judges' qualifications in 1999 and 2011.

First Instance judges have the qualifications for the job	2011	1999
Not at all	101 3.8%	5 1.6%
To a small extent only	285 10.9%	60 18.6%
In part	1270 48.4%	186 57.8%

[58] As noted earlier the survey sample included 2890 lawyers who responded to an internet questionnaire. See, Moshe Bar-Niv and Ran Lachman, 'Lawyers' satisfaction with the court functioning' (n 41).

[59] The question the lawyers were asked were a little different than the one the judges were asked. It referred to their assessment of the quality of the First Instance judges. Since most of the newly appointed judges are appointed at the Magistrate (first instance) level, the answer to this question may even better reflect the quality of the newly recruited judges. The question in the lawyers' survey was: "To what extent, to your assessment, have the judges the appropriate qualifications to perform their job?" The possible responses were: "1. Not at all; 2. To a small extent only; 3. In part; 4. To a considerable extent; 5. To a large extent; 6. To a very large extent".

To a considerable extent	668 25.4%	57 17.7%
To a large extent	248 9.4%	13 4%
To a very large extent	53 2%	1 0.3%
Total	[60]N=2625 100%	N=322 100%

The distributions of the lawyers' assessments of judges' qualifications show that the lawyers assessed the judges' qualifications after the reduction in compensation as better than before the change.[61] In 1999, about a fifth (22%) said that the judges have the appropriate qualification "to a considerable extent" or more, whereas in 2011 (37%) of them expressed the same assessment. At the same time, the proportion of lawyers who assessed the judges' qualifications as "partial" only or as not having the required qualifications, dropped from 78% in 1999 to 63% in 2011. The difference is statistically significant. While these assessments are not very flattering to the judiciary, either in 1999 or in 2010, the results indicate that the quality of the judiciary, as assessed by the lawyers, has not decreased but rather increased a bit a decade after the compensation reduction. In any case, the reduction certainly did not compromise the judicial quality, as proposed.

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60 In order to prevent statistical distortions due to differences in sample sizes, a sub-sample of 318 lawyers was randomly drawn from the large sample of 2897 and was also compared to the 322 responses of 1999. Comparing the sub-sample to the 1999 one with the same distribution, significant differences were found (χ^2= 27.8, d.f.=5, p<0.000).

61 The differences are statistically significant (χ^2= 45.2, d.f.=5, p<0.000). To avoid empty cells or ones with very small N, the significance was also calculated after collapsing together the categories of "very large extent" and "large extent" and the categories of "not at all" and "to a small extent only". The differences were still found to be significant.

It can, therefore, be concluded that after the reduced judicial compensation plan was introduced: a. there has been no problem in recruiting new judges under the reduced compensation package; b. the new judges were assessed by the veteran judges as well as by the lawyers, to be of a similar if not higher quality, but not of lower quality.

The fact that the assessments by the lawyers were congruent with those of the judges regarding the quality level of the new judges lends the findings here high credibility and reliability. The "natural experimental" design used provided further robustness to these results.

The results bring into doubt the claim re the importance of high judicial compensation as a motivating factor for becoming a judge. Perhaps above a certain compensation level, judges become somewhat less concerned about the compensation and other factors come into play as pivotal in motivating them.[62] If indeed it is so, tier B judges who earn less them tier A judges may be satisfied with their still fairly good compensations (still among the highest in the civil service) and consider other job-related factors. If judges are motivated by factors other than the judicial compensation, somewhat higher compensations may play less significant role in their decision to become a judge or retain the post. This proposition can be tested here.

4. The Importance of Compensation as a Motivator for Joining the Bench.

In the survey questionnaire the judges were asked to rate nine factors related to the position of a judge, in terms of the importance each had in their decision to join the bench. Compensation was one of these factors. The judges were also asked: *"At the time, to what extent did each of the following factors motivate you to accept the judicial nomination?"* The responses were: *1. Not at all; 2. A little; 3. To a certain extent; 4. To a large extent; 5. To a very large extent.*

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62 Richard A. Posner, 'What Do Judges Maximize? (The Same Thing Everybody Else Does)', (n 21; Moshe Bar Niv and Ran Lachman, (n 22).

The mean rating for the compensation as a motivator was found to be very low: 2.19 on a scale of 1-5. That is, compensation was rated as having little importance in the judges' decision to accept nomination. In fact, it was rated as the second lowest motivating factor out of seven work-related factors. The factor rated the highest in importance was viewing judgeship as an interesting job (with a mean rating of 4.5). The challenge of the job was similarly rate (mean rating of 4.4). These findings suggest that judicial compensation was of little significance in the decision of candidates to accept the judicial nomination, whereas factors such as interest or challenge in the judicial job were much stronger motivators. Therefore, for judges whose motivation was not financial but job-intrinsic one, the reduced compensation was of lesser consequence. Hence the ability of the court system to hire new judges, as well as the quality of the judiciary were retained despite the reduced compensation, given that the compensation was still fair and reasonable.

V. CONCLUSION

The paper provides empirical insights into the long-standing controversy: whether or not a significant raise in judicial compensation is required to maintain the quality level of court systems. There is no debate about the need for a competent and qualified judicial system - the question has been how this can be attained given its utmost importance for enhancing the good of society at large and its well-being. The prediction that without a considerable pay raise the quality of the courts would deteriorate is not empirically supported by our results.

The study here took advantage of a rather rare opportunity to explore the issue in a real-life case of a reduction of judicial compensation in Israel and examine its consequences using a natural experimental design. The analyses of the perspectives of both judges and lawyers, the two main participants in the judicial process, provide validity and credibility to the study's findings.

In sum, this paper indicates that:

a) Judicial compensation was not a primary incentive in the judges' decision to either join the bench or leave it. Judges were as satisfied with their reduced compensation as were their colleagues whose compensation remained uncut (i.e., higher). Hence, the reduction in compensation did not affect judges' satisfaction with judicial compensation and did not increase judges' drop out.

b) Further, both, judges and lawyers in our study indicated quite clearly that the quality of the judiciary was not compromised in the period (a decade) after the reduction in compensation. Some of them even suggested the quality of the judges rose in the decade after the compensation reduction. Hence, the results here suggest that judicial quality will not be compromised or eroded if judicial compensation is not substantially increased, as repeatedly claimed. This bleak claim that the future of the court system is endangered unless judicial pay is raised is not consistent with and not substantiated by the findings here.

c) The results suggested, quite clearly, that judges are not money-oriented[63]: once they receive respectable compensation, they seem to maximize utility by pursuing other facets of the judicial position. Intrinsic aspects of the judicial office such as professional challenges, the interest they find in the job, and the value of pursuing justice appear to be more dominant incentives to serve as a judge than increased compensation.

d) The results indicated that in judges' utility function financial compensation has a relatively low weight. The answer to the question "what do judges maximize?"[64] is perhaps that judges do not seek to maximize compensation, but rather to maximize other intrinsic utility-increasing factors.

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63 At least within the range of a judicial pay scale that is 4-fold or more that the average salary, and within the range of judicial compensation changes examined here.

64 Posner, (n 21).

It ought to be stressed that the findings do not suggest judicial compensation is of no value for judges, but rather that beyond a certain level, the monetary factor is not the sole or even the primary motivator for candidates aspiring to the judiciary. Hence even if judges are not highly satisfied with their compensation, this will probably not cause them to leave the bench since the financial element is not a decisive one. Raising judicial compensation may perhaps attract few more qualified candidates but the overall cost (associated with paying all judges) might not justify it as there appears to be no shortage of qualified candidates at the present compensation level. Furthermore, since other factors better attract candidates to the bench, the judicial system has to identify these factors and tailor the judicial office (e.g., enhance its intrinsic rewards) and recruitment policy so that under the current budgetary constraints the best candidates will be attracted to the judiciary.

APPENDIX A: THE RESEARCH METHOD

This study adopted a Natural field-experiment design. A natural-experiment is a study conducted in the real-life environment of the participants (or potential participants), aiming at measuring the possible effect of an actual event (the reduction of judicial compensation) that occurred irrespective of, and external to the study (i.e., without any manipulation or involvement of the researchers). Natural field experiments are rare as researchers can very seldom predict the occurrence of such events and measure ahead of time the relevant variables among those exposed to it. However, at times, it is possible to measure, after the fact, the relevant variables among those who were and those who were not exposed to the event (as an equivalent control group), compare them to each other, and thus assess the effect of the event.[65] This was done here.

Thus, the study compared a "study group" of judges who received reduced judicial compensation (tier B) to a control group of judges who received uncut compensation (tier A) in terms of their job satisfaction, change in the

[65] For details see: Babbie (n 10), 242; or Gravetter (n 10).

assessment of judiciary quality and more. Since the new compensation plan was introduced in 1999 affecting only newly recruited judges, we had to wait for a fairly long time period after 1999 to allow for new judges to join the bench. Therefore, judges' satisfaction and work quality were measured about a decade later, in 2011.

The major strength of the natural-experiment, and hence the strength of this study, is its very high realistic validity. Unlike the low realistic validity of reactions induced in a laboratory experiment, reactions in a natural-experiment reflect real-life behavior in the natural setting. Further, this design reduces the possible experimental bias and similar response biases, as participants (the judges) usually are unaware that they might be studied. The main weakness of the natural-experiment is that researchers have little control over the intensity of the independent variable's effect (the natural occurrence) and over extraneous variables such as some environmental influences with a possible compounding effect, which might bias the results. Here, this weakness is minimized as all respondents were judges presiding on the same bench, doing the very same job at the same work organization, and all exposed to the same socio-political environment during the period in question here.

1. The Sample and Data

Analyzed here is data previously collected through opinion-surveys conducted in early 2011[66] among Israeli presiding court judges. In the survey self-administered mail-questionnaires were sent to all the judges presiding at the First and Second court instances in Israel at the time. The comprehensive survey included questions regarding the judges' perceptions, evaluations, work-related attitudes and the functioning of the court system

[66] The study was designed and the questionnaires mailed out late in December 2010 so that they were filled and returned early in 2011. Hence the reference here is to 2011 survey.

as well as compensation.[67] In a parallel study of lawyers, in 2010, a very similar survey questionnaire was filled out by a large sample of 2897 lawyers and the data collected was used here as well.

2. Possible response biases:

The relatively small number of respondents could raise concerns that a self-selection bias may exist: i.e., judges decide whether or not to respond to the questionnaire based on their interest (or disinterest) in the study topic, compensation. [68] If respondents (judges) tend to respond to questions they have a high interest in or a strong opinion about, tier B judges would be more likely to respond as dissatisfied, than tier A judges. This however did not occur. First, as the results show tier A and B judges responded to this question in similar number (33 and 31 respectively) reflecting no self-selection on either tier A or B judges.

While secondary in importance, another concern may be the representativeness of the present sample of 86 judges. Given the natural field experimental design here, the question of how representative the sample is of the Israeli judiciary is of lesser relevance. The main focus in this design is on the compatibility of the study and control groups to avoid a distortion in the findings, not on how representative they are. Given the two compatible groups here, such a distortion is unlikely.[69]

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67 For a detailed description of the surveys and the samples of judges, and statistical characteristics of the responding judges see: Bar Niv (Burnovski) Moshe and Ran Lachman, (n 52).

68 Babbie, (n 10).

69 In any case, for a detailed discussion of the representativeness of the sample, see: Bar Niv (Burnovski) Moshe and Ran Lachman, (n 52).

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ANTI-SUIT INJUNCTIONS AND GEOPOLITICS IN TRANSNATIONAL SEPS LITIGATION

Giuseppe Colangelo* and Valerio Torti†

Anti-suit injunctions have recently emerged as a phenomenon significantly affecting the dynamics of standard essential patent (SEP) litigation. The role played by these patents in the Internet of Things scenario and the willingness of national courts to set themselves up as global licensing tribunals have spurred a race to the courthouse, incentivising forum shopping and the adoption of countermeasures such as anti-anti suit injunctions and anti-anti-anti suit injunctions. The implications of these litigation strategies have become a matter of geopolitics, as countries fear that the intellectual property rights of their companies may be devalued by foreign courts to promote domestic economic interests. Against this backdrop, this paper aims to provide a comparative overview of SEP disputes in which these injunctions have been issued or claimed and to identify some policy recommendations to curb the frictions affecting SEP licensing.

Keywords: standard essential patents; litigation; FRAND licensing; anti-suit injunctions

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I. INTRODUCTION

In recent decades, few topics have captured the attention of scholars, courts and policymakers as much as standardisation. Technology standards, in particular the processes through which they are developed, and the protection of related patent rights have constantly fuelled the debate by providing new issues and additional layers of complexity. Indeed, standards are apparently one of the most important and, at the same time, fragile pillars of the modern global tech-economy.

Firms taking part in a standardisation initiative are required to license their standard essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. The FRAND commitment aims to avoid or reduce the risk of holdup, that is, the *ex post* opportunism of SEP holders who exploit monopoly pricing by making these patents available at a price equivalent to what they would have been worth in the market prior to the time they were declared essential. However, both the economic rationale underlying FRAND commitments and their effectiveness in preventing the risk of

holdup have been severely questioned, mainly because of the unclear meaning of the FRAND acronym.[1] Indeed, there are no generally agreed-upon tests to determine whether a particular license satisfies a FRAND commitment, and there is also no consensus on its legal effects, particularly whether FRAND commitments should imply a waiver of the general law of remedies.

Because of this uncertainty, parties have regularly failed to reach agreement on FRAND outcomes; hence a spate of cross-border litigation has arisen, often leading to inconsistent and conflicting rulings. However, some courts have claimed the authority to set global FRAND rates, thereby setting themselves up as global licensing tribunals determining the terms of worldwide FRAND licenses in the context of national proceedings. As a consequence, parties have been incentivised to litigate rather than to find negotiated solutions – and to look for the most convenient jurisdiction. Therefore, concerns have been raised about the risks related to a 'race to the courthouse' among litigants and a 'race to the bottom' among jurisdictions.[2] Indeed, in setting global licensing terms courts may be interested in making themselves attractive venues for specific types of litigants (SEP holders rather

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1 See eg Gregor Langus, Vilen Lipatov, and Damien Neven, 'Standard-Essential Patents: Who Is Really Holding Up (And When)?' (2013) 9 Journal of Competition Law & Economics 253; Anne Layne-Farrar, 'Patent Holdup and Royalty Stacking Theory and Evidence: Where Do We Stand After 15 Years of History?' (2014) OECD Doc DAF/COMP/WD(2014)17/REV1 <https://one.oecd.org/document/DAF/COMP/WD(2014)17/REV1/en/pdf> accessed 15 December 2021; J Gregory Sidak, 'The Antitrust Division's Devaluation of Standard-Essential Patents' (2015) 104 Georgetown Law Journal 48; Damien Geradin, 'Moving Away from High-Level Theories: A Market-Driven Analysis of FRAND in the Context of Standardization' (2014) 59 The Antitrust Bulletin 327; Alexander Galetovic and Stephen Haber, 'The Fallacies of Patent-Holdup Theory' (2017) 13 Journal of Competition Law & Economics 1.

2 Jorge L Contreras, 'The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race to the Bottom in Disputes over Standards-Essential Patents' (2019) 25 Boston University Journal of Science & Technology Law 251; Damien Geradin and Dimitrios Katsifis, 'The Use and Abuse of Anti-Suit Injunctions in SEP Litigation: Is There a Way Forward?' (2021) <https://ssrn.com/abstract=3807899> accessed 5 November 2021.

than implementers), while parties are encouraged to bring suits in favourable jurisdictions as quickly as possible in order to exploit the advantages of being the first to strike.[3]

As part of these forum shopping strategies, litigants are also increasingly eager to request (and courts appear prone to issue) anti-suit injunctions (ASIs), that is, orders restraining a party from pursuing foreign proceedings or enforcing a judgment obtained in foreign proceedings. ASIs may bring benefits by containing litigation costs and reducing the likelihood of inconsistent results across jurisdictions.[4] However, rather than ending the game, the issuance of an ASI has resulted in a new form of unwelcome competition, with litigants and courts devising anti-anti suit injunctions (AASIs), which block a party from seeking or enforcing an ASI, anti-anti-anti suit injunctions (AAASIs), which prevent a party from obtaining an AASI to block another party from requesting or enforcing an ASI, and so on and so forth.

Although ASIs have existed in the context of transnational litigation since fifteenth-century England, SEP disputes have brought them into a new dimension. The present phenomenon reflects the global reach of markets for technology and the growing importance of SEPs as building blocks in the modern global economy, but also appears a natural fruit of the poison tree of FRAND determination. Furthermore, as the rise of the Internet of Things (IoT) and the evolution of many industries hinge on advanced mobile telecommunication standards (4G and 5G) to ensure interoperability and technical compatibility, SEP licensing has become a matter of geopolitics. Moreover, innovation in emerging technologies is crucially important to national security. For all these reasons, countries may have policy interests in preventing their companies' intellectual property rights from being

3 Contreras, 'The New Extraterritoriality' (n 2) 289-90.

4 Jorge L Contreras and Michael A Eixenberger, 'The Anti-Suit Injunction - A Transnational Remedy for Multi-Jurisdictional SEP Litigation' in Jorge L Contreras (ed), *The Cambridge Handbook of Technical Standardization Law: Competition, Antitrust, and Patent Law* (CUP 2018) 451.

adjudicated in foreign courts. Since the smooth implementation of mobile telecommunication standards is crucial to the economic potential of the IoT and United States (US) and European companies hold a significant amount of SEPs for these technologies, policymakers are worried that ASIs may represent a new and dangerous unfair practice adopted by Chinese companies, with the support of Chinese courts and authorities, to promote domestic economic interests and undervalue foreign patents by setting significantly lower FRAND rates.[5] Indeed, the European Union (EU) has recently filed a case against China at the World Trade Organization (WTO) for restricting EU companies from going to foreign courts to protect their SEPs.[6] In the US, a specific bill (the Defending American Courts Act) has been introduced in the Senate Judiciary Committee that would penalize parties seeking to assert foreign ASIs to restrict an action for patent infringement before a US court or the International Trade Commission.[7]

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5 See Commission, 'Report on the protection and enforcement of intellectual property rights in third countries' SWD (2021) 97 final, 19; Office of the US Trade Representative, '2021 Special 301 Report', (2021) 47–48 <https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf> accessed 5 November 2021. Finally, as part of its innovation strategy, the UK Intellectual Property Office is seeking views to understand whether the SEPs ecosystem is functioning efficiently and, among several issues, the impact of ASIs by implementers. 'Standard Essential Patents and Innovation: Call for Views' (*Intellectual Property Office*, 7 December 2021) <https://www.gov.uk/government/consultations/standard-essential-patents-and-innovation-call-for-views/standard-essential-patents-and-innovation-call-for-views> accessed 16 December 2021.

6 'EU Challenges China at the WTO to Defend its High-Tech Sector' (European Commission, 18 February 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1103> accessed 24 February 2022. See also Request for Information Pursuant to Article 63.3 of the Trips Agreement: Communication from the European Union to China (6 July 2021) IP/C/W/682 <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/IP/C/W682.pdf&Open=True> accessed 5 November 2021, requesting information before the WTO and expressing concerns over China's recent ASI case law.

7 S 3772, 117th Cong (2022). Pursuant to this bill, parties asserting foreign ASIs would be prohibited from challenging the asserted patents at the Patent Trial and Appeals Board and, if they are found to infringe these patents, the infringement would be presumed to

In sum, considering the significant national interests associated with standard setting, anti-suit strategies have become effective tools for countries to protect and entrench their technological, economic, and political advantages in the international political economy.[8] The aim of the present paper is to investigate the rationales for these litigation strategies, illustrate cases in which these orders have been granted or claimed, and formulate some policy recommendations. The work is structured as follows. Section 2 describes the scenario in which ASIs have traditionally played a role in transnational litigation and the legal standards adopted for their application. Section 3 illustrates the reasons behind the emergence and diffusion of anti-suit orders in SEP litigation and provides a comparative overview of recent cases in which these injunctions and countermeasures against them have been issued. Section 4 provides some policy recommendations to curb the frictions affecting SEP licensing. Section 5 concludes, summarizing the geopolitical relevance of SEPs litigation and the policy proposals advanced to tackle the recent judicial escalation fuelled by the issue of anti-suit orders.

II. Transnational Litigation and Forum Shopping: the Value of Comity

ASIs have often played a decisive role in transnational litigation. Their historical origins have been linked the rise of equity in English law and its struggle with common law courts.[9] This type of judicial order typically requires a party to refrain from commencing or continuing legal proceedings in a foreign court. From this standpoint, ASIs afford courts the opportunity to affect the course and significance of foreign litigation. Therefore, a similar intervention – characterised by the emergence of extra

be wilful for the purposes of enhancing damages and the action would be deemed exceptional when determining whether to award attorney's fees.

8 King Fung Tsang and Jyh-An Lee, 'The Ping-Pong Olympics in Antisuit Injunction in FRAND' (2022) 28 Michigan Technology Law Review 305.

9 Trevor C Hartley, 'Comity and the Use of Anti-suit Injunctions in International Litigation' (1987) 35 The American Journal of Comparative Law 487.

territorial effects – entails a jurisdictional conflict rather than a cooperative relation.[10] More recently, ASIs have started to influence the dynamics of SEP litigation on a global basis. In order to understand their scope, their capacity for mischief, and the related effects in SEP transnational litigation, it is appropriate to briefly explore the concept of comity and the role it plays for judicial authorities in determining whether an anti-suit order should be granted.[11]

Although comity represents a defining principle of international cooperation, its notion has traditionally been difficult to describe, and it has been characterized as a complex or elusive concept.[12] It may perhaps be stated that it should neither be seen as a matter of absolute obligation, on the one hand, or of mere courtesy and good will, on the other. Instead, it may be interpreted as 'the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws'.[13] This approach, as recognised by the Organization for Economic Cooperation and Development (OECD), necessarily entails an accurate consideration of foreign countries' important interests while conducting

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10 George A Bermann, 'The Use of Anti-Suit Injunctions in International Litigation' (1990) 28 Columbia Journal of Transnational Law 589.

11 *Microsoft Corp v Motorola Inc*, 696 F3d 872 (9th Cir 2012).

12 Daniel S Tan, 'Anti-Suit Injunctions and the Vexing Problem of Comity' (2004) 45 Virginia Journal of International Law 283; Haris Tsilikas, 'Anti-Suit Injunctions for Standard Essential Patents: The Emerging Gap in International Patent Enforcement' (2021) 16 Journal of Intellectual Property Law and Practice 729. See also William S Dodge, 'International Comity in American Law' (2015) 115 Columbia Law Review 2071, dividing the comity doctrines into three categories based on the actors to whom deference is given, describing deference to foreign lawmakers as "prescriptive" comity, deference to foreign courts as "adjudicative" comity, and deference to foreign governments as litigants as "sovereign party" comity.

13 *Hilton v Guyot*, 159 US 113 (1895).

enforcement activities.[14] In addition, from a similar standpoint, comity reflects the broad concept of respect among co-equal sovereign nations, leading a jurisdiction to exercise a sort of unilateral self-restraint.[15] In sum, whatever definition is employed, comity is 'a protean concept of jurisdictional respect'.[16]

The sense of respect for the adjudicatory powers of other judicial authorities is undoubtedly critical in a rules-based international order.[17] Some commentators have further underlined the cooperative function that comity often serves, whereby it is interpreted by courts as the basis for legal doctrines promoting cooperation at the international level with the ultimate aim of aligning states' conduct, enhancing the effectiveness of their enforcement activities, and neutralising potential conflicts.[18] In brief, from a broader perspective, a court will usually grant comity if its default presumption is that foreign states are likely to cooperate. On the other hand, it will probably reject deference if its default presumption is that foreign states are likely to defect. In this context, as the argument goes, a refusal to recognise deference to foreign authorities' decisions may amount to defection from a cooperative strategy unless the foreign decision itself constituted defection.

Against this backdrop, FRAND-related ASIs involve important considerations of comity, which are heightened by global economic

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14 See OECD, *Challenges of International Co-Operation in Competition Law Enforcement* (OECD 2014) 11, describing the expansion of the concept of comity beyond the traditional boundaries developed under public international law (so called "negative comity") to a new concept of "positive comity", whereby one country requests another jurisdiction to undertake enforcement activities in order to address anti-competitive conduct that is substantially and adversely affecting the interests of the referring country.

15 Pedro Caro de Sousa, 'The Three Body Problem – Extraterritoriality, Comity and Cooperation in Competition Law' in Nuno Cunha Rodrigues (ed) *Extraterritoriality of EU Economic Law* (Springer 2021) 119.

16 *Quaak v Klynveld Peat Marwick Goerdeler*, 361 F3d 11, 19 (1st Cir 2004).

17 Tsilikas (n 12).

18 See eg Cameron Sim, 'Choice of Law and Anti-suit Injunctions: Relocating Comity' (2013) 62 International and Comparative Law Quarterly 703; Christopher R Drahozal, 'Some Observations on the Economics of Comity' in Thomas Eger, Stefan Oeter and Stefan Voigt (eds), *Economic Analysis of International Law* (Mohr Siebeck 2014) 147.

interdependence. As international commerce depends to a large extent on the ability of firms to predict the consequences of their conduct in overseas markets, cooperation and judicial reciprocity among countries are strongly needed. In this regard, courts' willingness to respect ASIs issued in foreign jurisdictions supports mutual trust and helps to reduce conflicts and wasteful litigation. Indeed, comity implies a two-way relationship. After all, a legal system may expect foreign courts to abide by its ASIs only if it is willing to defer to them itself. However, as FRAND disputes will show, 'comity, like beauty, sometimes is in the eye of the beholder'.[19]

Although the US is among the jurisdictions where courts have sometimes issued ASIs (ie 'stays' of litigation) in the context of different transnational disputes, this does not mean that US courts have traditionally been willing to grant such an extra-territorial remedy in order to prevent parties from beginning or continuing proceedings before foreign tribunals. Instead, as Strong has noted,[20] ASIs in the US should be understood as extraordinary remedies, particularly in the light of the established ('first to judgment') principle that 'parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until judgment is reached in one, which can be pled as *res judicata* in the other'.[21] This approach is supposed to avoid first-to-file strategies and the resulting 'race to the courthouse'.

As for the scope and conditions for granting ASIs, it is first worth clarifying that both suits may in theory be pending before US courts, although in practice an ASI request will more likely be linked to parallel proceedings in a foreign country. Strong has described the legal standard as ambiguous and fragmented.[22] A number of elements seem to be necessary for the grant of

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19 *Quaak* (n 16) 19.

20 SI Strong, 'Anti-Suit Injunctions in Judicial and Arbitral Procedures in the United States' (2018) 66 The American Journal of Comparative Law 153.

21 *Laker Airways Ltd v Sabena, Belgian World Airlines*, 731 F2d 909 (DC Cir 1984).

22 Strong (n 20) 154.

an ASI.[23] In *Unterweser,* the Fifth Circuit set forth four factors, requiring evaluation of whether the foreign dispute would '(1) frustrate a policy of the forum issuing the injunction; (2) be vexatious or oppressive; (3) threaten the issuing court's *in rem* or *quasi in rem* jurisdiction; or (4) prejudice other equitable considerations'.[24] In the case where at least one of the *Unterweser* factors is present, US courts will ultimately explore whether the ASI will impact the abovementioned comity principle. More recently, in *Gallo*, the Ninth Circuit has broadened the legal standard, introducing a three-part framework.[25] Specifically, the Ninth Circuit granted an ASI on the basis of: (i) the identity of the parties and the nature of the issues raised in the dispute, as well as the dispositive nature of the US dispute with regard to the foreign action; (ii) the satisfaction of at least one of the *Unterweser* requirements; and (iii) the tolerability of the impact of the injunction on comity.

However, US circuit courts have developed two different approaches to granting ASIs: a conservative approach, which seems to presume that states are likely to cooperate, and a liberal approach, which instead presumes that states are likely to defect.[26] Under the conservative approach, ASIs should only be granted in rare cases, where an action in a foreign jurisdiction would preclude US jurisdiction or threaten a vital US policy and domestic interests outweigh international comity concerns. Supporters of the conservative approach argue that this interpretation should be preferred as a matter of policy, as it requires a judge to balance competing policy considerations and is ultimately more respectful of the fundamental principle of international comity because it recognises a rebuttable presumption against issuing international ASIs. In contrast, the liberal approach endorses the issuance of ASIs to avoid vexatious and duplicative foreign disputes and to prevent inconsistent decisions. This second approach, therefore, seems to put much

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23 Jorge L Contreras, 'It's Anti-Suit Injunctions All the Way Down – The Strange New Realities of International Litigation over Standards-Essential Patents' (2020) 26(4) IP Litigator 1.

24 *In Re Unterweser Reederei GMBH*, 428 F2d 888, 890 (5th Cir 1970).

25 *E&J Gallo Winery v Andina Licores SA*, 446 F3d 984, 991-95 (9th Cir 2006).

26 Strong (n 20) 160-161.

less emphasis on the principle of international comity and give much greater weight to efficiency rationales.

Regardless of the approach chosen, a private contractual dispute is usually less likely to raise comity concerns compared, for instance, to litigation implicating public international law or involving government litigants. This means that, if two parties have contractually committed to litigate any future dispute before a specific forum, then enjoining one of the parties from beginning or continuing proceedings in a different forum should not be interpreted as an action in conflict with the comity principle.[27] In contrast, when a case raises considerations that are more complex and controversial, it is up to the judicial authorities to exercise their discretion and explore whether an ASI would conflict with the international comity principle. In making this comity inquiry, it may be relevant to examine, *inter alia*, the scope of the ASI[28] and the order in which the domestic and foreign suits were filed.

The balancing of policy considerations appears rather different in the EU legal framework. Indeed, the jurisprudence of the Court of Justice (CJEU) and normative acts adopted by European institutions (eg Brussels I Regulation)[29] have identified and developed the concept of 'mutual trust', according to which courts in one Member State may never issue an ASI to prevent or block legal proceedings in another Member State. Therefore, under a sort of conclusive presumption, EU countries are necessarily part of a cooperative game that rules out granting and enforcing anti-suit orders. In the words of the Brussels I Regulation, 'mutual trust in the administration of justice in the Community justifies judgments given in a Member State being

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27 ibid 162.

28 '[T]he sweep of the injunction should be no broader than necessary to avoid the harm on which the injunction is predicated'. *Laker Airways* (n 21).

29 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

recognised automatically without the need for any procedure except in cases of dispute'.[30]

A few cases decided by the CJEU have also shed light on the scope of jurisdictional conflicts emerging from civil or commercial disputes within the Union. In *Allianz Spa v West Tankers*, the Grand Chamber of the CJEU confirmed that an ASI would conflict with the Brussels I Regulation insofar as it would prevent a national court from deciding on the applicability of that regulation to the dispute brought before it and, hence, from ruling on its own jurisdiction.[31] Put differently, in the CJEU's opinion, an ASI would be contrary to the general principle that every court in the EU determines whether it has jurisdiction to resolve disputes brought before it, and that 'in no case is a court of one Member State in a better position to determine whether the court of another Member State has jurisdiction'.[32] In contrast, allowing EU national courts to grant ASIs would inevitably impair the mutual trust which Member States accord to one another's legal and judicial frameworks.[33] Interference of this sort would not even be justified in extreme circumstances where an ASI is sought to prevent an abuse of process or a bad faith action by a litigant before the foreign authority.[34]

III. Anti-Suit Injunctions in SEP Disputes

As was previously mentioned, ASIs nowadays strongly influence the dynamics of SEP disputes. Despite the national nature of patents, the global reach of markets for technology inevitably leads to transnational litigation over SEPs. While patents grant territorial rights, every element in the FRAND disputes is global: standards are global, players operate globally, and

30 ibid para 16.

31 Case C-185/07 *Allianz Spa and Generali Assicurazioni Generali Spa v West Tankers Inc* EU:C:2009:69.

32 ibid paras 28-29. See also Case C-351/89 *Overseas Union Insurance and others v New Hampshire Insurance Company* EU:C:1991:279, paras 23-24; Case C-116/02 *Erich Gasser GmbH v MISAT Srl* EU:C:2003:657, para 48.

33 *Allianz and Generali Assicurazioni Generali* (n 31) para 30.

34 Case C-159/02 *Turner v Grovit and others* EU:C:2004:228, paras 27-31.

products are developed and marketed globally.[35] Therefore, FRAND disputes can spawn litigation in each country in which standard-compliant products and services are made available.[36] From this perspective, the respect of comity is particularly needed in the SEP scenario to promote transnational judicial reciprocity rather than the competition between jurisdictions.[37] Against this background, ASIs in principle constitute efficient means to promote judicial consistency and reduce litigation by precluding multi-jurisdictional disputes.

However, the surge of ASIs and the risks related to their opportunistic use in the SEP landscape is linked to the role that certain national courts have come to play in setting themselves up as *de facto* global licensing tribunals. As the tendency of some courts to set high rates may attract patent holders to those jurisdictions, implementers may in turn be interested in challenging those results before courts in jurisdictions with an established reputation for being hostile to patent holders and prone to set low rates.[38]

From this standpoint, the decisions by successive English courts in *Unwired Planet v Huawei* have triggered the global race to the courthouse.[39] The High Court of Justice, under Mr Justice Birss, found that global portfolio licensing was common industry practice and offered efficiency benefits by saving transaction costs for licensors and licensees and obviating the need to determine a royalty rate on a patent-by-patent basis.[40] Indeed, the patent portfolio at stake was 'sufficiently large and had sufficiently wide geographical scope that a licensor and licensee acting reasonably and on a

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35 Pierre Larouche and Nicolò Zingales, 'Injunctive Relief in the EU – Intellectual Property and Competition Law at the Remedies Stage' in Contreras (ed) (n 4) 406, 419.

36 Eli Greenbaum, 'No Forum to Rule Them All: Comity and Conflict in Transnational FRAND Disputes' (2019) 94 Washington Law Review 1085.

37 Peter K Yu, Jorge L Contreras and Yu Yang, 'Transplanting Anti-Suit Injunctions' 71 American University Law Review 1537 (2022).

38 Contreras, 'The New Extraterritoriality' (n 2) 281-82.

39 *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2017] EWHC 711 (Pat), [2019] 4 CMLR 7, aff'd [2018] EWCA Civ 2344, [2018] RPC 20, aff'd [2020] UKSC 37, [2020] Bus LR 2422.

40 ibid.

willing basis would have agreed on a worldwide licence and would have regarded country-by-country licensing as madness'.[41] Furthermore, Birss held that the approach supported did not contravene jurisdictional rules since the validity of patents would remain a matter falling within the exclusive jurisdiction of the judicial authorities of the territory where the patents subsist.

The UK Supreme Court ultimately upheld the ruling, confirming that national courts have the power to fix the conditions of a global FRAND license and grant an injunction to prevent infringements of SEPs:

> We recognise that Birss J has gone further than other courts have done thus far in his willingness to determine the terms of a FRAND licence which the parties could not agree, but that does not involve any difference in principle from the approach of courts in other jurisdictions. Otherwise, his approach is consistent with several judgments in other jurisdictions […]. The principles stated in those judgments contemplate that, in an appropriate case, the courts in the relevant jurisdictions would determine the terms of a global FRAND licence.[42]

Notably, by referring to some of the most significant jurisdictions (ie Germany, China and the US), the UK Supreme Court was able to identify a number of generally accepted principles or practices, recognising *inter alia* the lawfulness of: i) taking into account the usual negotiation practices in the relevant industries when setting the terms of a FRAND licence; ii) determining a FRAND licence at a worldwide or international level in appropriate circumstances (eg when SEP holders have a sufficiently large and geographically diverse portfolio and the alleged infringers are active

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41 ibid [543]. However, in the previous *Vringo Infrastucture Inc v ZTE (UK) Ltd*, the same judge dismissed the argument that the refusal to accept a particular global license would indicate the unwillingness of the licensee to agree to global licensing in general, stating that 'just because it may be so that the global portfolio offer is a FRAND offer, it does not follow that the global portfolio licence on offer is the only set of terms which could be FRAND'. [2015] EWHC 214 (Pat), [2015] RPC 23 [107].

42 *Unwired Planet International Ltd v Huawei Technologies Co Ltd* [2020] UKSC 37, [2020] Bus LR 2422 [67].

globally); and iii) granting injunctive relief against the infringement of SEPs if the implementer has refused to accept a FRAND licensing offer.[43]

Moreover, the Court noted that the national nature of patents 'makes it very difficult, if not wholly impracticable, for a patent owner to protect an invention which is used in equipment manufactured in another country, sold in many countries and used by consumers globally'.[44] Therefore, this attribute of patent law may invite holdout behaviour enabling implementers to deny patent holders' legitimate rights by avoiding paying them the proper price for the use of their inventions internationally.[45] Finally, regarding the risk that this approach may favour forum shopping, conflicting judgments, and applications for ASIs, the Court argued that this would result from the policies of standard development organisations' (SDOs), which, though they allow

> FRAND worldwide licences when a SEP owner has a sufficiently large and geographically diverse portfolio and the implementer is active globally, do not provide for any international tribunal or forum to determine the terms of such licences.[46]

Besides UK courts, the Judicial Court of Paris has affirmed its jurisdiction to set global FRAND rates in *TCL v Philips*[47] and in *Xiaomi v Philips*[48], as has the District Court of The Hague in *Vestel v Philips*.[49] The US District Court for the Central District of California also took a similar approach, determining a global FRAND royalty rate in *TCL v Ericsson*.[50] However,

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43 ibid [84].

44 ibid [4].

45 ibid.

46 ibid [90].

47 Tribunal Judiciaire de Paris, Case No RG 19/02085 (2020).

48 Tribunal Judiciaire de Paris, Case No RG 20/12558 (2021).

49 Court of The Hague, Case No C/09/604737 / HA ZA 20-1236 (2022).

50 *TCL Commc'n Tech Holdings Ltd v Telefonaktiebolaget LM Ericsson*, 2017 WL 6611635 (CD Cal Dec 21, 2017), superseded by *TCL Commc'n Tech Holdings Ltd v Telefonaktiebolaget LM Ericsson*, 2018 WL 4488286 (CD Cal Sep 14, 2018), rev'd in part and vacated in part, *TCL Commc'n Tech Holdings Ltd v Telefonaktiebolaget LM Ericsson*, 943 F3d (Fed Cir 2019).

unlike Unwired Planet and Huawei, TCL and Ericsson agreed to engage in a binding court adjudication of terms for a worldwide portfolio license. Moreover, Chinese judicial authorities have recently manifested their willingness to set themselves up as global licensing tribunals and other jurisdictions may soon follow.[51] The phenomenon has in turn encouraged SEP owners and implementers to request ASIs (and also AASIs and AAASIs), hence confirming the risk mentioned in *Unwired Planet* of unleashing an inter-jurisdictional race to the bottom.[52]

1. *ASI Cases*

It is worth noting that ASIs in SEP litigation were granted for the first time in the US, namely in *Microsoft v Motorola,* where a US district court concluded that resolving the US dispute would dispose of a German one.[53] In the district court's view, the German action raised a number of serious concerns, from the risk of forum shopping and inconsistent judgements to duplicative or vexatious foreign litigation, which would undermine other equitable considerations by hampering, for instance, the US judge's ability to fairly adjudicate the FRAND dispute. Furthermore, the facts that both litigants were US corporations, the challenged conduct took place within the US, and the German action was filed after the U.S. action also contributed to overcoming any concern related to international comity. The Court of Appeal ultimately acknowledged the soundness of the district court's approach, confirming the willingness of US courts to grant ASIs

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51 See Hubei Province – Wuhan Intermediate People's Court, Case E 01 Zhi Min Chu No 169 (2020), *Xiaomi Communication Technology Co Ltd v Inter Digital Inc*; Intermediate People's Court of Shenzhen City of Guangdong Province, Case Yue 03 Min Chu No 689 (2020), *Guangdong OPPO Mobile Telecommunications Corp Ltd v Sharp Corp*; Hubei Province – Wuhan Intermediate People's Court, Case E 01 Zhi Min Chu No 743 (2020), *Samsung v Ericsson*.

52 For a useful summary of ASIs and AASIs issued in FRAND cases, see Jorge L Contreras, 'Anti-Suit Injunctions and Jurisdictional Competition in Global FRAND Litigation: The Case for Judicial Restraint', (2022) 11 NYU Journal of Intellectual Property & Entertainment Law 171.

53 *Microsoft Corp v Motorola Inc*, 871 FSupp2d 1089 (WD Wash 2012).

where the *Gallo* and *Unterweser* factors are present and the impact on comity is considered tolerable.[54]

In a similar vein, in *Huawei v Samsung*, District Judge Orrick found that only an ASI could preserve the integrity of a US action even though the related lawsuits before the US and Chinese courts were different.[55] The relevance of the established threshold requirements was also confirmed in *Vringo v ZTE,*[56] *Apple v Qualcomm*[57] and *Optis v Huawei,*[58] where applications for ASIs were instead rejected. However, in *TCL v Ericsson,* the district court granted an ASI without conducting an exhaustive analysis of the required conditions in the light of the fact that both parties had agreed that the US action should result in a global resolution of their SEP dispute.[59] In sum, US courts have frequently dealt with ASI requests in SEP litigation. Four such cases (*Vringo v ZTE, Apple v Qualcomm, Optis v Huawei* and *Huawei v Samsung*) involved Chinese courts and three of them involved Chinese companies (ZTE and Huawei), though US courts agreed to issue an ASI only in one of these.

In 2018, UK courts joined the club and began issuing ASIs against Chinese companies. In *Conversant v Huawei and ZTE China*, the High Court expressed concern about the artificial attempt to anchor proceedings in another country where the true connection of the case was with the UK jurisdiction. It deemed some aspects of the parallel Shenzhen proceedings 'vexatious in that they sought to obstruct, or could have had the effect of obstructing pending proceedings before the English court or of undermining or frustrating the performance of a judgment given by the English court'.[60]

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54 *Microsoft Corp v Motorola Inc*, 696 F3d 872 (9th Cir 2012).

55 *Huawei Technologies Co Ltd v Samsung Elecs Co Ltd*, 340 FSupp3d 934 (ND Cal 2018).

56 *Vringo Inc v ZTE Corp*, 2015 WL 3498634 (SDNY June 3, 2015).

57 *Apple Inc v Qualcomm Inc*, 2017 WL 3966944 (SD Cal Sept 7, 2017).

58 *Optis Wireless Tech LLC v Huawei Technologies Co Ltd*, 2018 WL 3375192 (ED Tex July 11, 2018).

59 *TCL Commc'n Tech Holdings* (n 50).

60 *Conversant Wireless Licensing v Huawei Technologies Co Ltd and ZTE Corp* [2018] EWHC 2549 (Ch), [2018] Costs LR 1049.

Previously, the High Court had considered the possibility of issuing an ASI in *Unwired Planet v Huawei*, arguing that Huawei's commencement of Chinese proceedings evidenced a holdout strategy.[61] However, the court was also critical of Unwired Planet's conduct in seeking preliminary injunctive relief against Huawei in Mexico without an apparent justification. The parties eventually settled parallel litigation in China and Mexico.

Against this backdrop, interest in the role of ASIs in SEP litigation has been sparked by a sudden increase in the number of ASIs issued by Chinese courts. In particular, in 2020, four decisions were taken relating to applications for ASIs that signalled the courts' intention to set China as the jurisdiction of choice for global disputes.[62] Three of the rulings were in favour of Chinese telecom companies.

In this scenario, the Supreme Court's decision in *Huawei v Conversant* can be considered a model for the Chinese approach, providing guidance to lower courts facing similar claims.[63] After Conversant secured an injunction against Huawei in parallel proceedings in Germany,[64] Huawei applied to the Supreme Court of China seeking an 'act preservation' order to prevent Conversant from enforcing this injunction until the conclusion of the Chinese dispute. In granting the requested ASI, the Chinese Supreme Court defined as relevant factors the impact of foreign litigation on actions pending before Chinese courts, the necessity of issuing an ASI, the balance of interests

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61 [2017] EWHC 2831 (Pat).

62 See Yu, Contreras and Yang (n 37), arguing that Chinese courts have apparently been sensitive to the words of Justice Luo Dongchuan (the President of the Intellectual Property Court of the Supreme People's Court), who, during the National People's Congress in May 2020, advanced some proposals aimed at enhancing Chinese judicial procedures, including the expansion of China's act preservation system, a remedy equivalent to ASI.

63 Supreme People's Court of the People's Republic of China, Case Zui Gao Fa Zhi Min Zhong No 732, 733, 734 (2020), *Huawei Technologies Co Ltd and another v Conversant Wireless Licensing*. As part of the same litigation, an ASI has also been granted to ZTE. Intermediate People's Court of Shenzhen, Case Yue 03 Min Chu No 335-1 (2020).

64 District Court (LG) of Düsseldorf, Case No 4b O 30/18 (2020) *Conversant Wireless Licensing SARL v Huawei Technologies Co Ltd.*

between defendant and claimant deriving from the issuance of an ASI, and the impact of the ASI on public interest and on the international comity principle.

The Supreme Court's judgement in *Huawei* was followed by the issuance of three other ASIs in *Xiaomi v Inter Digital,*[65] *OPPO v Sharp*[66] and *Ericsson v Samsung,*[67] in which Chinese courts expanded the reach of *Huawei* by asserting their jurisdiction to set global FRAND rates and grant global injunctive relief barring legal action in any other country. Indeed, in upholding the decision in *OPPO,* the Supreme Court celebrated the emergence of China as a guide, rather than a follower, in setting international intellectual property rules.[68]

2. AASI Cases

In global SEP litigation, ASIs were soon followed by AASIs, which aim to prevent the opponent from seeking or enforcing an ASI. As a form of counter-ASI, an AASI seeks to preclude the blocking of an action before another court, thereby allowing the action to continue in parallel. The *Nokia v Daimler and Continental* dispute is the first case where the legal battles between SEP holders and implementers generated both ASI and AASI requests. By issuing an AASI, the Landgericht of Munich held that an ASI blocking Nokia's actions in Germany (such as the one requested by

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65 *Xiaomi Communication Technology* (n 51).

66 *Guangdong OPPO Mobile Telecommunications* (n 51).

67 *Samsung* (n 51).

68 Supreme People's Court of the People's Republic of China, Case Zui Gao Fa Zhi Min Xia Zhong No 517 (2021), *Sharp Corp v Guangdong OPPO Mobile Telecommunications Corp Ltd.* In particular, the Chinese Supreme Court identified the following five factors, which would affect whether the Chinese court of first instance had jurisdiction to settle global terms for licensing SEPs: (i) the willingness of the parties to agree a global licence; (ii) the proportion of the SEPs to be licensed having been granted in any one country, in particular China; (iii) the principal place of business of the implementer; (iv) the place where negotiations have been conducted; and (v) the location of property available for seizure or enforcement of the licence.

Continental before the US District Court of California)[69] would unlawfully limit the property law content of patents and deprive Nokia of its legal standing and protected legal interests, namely access to justice and effective judicial protection of its rights.[70] Conversely, granting an AASI would not affect the prosecution of the US proceedings on the FRAND quantification.

The Higher Regional Court of Munich upheld the ruling, concluding that an AASI was the only effective means of defence against an ASI that would threaten a patent holder's property rights.[71] In the Court's view, such an AASI did not infringe either international law (as it did not challenge U.S. sovereignty) or European law (since the case at stake concerned violation of German intellectual property rights by a domestic firm).

The tension between the US and EU jurisdictions in the global SEP battle regained momentum in the *IPCom v Lenovo* litigation.[72] Although it recognised that an AASI usually presents an 'even greater danger of interfering improperly with the conduct of foreign proceedings', the UK High Court of Justice eventually granted one, arguing that it would be vexatious and oppressive to IPCom if it were entirely precluded from litigating on both infringement and validity of its UK patents.[73] Furthermore, the AASI sought by IPCom would have limited scope and would not materially interfere with the US proceedings, the latter being mostly focused on determining FRAND royalty terms and securing a declaration of non-infringement of the US patents.[74]

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69 *Cont'l Automotive Sys Inc v Avanci LLC et al,* 2019 WL 6735604 (ND Cal Dec 11, 2019)

70 District Court (LG) of Munich, Case No 21 O 9333/19 (2019) *Nokia v Daimler and Continental*.

71 Higher Regional Court (OLG) of Munich, Case No 6 U 5042/19 (2019) *Continental v Nokia*.

72 See *Lenovo (US) Inc et al v IPCom GmbH & Co KG*, 2019 WL 6771784 (ND Cal Dec 12, 2019); *IPCom Gmbh & Co v Lenovo Technology (United Kingdom) Limited* [2019] EWHC 3030 (Pat), [2020] FSR 20.

73 *IPCom* (n 72) paras 20, 52.

74 ibid paras 46-47.

Interestingly, the aforementioned disputed issues had already been explored by a French court, as the patent assertion entity had started parallel proceedings before the High Court of Paris in relation to its French SEPs.[75] Reaching the same conclusion as the UK court, the Paris Tribunal held that ASIs are contrary to French public order unless they seek to enforce contractual arbitration or jurisdiction clauses, and that in the case at stake the ASI sought by Lenovo in the US would limit IPCom's fundamental rights to protect and enforce its French property rights and to have access to fair legal proceedings. The order was upheld by the Court of Appeal, which argued that the US ASI would unlawfully affect IPCom by preventing it from filing any new infringement actions. It eventually confirmed the need to put an end to the unlawful disturbance posed by Lenovo.[76]

An even broader conflict emerged in the *InterDigital v Xiaomi* litigation, encompassing judicial interventions by Chinese, German and Indian courts. In response to an ASI granted by a Chinese judge, the Delhi High Court issued its first AASI, which the Court preferred to label as an anti-enforcement injunction.[77] It held that a court of one sovereign country should refrain from blocking enforcement of an order passed by another sovereign country's court merely on the grounds that such enforcement might prejudice one of the parties. However, if such order negatively impacts the legitimate invocation of legal remedies available in a certain sovereign country without due justification, then the court in that country must then react against the unlawful incursion on its jurisdiction and on the

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75 Tribunal Judiciaire de Paris, Case No RG 19/59311 (2019).

76 Cour d'Appel de Paris, Case No 14/2020 (2020).

77 High Court of Delhi, Case IA 8772/2020 in CS(COMM) 295/2020 (2021), *InterDigital Technology Corp v Xiaomi Corp*. The Court, indeed, argued that '[r]eferring to "anti-enforcement injunctions" as "anti-anti-suit injunctions" would […] be a misnomer. It would not be correct to equate a prayer for injuncting the opposite party from continuing to prosecute a proceeding pending in a foreign Court, with a prayer for injuncting execution of an order passed by the foreign Court. It would be completely unrealistic for a Court not to recognize the distinction between these two categories of cases'. ibid para 80.

fundamental right to demand legal redress.[78] International comity considerations under these circumstances are not enough to justify withholding AASI relief.

Analogous considerations emerged in the German branch of the litigation.[79] After balancing the different parties' interests and noting that an AASI would neither impair Xiaomi's rights in China nor impact the Chinese main proceedings, the Munich Regional Court ultimately found sufficient grounds for granting a preliminary AASI. Furthermore, the court stated that any implementer requesting or threatening to request an ASI outside Germany might be considered an unwilling licensee within the meaning of the CJEU's ruling in *Huawei v ZTE,*[80] and subject to a sales ban in Germany. In the German court's view, under the CJEU's negotiation model an implementer who has been notified about a SEP infringement may be required not only to demonstrate willingness to acquire a FRAND license but also to confirm that it will not seek an ASI against the SEP owner.[81] More generally, from the German court's perspective, preventing the enforcement of an injunction for patent infringement in Germany (through an ASI, or even an AAASI blocking an AASI) amounted to unlawful interference with the proprietary rights and access to justice rights of the SEP holder, which may then legitimately invoke the right to self-defence.

Finally, the court recalled its power under German law to grant preventive AASIs, which means issuing an AASI even if a foreign ASI has not yet been granted, provided there is a 'risk of first infringement' of patent rights.[82] Such a 'risk of first infringement' is especially likely when the implementer has

78 ibid para 90.

79 District Court (LG) of Munich, Case No 7 O 14276/20 (2021), *InterDigital Inc v Xiaomi Communication Technology Co Ltd.*

80 Case C-170/13 *Huawei Technologies Co Ltd v ZTE Corp* EU:C:2005:176.

81 See also District Court (LG) of Munich, Case No 7 O 36/21 (2021), *Huawei Technologies v IP Bridge*, concluding that an implementer seeking a foreign ASI cannot be considered as a 'willing licensee' in the context of a potential FRAND defence raised in the main proceedings.

82 *InterDigital* (n 79) s E(II).

requested or threatened to request an ASI against the SEP owner, or filed or threatened to file a main action for the grant of a licence or for determination of a FRAND global royalty in a jurisdiction that usually grants ASIs.

In sum, German courts have yet to grant an ASI and have taken a hard stance against ASIs issued by foreign courts. Indeed, German courts have granted AASI requests against Chinese companies in *Huawei Technologies v IP Bridge,*[83] *HEVC Advance v Xiaomi*[84] and *Nokia v OPPO.*[85] Although the Higher Regional Court of Düsseldorf recently overturned an AASI (finding no specific threat to German patent rights from the fact that Xiaomi was seeking an ASI in China), it nonetheless concurred with the District Court of Munich's ruling in *InterDigital v Xiaomi*, stating that an implementer seeking an ASI might be deemed an unwilling licensee.[86]

Elsewhere on the geopolitical chessboard, it is worth noting that in the Netherlands the Court of The Hague has rejected a petition by Ericsson for an AASI against Apple, noting that Ericsson had not stated anything from which a concrete threat followed and had erroneously referred to Apple's institution of an ASI in a dispute with Qualcomm, while it was actually Qualcomm that had requested an ASI in that case.[87]

Finally, an AASI was considered by a U.S. District Court in *Ericsson v. Samsung*.[88] Although several *Unterweser* conditions were satisfied, the Court nonetheless acknowledged that injunctive relief is an extraordinary remedy

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83 *Huawei Technologies* (n 80).

84 District Court (LG) of Düsseldorf, Cases No 4c O 73/20, 4c O 74/20, 4c O 75/20 (2021).

85 District Court (LG) of Munich, Case No 21 O 8690/21 (2021). See also *Nokia Technologies OY v OPPO Mobile UK Ltd and Others* [2021] EWHC 2952 (Pat), where the UK High Court denied a request to stay proceedings pending in a Chinese case. Indeed, OPPO has asked the Intermediate People's Court of Chongqing to set the terms of a global FRAND licence of Nokia's SEPs.

86 Higher Regional Court (OLG) of Düsseldorf, Case No 2 U 25/21 (2022), *HEVC Advance v Xiaomi.*

87 Court of The Hague, Case No C/09/618542 / KG ZA 21-914 (2021), *Telefonaktiebolaget LM Ericsson v Apple Retail Netherlands BV.*

88 *Ericsson Inc v Samsung Electronics Co Ltd*, 2021 WL 89980 (ED Tex Jan 11, 2021).

that should be narrowly tailored in order to prevent irreparable harm. Indeed, a narrowly focused indemnification provision would ensure that both proceedings could 'progress on the merits without the risk of unbalanced economic pressure being imposed by one party on another'.[89] Accordingly, the Texas District Court permitted Ericsson to request a FRAND royalty determination and bring patent infringement claims against Samsung before the US courts, but declined to order Samsung to withdraw the ASI or bar Samsung from taking part in the Chinese lawsuit.

3. AAASI and AAASI Scenarios

The frontiers of the global SEP battles could be widened even further if litigants started seeking AAASIs as an antidote to AASIs and a way to preserve or resuscitate the legal effects of previous ASIs. AAASIs have recently made their appearance in the context of FRAND litigation. In the previously mentioned *InterDigital v Xiaomi* litigation, the Munich District Court briefly envisioned a scenario where an implementer applies or threatens to apply for an AAASI to block or prevent the SEP owner's claim for an AASI.[90] In such a context, the German judge reasoned, it would not be inappropriate for a SEP holder to react by requesting the court to issue an anti-anti-anti-anti-suit injunction order (AAAASI) as a provisional countermeasure still based on the risk of SEP infringement. Another example can be seen in the *Samsung v Ericsson* dispute. Indeed, the Wuhan Intermediate People's Court not only issued an ASI, but also prohibited Ericsson from seeking an order (ie an AASI) elsewhere to prevent Samsung from enforcing the ASI granted by the Chinese court, thereby issuing the first AAASI.[91]

89 ibid 14.

90 *InterDigital* (n 79).

91 *Samsung* (n 51).

4. Comity in FRAND-related ASI Cases

International comity is 'an important integer in the decisional calculus'.[92] Given that efforts to promote comity require transnational judicial reciprocity, distrusting foreign proceedings in SEP litigation may be counterproductive and elicit retaliatory measures. Therefore, in order to avoid the escalation of jurisdictional conflicts, courts should carefully assess comity factors before issuing FRAND-related ASIs.

The analysis conducted in the previous paragraphs has shown that US courts have cast the first stone in ASI battles, which have essentially involved the US and China, while other jurisdictions have merely responded to anti-suit orders precluding actions in their own backyards. Instead of adopting countermeasures (ie AASIs), Chinese courts have followed the very same path as their US counterparts.

Evaluating the case law through the lens of comity principles, the evidence supports the idea that differences in terms of legal frameworks and traditions may have influenced courts' willingness to issue ASIs, but at the same time different national interests may have played a relevant role as well. Indeed, while the German and French reluctance in issuing ASIs may be explained by their civil law tradition, the same reasoning does not apply to countries such as India.[93] Further, the ASI regimes of the US and China share many characteristics.[94]

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92 *Quaak* (n 16) 17.

93 See Tsang and Lee (n 8), highlighting that most of the cases involved key players in the world's telecommunications market, including the top five smartphone manufacturers, which are Korean (Samsung), US (Apple), and Chinese (Huawei, Xiaomi, and Oppo) companies.

94 ibid. See also Brief of International Intellectual Property Law Professors as Amici Curiae in Support of Neither Party, Brief of International Intellectual Property Law Professors as Amici Curiae in Support of Neither Party, *Ericsson Inc and Telefonaktiebolaget LM Ericsson v Samsung Elecs Co Ltd et al*, No 21-1565 (Fed Cir March 1, 2021), arguing that, the Chinese Court's ASI in *Samsung* (n 51) was an appropriate exercise of its authority to protect its jurisdiction over the parties' dispute and conformed with the ASI analysis conducted by US courts.

In practice, as noted, ASI determinations appear to turn on a single factor, namely, whether the local action will be dispositive of the foreign action.[95] Accordingly, courts have frequently issued ASIs just to protect their jurisdiction, whereas interference with comity has usually been considered tolerable because of the temporary nature of the ASI (if it is addressed at all).

As a notable exception, a US District Court in *Vringo v ZTE* denied the granting of an ASI, arguing that the injunctive relief would have been inappropriate because resolution of the case would have not disposed of the antitrust decision in China.[96] Further, in *Apple v Qualcomm,* another US District Court found that the impact on comity was not tolerable and weighed against the issuance of an ASI.[97] Notably, since the boundaries of the dispute at stake were not limited to the US, the Court stated that the issuance of an ASI would have effectively deprived the UK, China, Japan, and Taiwan from assessing the anticompetitive effects of Qualcomm's licensing and chip practices on their markets. Finally, in *Optis v Huawei*, Judge Payne noted that the scope of any relief awarded by a US or Chinese court extends only as far as jurisdiction allows, hence there was no apparent threat to his Court's jurisdiction.[98]

Given the illustrated scenarios of ASIs cases, it is evident that the principle of comity – as interpreted by national courts – has generally failed to contain the risk of jurisdictional conflicts. Since these disputes stem from the growing tendency of national courts to set global licensing terms despite the well-known uncertainty about FRAND determination, efforts should be devoted to reducing SEPs litigation as a whole rather than merely identifying specific solutions to the jurisdictional tensions triggered by ASIs. As explained in the next section, such a goal may only be achieved through

95 Brief of International Intellectual Property Law Professors (n 94); Tsang and Lee (n 8).
96 *Vringo* (n 56).
97 *Apple* (n 57).
98 *Optis Wireless Tech* (n 58).

an intervention at the upstream level, refining the scope of SDOs' intellectual property rights (IPR) policies.

IV. Looking for a Viable and Effective Solution

As previously noted, the dynamics of ASIs and their countermeasures perfectly depict the evolution of the 'race to the court-house' and 'race to the bottom' phenomena that have engaged stakeholders and courts at the global level. Furthermore, these disputes have highlighted the increasingly central role played by the Chinese jurisdiction on the standard-setting stage, together with the clear divide between European common law (ie UK) and civil law (eg France and Germany) jurisdictions, with the latter reluctant to recognise the effectiveness of ASIs and more inclined to resist interference by foreign courts. More generally, the new wave of litigation has raised unresolved questions about international comity relations, conflicts of laws, and effective judicial protection, which have significantly amplified the already existing tensions among the players involved in SEP licensing. Indeed, if SEP owners have unfettered freedom to select the jurisdiction in which to bring an action for infringement, they will probably select the jurisdiction likely to settle FRAND terms most favourable to them. By the same token, if implementers have unfettered freedom to bring a claim in any jurisdiction for settlement of FRAND terms, they will select the country which is most favourable to them.[99] Therefore, ASIs may have a pernicious impact on the protection of patent rights and on the proper functioning of standardisation processes.

Regarding solutions, some proposals advocate an intervention by international bodies. Such intervention could either lead to an international agreement or an industry-wide arbitral forum for resolving global FRAND disputes at their roots. At one end of the spectrum, Cotter proposes that

[99] See *Nokia Technologies* (n 85) paras 117-18, stating that a race to the bottom is no more attractive than a race to the top. See also Tsilikas (n 12) 736, arguing that ASIs represent an additional tool for holdout by unwilling licensees.

inter-governmental cooperation could entail the development of soft law instruments (eg best practices) to deal with FRAND determinations.[100] By this view, it has been suggested that, in the SEPs context, courts should resort to ASIs only in circumstances in which enforcement in another jurisdiction would frustrate the domestic court's ability to render judgment. Further, as the argument goes, such best practices could even define the optimal method of FRAND calculation (eg top-down versus bottom-up models) or the desirable approach on issues of confidentiality of SEPs licensing agreements.[101]

On the other end of the spectrum, Contreras argues that international coordination could lead to the founding of a global non-governmental tribunal with sole authority to fix global FRAND rates for all SEP owners with respect to a specified standard.[102] Any request for injunctive relief by licensors or licensees before a national court would then have to be stayed until the global tribunal fixed the scope of FRAND licensing terms. A rate-setting tribunal should operate under consistent principles and procedures, and its decisions should be made public to offer robust guidance to the industry. The promotion of transparency, consistency, and comprehensiveness principles in the determination of aggregate FRAND terms should be at the basis of the tribunal's *modus operandi*.

The proposal actually includes a mandatory and an optional version.[103] While the latter resembles arbitration and other alternative dispute resolution (ADR) mechanisms already available for the voluntary adjudication of FRAND disputes, the former may be imposed through statutory and treaty obligations or (more effectively) through binding provisions in SDOs' policies. In this regard, Contreras considers a recognized non-governmental

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100 Thomas F Cotter, 'Is Global FRAND Litigation Spinning Out of Control?' [2021] Patently-O Law Journal 1.

101 ibid.

102 Jorge L Contreras, 'Global Rate-Setting: A Solution for Standards-Essential Patents?' (2019) 94 Washington Law Review 701.

103 ibid 738-41.

international organization (such as the World Intellectual Property Organization or the OECD) or institution (such as the International Chamber of Commerce, the American Arbitration Association, or the London Court of International Arbitration) the best host for the FRAND tribunal.[104] An obligation to solve disputes on FRAND royalties before a non-governmental rate setting tribunal would obviously bind SDOs participants, but not those businesses (eg manufacturers) that have decided to avoid joining the SDO. Nevertheless, the SDO could include in its policies or bylaws an additional clause according to which (non-member) firms willing to implement the standard should agree to solve any royalty conflict before the cited tribunal. Contreras provides further details on the calculation and allocation of the defined fees. Under the mandatory version of the model, for instance, the tribunal would first set the aggregate royalties and then proceed to allocate them to the various SEPs holders, all of which would be bound by such determination. Under the optional version, only the parties expressly selecting the rate setting tribunal would be bound by the royalty calculation, though such determination and allocation could still be informative to subsequent courts or arbitrators in subsequent disputes involving other SEPs owners.[105]

However, solutions requiring substantial international cooperation may be particularly complex to achieve and take considerable time.[106] It may be reasonable to enquire, instead, whether a robust (and prompter) intervention at the upstream policy level would be more desirable. This may entail substantial rethinking of the IPR licensing policies widely adopted by SDOs.

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104 ibid 742.

105 ibid 740-41. On the role of arbitral organizations in FRAND disputes, see also Peter G Picht and Gaspare T Loderer, 'Arbitration in SEP/FRAND Disputes: Overview and Core Issues' (2019) 36 Journal of International Arbitration 575, 581-83, considering a number of suitable institutional players (eg WIPO and ICC) and exploring the future role of the Patent Mediation and Arbitration Centre foreseen by the Agreement on a Unified Patent Court ([2013] OJ C175/1).

106 Geradin and Katsifis (n 2) 28-31; Maximilian Haedicke, 'Anti-Suit Injunctions, FRAND Policies and the Conflict between Overlapping Jurisdictions' (2022) 71 GRUR International 101.

After all, ASI global disputes epitomise the negative externalities of the fuzzy FRAND paradigm, which has proven to be an 'abysmal failure' rather than a resource for optimal licensing.[107] In other words, as emerged from the last decade's wasteful SEP litigation, the significant uncertainty about the very meaning of FRAND is at the origin of the conflictual relations between patentees and licensees, and the global case law is undoubtedly far from solving all complex matters related to the FRAND licensing concept.

Further considerations seem to endorse an intervention at the SDO policy level. As has been attested by national courts, SEP disputes are contractual in nature.[108] Therefore, it is not disputed that a company's violation of a FRAND pledge amounts to a breach of contract. If anything, it is the role and the appropriateness of antitrust law to police opportunistic behaviours that is debatable.[109] Accordingly, problems concerning the licensing of SEPs

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107 Aron Devlin, 'Standard-Setting and the Failure of Price Competition' (2009) 65 NYU Annual Survey of American Law 217, 236. See also Mark A Lemley and Timothy Simcoe, 'How Essential Are Standard-Essential Patents?' (2019) 104 Cornell Law Review 607, 612-14, noting that everything about the FRAND commitment is still controversial, including 'whether a FRAND commitment prevents a patentee from getting an injunction, whether the fact that a patent is standard-essential should bar an injunction even if there is no FRAND commitment, whether a patentee that makes a FRAND commitment must offer it to everyone or only willing licensees, who is a willing licensee, whether the FRAND commitment is an enforceable contract, who decides what royalty is FRAND, what a FRAND royalty rate actually is, and what the consequences are of reneging on a FRAND commitment'. See also Tsang and Lee (n 8), arguing that the surge in ASIs reflects the international legal vacuum about FRAND determination.

108 See eg *Microsoft* (n 53); *Unwired Planet International* (n 39); *TCL* (n 47); German Federal Court of Justice (Bundesgerichtshof), Case KZR 35/17 (2020) *Sisvel v Haier* (*Einwand II*).

109 See eg Richard A Epstein and Kayvan B Noroozi, 'Why Incentives for "Patent Holdout" Threaten to Dismantle FRAND, and Why It Matters' (2017) 32 Berkeley Technology Law Journal 1381; Maureen K Ohlhausen, 'The Elusive Role of Competition in the Standard-Setting Antitrust Debate' (2017) 20 Stanford Technology Law Review 93; Gregory J Werden and Luke M Froeb, 'Why Patent Hold-Up Does Not Violate Antitrust Law' (2019) 27 Texas Intellectual Property Law Journal 1.

should be essentially addressed by contract law.[110] Indeed, strategic conduct is a form of contractual opportunism that reflects incomplete contracting at the time of standardisation. It follows that problems in SEP licensing stem from a lack of contractual or organisational solutions provided by SDOs, which exacerbates the risk of strategic behaviour.[111] Further, SDOs are the closest to all market players and have a sophisticated understanding of the standards and of their main contributors. Hence, they are best positioned to tackle the licensing dilemma at its roots.[112]

Given these premises, by focusing on the crucial position of SDOs, some policy recommendations can be put forward to curb the economic and legal frictions affecting SEP licensing. First, SDOs should require all SEP owners involved in a standardisation process to unilaterally disclose, ahead of the standard being adopted, the most restrictive licensing terms, comprising the highest licensing rates (not excluding royalty-free terms) and most stringent non-pricing terms (eg restrictions on the use of the licenced patent). SDOs are best placed to determine a reasonable aggregate rate for standards by imposing *ex ante* price commitments. Coordinated predetermination of the most restrictive licensing terms (or 'licence ceiling') may deliver aggregate royalties widely accepted in the industry, avoiding holdup problems and royalty stacking. This, in turn, would bring a substantial reduction in litigation involving licensing commitments.[113]

More specifically, such a licensing framework should be applied in a non-discriminatory way to all businesses requiring licenses for implementing the

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110 See Tsang and Lee (n 8), arguing that, given the private-ordering nature of standard setting and FRAND commitment, the best way to address this issue is through private ordering.

111 Charles River Associates, *Transparency, Predictability, and Efficiency of SSO-based Standardization and SEP Licensing: A Report for the European Commission* (European Union 2016) 12-13.

112 Kung-Chung Liu, 'Arbitration by SSOs as a Preferred Solution for Solving the FRAND Licensing of SEPs?' (2021) 52 International Review of Intellectual Property and Competition Law 673.

113 On the benefits of the *ex ante* model, see eg Charles River Associates (n 111) 28-30.

standardized technology. In terms of advantages, a model based on *ex ante* unilateral disclosure of the licence ceiling would overcome the risks related to the FRAND mechanism. The latter, as argued before, leaves potential licensees uncertain as to the conditions on which patents will be licensed. Early disclosure of the licensing conditions, instead, would remove such a risk by giving implementers more certainty about the applied economic terms. Secondly, due to the existence of specific economic terms, unfair conduct consisting in the application of higher fees or more restrictive non-pricing terms (than those declared *ex ante*) would seldom succeed. Indeed, a contractual promise based on defined price and non-price benchmarks would be easier to enforce before a court than the undefined FRAND licensing model. Finally, in the context of a maximum cap framework, a standard development body would even be in the position to assess not only the technological excellence of the proposed solutions, but also all related costs and efficiencies.[114]

One criticism that could be raised to the model, perhaps, lies in the fact that patentees would be required to set maximum terms at an early stage, sometimes without being aware of the precise contribution their IPRs would bring to the standardised product or technology under discussion.[115] Yet, the issue may be solved by giving patentees more flexibility on when to disclose the license ceiling, instead of compelling them to do so as soon as they join the SDO and its working groups. This may, for instance, imply allowing patent owners to submit the defined economic conditions, at the latest, before the SDO adopts its first formal resolution on the preferred standard. At that stage, indeed, advanced discussions on the optimal solutions to promote will have already taken place and patent holders may have acquired

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114 See Robert A Skitol, 'Concerted Buying Power: Its Potential for Addressing the Patent Hold-up Problem in Standard Setting' (2005) 72 Antitrust Law Journal 742; Jorge L Contreras, 'Rethinking RAND: SDO-based Approaches to Patent Licensing Commitments' (ITU Patent Roundtable, Geneva, 10 October 2012) ITU Patent Roundtable.

115 See Jorge L Contreras, 'Technical Standards and Ex Ante Disclosure: Results and Analysis of an Empirical Study' (2013) 53 Jurimetrics 163.

a clearer understanding of the value of their SEPs. In making such determination of the economic terms, one helpful criterion would be to look at the value of licences for similar patented innovations related to similar products. By contrast, allowing disclosure after the SDO takes significant formal steps towards a specific technical solution would lead to considerable risks. Indeed, if the disclosed cap were eventually considered exorbitant, the SDO would likely have to reconsider alternative solutions and would consequently lose both the time and the financial costs incurred during the selection process (eg market analysis to examine buyers' interest in the standard). Therefore, the irrevocable and unconditional cap disclosure should be made well before the formal voting and adoption of the standard, but not necessarily at early stages of the process.[116]

The effectiveness and benefits of an *ex ante* disclosure framework have been recognised by both the U.S. Department of Justice (DoJ) and the European Commission. The latter, in its guidelines on horizontal cooperation agreements, has considered that unilateral *ex ante* disclosure would allow the standard development bodies to adopt better informed decisions on competing standards and explore not only the technical merits, but also their costs.[117] On a similar note, the DoJ has in the past noted that *ex ante* disclosure of most restrictive terms could 'reduce the likelihood of unexpected licensing terms that threaten the success of future […] standards', and could further lead to faster development, implementation, and adoption of a standard, as well as fewer litigated disputes.[118]

Despite the cited advantages, only a few SDOs in the ICT field have explored the adoption of policy rules promoting *ex ante* disclosure of a

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116 For an analysis of the optimal timing for declarations of SEPs and related licensing terms (including cap commitments), see Charles River Associates (n 111) 64-66.

117 Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal cooperation agreements' (Communication) [2011] OJ C11/01, para 299.

118 Letter from Thomas O Barnett to Robert A Skitol, Esq (30 October 2006).

licence ceiling.[119] While these SDOs have clarified that unilateral disclosure of a 'not to exceed' licence fee or a maximum cap is not prohibited, at the same time, they have continued promoting FRAND economic conditions or royalty-free terms.[120] Such hybrid options, requiring FRAND commitments while merely allowing unilateral and voluntary disclosure, do not represent effective solutions to ensure once and for all transparency and legal certainty within the SDO context. Only by mandating (rather than permitting) *ex ante* disclosure of the licence ceiling, and eliminating vague references to FRAND in their policies, can SDOs bring to an end, or at least substantially reduce, the wasteful SEP litigation.

As a feasible alternative, should SDOs maintain the much-debated FRAND framework, they should at least impose mandatory bilateral (ie between licensors and potential licensees) arbitration in order to prevent forum shopping through the strategic use of ASIs and related countermeasures.[121] More specifically, SDOs should amend their IPR policies to ensure that, if

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119 See, for instance, Scott Bradner and Jorge L Contreras, 'Intellectual Property Rights in IETF Technology' (Internet Engineering Task Force, May 2017) <https://datatracker.ietf.org/doc/html/rfc8179> accessed 4 August 2022; Institute of Electrical and Electronics Engineers Standards Association (IEEE-SA), 'IEEE-SA Standards Board Bylaws' (February 2022) para 6.2 <https://standards.ieee.org/wp-content/uploads/import/documents/other/sb_ bylaws.pdf> accessed 4 August 2022. For an analysis of IEEE-SA's IP policies, see Nicolas Petit, 'The IEEE-SA Revised Patent Policy and its Definition of Reasonable Rates – a Transatlantic Antitrust Divide?' (2017) 27 Fordham Intellectual Property, Media and Entertainment Law Journal 211.

120 See Contreras, 'Technical Standards and Ex Ante Disclosure' (n 115) 172, focusing on the *ex ante* disclosure policies of a number of SDOs and finding that the main criticisms raised against an early licence ceiling model (including negative impact on standardization length, members' participation, and standards quality) do not seem supported by either quantitative or qualitative evidence.

121 Mark A Lemley and Carl Shapiro, 'A Simple Approach to Setting Reasonable Royalties for Standard-Essential Patents' (2013) 28 Berkeley Technology Law Journal 1135; Richard Arnold, 'SEPs, FRAND and Mandatory Global Arbitration' (2021) 70 GRUR International 123; Geradin and Katsifis (n 2); Haedicke (n 106). Greenbaum (n 36) and Tsang and Lee (n 8) support, instead, the idea that SDOs should include an exclusive forum selection clause. However, they differ over whether the forum selection clause should designate the jurisdiction specified in the 'choice of law' clause or the jurisdiction where the patent is granted.

there is a lack of consensus between licensors and licensees on the scope of a FRAND licence, the matter should be referred to an arbitration panel (eg composed of two members selected by the patentee and licensee respectively and a third member chosen by the first two appointees). In terms of FRAND royalty quantifications, the arbitration panel could make its own assessment and choice, or could alternatively select either the patentee's or the licensee's proposal (so-called 'baseball arbitration').[122]

Arbitration, as a form of ADR, is certainly not a new phenomenon in the context of IP matters. However, in the last few years, it has gained traction in the area of FRAND-committed SEPs solving a number of complex and disputed issues.[123] Overall, it offers substantial advantages when compared to national court litigation. First, the concerned parties are normally allowed to choose the arbitral panel with the required and desired expertise on SEPs cases. Second, arbitration may avoid the risk of waste of resources due to multiple court proceedings, which represent a considerable financial burden, especially for the smaller players. Third, it is much more time-effective and efficient in comparison to ordinary litigation. Fourth, ADR remedies generally offer a higher degree of confidentiality, which may be valued by the parties to a SEP dispute. The cited benefits and effectiveness of ADR remedies have been acknowledged by both administrative and judicial authorities.[124]

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122 Charles River Associates (n 111) 80. Under a modified version (called 'night baseball'), parties' licensing proposals are not disclosed to the arbitrator: the latter simply selects a royalty level on the basis of an independent evaluation. Ultimately, the selected royalty coincides with the party's (licensee or patentee) offer that is closest to the arbitrator's licence choice. In the realm of existing SDOs, only one organization – albeit not involved in information and communication standards but in the different sector of computing architectures – seems to have considered mandatory arbitration. See VITA Standards Organization, 'Policies and Procedures' (December 2021) para 10.5 <https://www.vita.com/resources/Documents/Policies/vso-pp-r2d8.pdf> accessed 26 February 2022.

123 Picht and Loderer (n 105) 575.

124 ibid 579-81.

With this regard, arbitration would be endorsed by the European Commission, whose recent IP Action Plan explicitly encourages industry-led initiatives (like ADR) to bring more transparency and legal certainty in SEP licensing.[125] In this perspective, it is also worth noting that the Commission has tabled a proposal for a regulation setting out a roadmap for establishing a new framework for SEPs.[126] In a similar vein, the UK Intellectual Property Office, noting that potential benefits of more widespread use of arbitration could include reduced costs and lower barriers to entry for innovators, has launched open consultation on SEPs, seeking views on how best to encourage and promote greater use of arbitration and whether the government should intervene – for example, by introducing a mandatory requirement to arbitrate.[127]

For the sake of clarity, even an arbitration mechanism implemented by SDOs would not be immune from criticism. For instance, as some authors have pointed out, mandatory arbitration would deprive SEP owners and

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125 Commission, 'Making the most of the EU's innovative potential. An intellectual property action plan to support the EU's recovery and resilience' (Communication) COM (2020) 760 final, para 4. In a recent webinar organized by the European Commission, Lord Justice Richard Arnold and Maurits Dolmans made the case for arbitration. In his presentation, entitled 'SEPs, FRAND and Mandatory Global Arbitration', Arnold supported the introduction of a system for the mandatory global arbitration of FRAND disputes that should be achieved by including an arbitration clause within the contract formed between SDOs and SEP holders. In a similar vein, to avoid forum shopping and ASI tactics, Dolmans argued in his presentation, entitled 'The EC Should, and Can, Incentivise FRAND Arbitration', that, in the forthcoming Guidelines on Horizontal Agreements and when implementing the IP Action Plan, the European Commission has a unique opportunity to encourage SDOs to provide for arbitration in their IPR policies. Commission, 'Enforcement of Standard Essential Patents – Current Bottlenecks and Possible Solutions' (Webinar Series on Standard Essential Patents, 19 May 2021) <https://ec.europa.eu/growth/ events/webinar-series-standard-essential-patents_en> accessed 27 February 2022.

126 'Intellectual Property – New Framework for Standard-Essential Patents' (European Commission) <https://ec.europa.eu/info/law/better-regulation/ have-your-say/initiatives/13109-Intellectual-property-new-framework-for-standard-essential-patents_en> accessed 3 November 2021.

127 'Standard Essential Patents and Innovation: Call for Views' (n 5).

implementers of access to the judicial system.[128] Furthermore, it may still be complex for the SDO community to reach an agreement on the scope of an arbitral award. Should the arbitrator be allowed to also evaluate the essentiality, validity, exhaustion, and infringement of the standard essential patent? Which law and rules would be applicable to the arbitration proceedings and substance of the case, the *lex loci arbitri* (ie law of the place of arbitration) or the *lex loci protectionis* (ie law of the jurisdiction granting IP protection)? Would patent holders be allowed to apply for interim injunctions before national courts, pending the outcome of the arbitration process? Could an arbitral award have *erga omnes* effect, also affecting the position of other SDO members? Should the award be fully covered by a confidentiality clause, or should it be disclosed (at least partly) to all SDO members? Lastly, should the arbitrators retain decision-making power to sanction *ex post* any breach of the obligations established in the arbitral award?[129]

Internal surveys or policy discussions within an SDO, involving both patentees and potential licensees, should hence be conducted in order to set (to the extent possible) the optimal scope of the SDO arbitration clause and strike the right balance between the parties' interests without discouraging their participation. Intuitively, the introduction of a broad arbitration mechanism (eg mandating arbitral determinations on both FRAND terms and SEPs infringement, validity, or essentiality, while denying the possibility of interim relief applications) would undoubtedly lead to significant time and costs savings, especially when compared to the ordinary litigation pathway.[130] In brief, if a binding arbitral mechanism is eventually mandated in a SDO environment, all these thorny issues would need to be clarified in context. However, this seems a necessary step to ensure a level playing field.

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128 Charles River Associates (n 111) 79; Liu (n 112).

129 On the scope of an arbitral award in SEPs cases, see Picht and Loderer (n 105) 583-91.

130 For an analysis of the role of arbitration in solving patent disputes, see, among others, Konstantinos Petrakis, 'The Role of Arbitration in the Field of Patent Law' (1997) 52 Dispute Resolution Journal 24.

As the UK Supreme Court held in *Unwired Planet,* the risk of irreconcilable judgments and applications for ASIs are the direct result of SDO policies that, while allowing FRAND worldwide licences, do not provide any forum to determine the terms of such licences.[131]

V. CONCLUDING REMARKS

To quote the recent UK High Court's decision in *Nokia v OPPO*, the current unevolved framework for the settlement of SEP global licences is 'plainly not satisfactory'.[132] It encourages uncertainty and expensive parallel litigation in several jurisdictions, and it is probably unsustainable in the long term.[133] In fact, the conflictual dynamics triggered at the international level have also raised substantial concerns among various government authorities.

As the importance of standards is growing with the increasing globalisation of commerce, the emergence of new technologies, and the need for interoperability, concern the ongoing jurisdictional conflicts has been heightened in view of the willingness of Chinese courts to use the ASI legal tool to set themselves up as global licensing tribunals with the aim of safeguarding and advancing China's economic interests.[134] Indeed, the suspicion is that the final goal lurking behind the sudden increase in the number of ASIs issued by Chinese courts is to set rates low enough to meet

131 *Unwired Planet International* (n 39) para 90.

132 *Nokia Technologies* (n 85) para 116.

133 ibid.

134 See 'China is Becoming More Assertive in International Legal Disputes' (*The Economist*, 11 September 2021) <https://www.economist.com/ china/china-is-becoming-more-assertive-in-international-legal-disputes/21804496> accessed 4 November 2021; Josh Zumbrun, 'China Wields New Legal Weapon to Fight Claims of Intellectual Property Theft' (*The Wall Street Journal*, 26 September 2021) <https://www.wsj.com/articles/china-wields-new-legal-weapon-to-fight-claims-of-intellectual-property-theft-11632654001> accessed 4 November 2021.

an industrial policy aimed at promoting Chinese companies' competitiveness.[135]

In this regard, the European Commission has signalled a need to nurture a more stable and effective global intellectual property framework and to firmly address the challenges deriving from weak protection and enforcement for EU businesses operating abroad, explicitly alluding to the risks related to broad extraterritorial anti-suit orders.[136] The Commission has identified the Chinese legal framework as a particularly complex and legally uncertain environment from the standpoint of firms holding relevant SEPs and willing to monetise their IPRs. In a similar vein, the Office of the US Trade Representative has remarked on the failure by Chinese courts to thoroughly protect US intellectual property, also pointing to the emerging practice in Chinese tribunals of granting ASIs in SEP cases without notice or an opportunity for all litigants to take part in the proceedings.[137]

However, the recent judicial escalation has been originated, on the one hand, by English courts' decisions in *Unwired Planet* empowering national courts to fix terms of global FRAND licenses and, on the other hand, by US courts' decisions in *Microsoft v Motorola* issuing the first ASI in the SEP context. Because of the economic relevance and strategic role of standards in an interconnected and interdependent world, the lack of mutual trust and judicial reciprocity, which inspire comity, have unsurprisingly led to the adoption of retaliatory measures or self-defence actions by other jurisdictions.

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135 Jyh-An Lee, 'Implementing the FRAND Standard in China' (2016) 19 Vanderbilt Journal of Entertainment & Technology Law 37.

136 Commission, 'Making the most of the EU's innovative potential' (n 125) 17. See also European Parliament, 'An intellectual property action plan to support the EU's recovery and resilience' (Resolution) 2021/2007 (INI) para 19, calling on the Commission to continue observing the conduct of third country companies in international standardisation bodies, which, together with recent decisions by foreign courts, places European companies at a significant disadvantage by undermining the competitiveness of the European market.

137 Office of the US Trade Representative (n 5) 47-48.

Moreover, ASI wars are a new side effect of the FRAND mechanism. In the two decades since its adoption by the ICT standard-setting environment, this licensing framework has triggered a significant number of disputes related *inter alia* to the precise meaning and scope of FRAND licenses, the nature and legal implications of FRAND commitments, and the value chain level at which a SEP holder must grant FRAND licenses.[138] Thus, focusing on the flaws of the FRAND model, rather than searching for answers from the comity principle, represents the optimal pathway.

In this regard, instead of waiting for complex international coordination, a prompt adjustment of SDO licensing policies seems desirable at this stage, also considering the increasing importance SEPs have been acquiring in other sectors, from automotives to health and energy. A moderate version of this approach could entail the inclusion in SDO policies of an arbitration clause according to which licensees and licensors – in the absence of consensus over the scope of a FRAND license – would be required to refer the matter to an arbitral panel rather than bring the case before a national court. A more drastic solution would abandon the much-debated FRAND mechanism and impose on SEP holders a duty to disclose *ex ante* the most restrictive licensing terms applied for a given essential patent.

138 See European Parliament (n 136) para 18, underlining that FRAND terms are vague and involve legal uncertainty and calling on the Commission to monitor industry developments and provide more clarity on various aspects of FRAND.

SPECIAL SECTION

HOW INTERNATIONAL ORGANISATIONS SHAPE INTERNATIONAL ENVIRONMENTAL LAW THROUGH NON-BINDING INSTRUMENTS: AN ACCOUNT OF THE EXERCISE OF INTERNATIONAL PUBLIC AUTHORITY

Rita Guerreiro Teixeira*

This article lays out a framework of authority for the analysis of non-binding instruments of international organisations as exercises of international public authority. This framework considers influence on freedom of addressees and law-appliers, rather than formal bindingness, to be the decisive criteria of authority. I argue that this approach can better explain the legal relevance and impact of these instruments on the conduct of different actors, particularly in the field of international environmental law. The article further proposes that the decision-making processes taking place inside international organisations, which are a distinctive feature of this form of governance, influence the authority of the instruments adopted. These processes have, at least, three characteristics that are particularly relevant in relation to environmental regulation: (i) the scientific and technical expertise of the organisation and other participants, (ii) the range of participants and the achievement of broad consensus within relevant communities of practice, and (iii) the development of procedural norms necessary to implement and comply with existing obligations. Finally, this framework of authority is applied to analyse the authority of the instruments adopted by the Food and Agriculture Organisation on the regulation of sustainable fisheries. This case study illustrates

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the explanatory value of the framework and draws conclusions on its implications for the law of international organisations.

Keywords: international public authority; non-binding instruments; international organisations; international environmental law; fisheries

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I. INTRODUCTION

International organisations have been at the forefront of contemporary developments in international environmental law, adopting influential codes of conduct, guidelines, and declarations of principles. However, the traditional, formalistic account of international law-making, reliant on a strict dichotomy between binding and non-binding instruments, provides limited analytical tools to conceptualise these instruments and to account for their influence on the conduct of different actors.[1] This has resulted in an

[1] José E Alvarez, 'Standard-Setting in UN System Organizations' in Jan Klabbers (ed), The Cambridge Companion to International Organizations Law (Cambridge University Press 2022) 122–123; Rita Guerreiro Teixeira, 'The Role of International Organizations in the Development of International Environmental Law: Adjusting the Lenses of Analysis' (2021) 53 Case Western Reserve Journal of International Law 237, 247.

explanatory gap in the way that international lawyers understand and theorise international organisations and their role in shaping international environmental regimes.[2]

This article aims to address that gap. It deals with the question of what the legal relevance of non-binding instruments of international organisations in international environment law is, and it argues that this can be better answered from the point of view of authority (rather than through a relation with formal sources).[3] In doing so, it inserts itself in two ongoing debates. First, it joins the discussion on the authority of international legal instruments, relying on accounts of authority as a measure of deference and on the literature on international public authority, and building on the argument that authority can be dissociated from formal validity, bindingness, and coercion.[4] It presents two main propositions to advance this debate. It establishes that the international regulation of the environment (a highly technical field, where scientific uncertainties and high-cost measures make effective regulation difficult to adopt) offers an optimal viewpoint to study the authority of non-binding instruments of international organisations. Additionally, it argues that certain characteristics of the decision-making processes of international organisations are determinant for the authority of their environmental instruments, influencing how they are received by different stakeholders and how much deference they induce.

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2 On the identification of this gap, see Jan Klabbers, 'The Normative Gap in International Organizations Law' (2019) 16 International Organizations Law Review 272, 272–274.

3 Statute of the International Court of Justice 1946 (UNTS vol 33, p 993), Art. 38(1). Further discussion in Guerreiro Teixeira (n 1).

4 See Fuad Zarbiyev, 'Saying Credibly What the Law Is: On Marks of Authority in International Law' (2018) 9 Journal of International Dispute Settlement 291, 294–295; Nico Krisch, 'Liquid Authority in Global Governance' (2017) 9 International Theory 237, 243; Armin von Bogdandy, Matthias Goldmann and Ingo Venzke, 'From Public International to International Public Law: Translating World Public Opinion into International Public Authority' (2017) 28 European Journal of International Law 115.

Second, this article aims to contribute to the debate on the need for a revised framework for analysing international institutional law-making, by better understanding how international organisations influence the freedom of other actors. It joins the ranks of those that call for a recast of functionalist approaches for being unable to accommodate new legislative developments.[5]

The paper proceeds in three parts. Part II clarifies the concept of authority used and the characteristics that make it a fit tool for studying the legal relevance of non-binding instruments. Part III discusses three marks of authority[6] found in the legislative processes of international organisations. Finally, part IV is a case study of the authority of the Code of Conduct on Responsible Fisheries (CCRF) adopted by the Food and Agriculture Organisation (FAO), highlighting some important implications of the proposed approach.

II. Normative Instruments as Exercises of International Public Authority by International Organisations

The success of several non-binding instruments in guiding international practice has shown that (formal) law and authority 'can move along separate tracks'.[7] The Guidelines for Conducting Integrated Environmental Assessments developed by the United Nations Environmental Programme, the food safety standards of the Codex Alimentarius (jointly developed by the World Health Organisation and FAO), the International Maritime Organisation guidelines for the prevention of pollution at sea are all influential instruments that have been well received and widely implemented by states and other stakeholders, regardless of their formal status.[8] Consequently, this paper relies on the concept of international public

5 See Jan Klabbers, 'International Organizations and the Problem of Privity: Towards a Supra-Functionalist Approach' in George Politakis, Tomi Kohiyama and Thomas Lieby (eds), *ILO100: law for social justice* (International Labour Office 2019).

6 The terminology of "marks of authority" is proposed in Zarbiyev (n 4) 298.

7 Klabbers, 'The Normative Gap in International Organizations Law' (n 2) 297.

8 Jürgen Friedrich, *International Environmental "soft law"* (Springer 2013) 26, 31, 58.

authority as a more fitting tool to grasp the legal relevance of these various normative instruments.[9] This concept has the advantage of considering influence on freedom, rather than formal bindingness,[10] to be the decisive criteria of authority. According to this approach, a normative instrument adopted by an international organisation is an exercise of international public authority if, and to the extent that, it influences the freedom of other actors (both the norm addressees and/or law-appliers) in pursuance of a common interest.[11]

An instrument can influence an actor's freedom when it changes its legal position and also when it establishes a rule or standard of conduct whose violation determines that an act is illegal, creates a disadvantage (legal, economic, or reputational), prevents obtainment of a benefit, or requires it to justify its actions if it chooses to act differently from what is prescribed.[12] This understanding of authority presupposes a certain degree of freedom to act otherwise. Simultaneously, authority must remain content-independent, or it risks being assimilated to persuasion based on rational arguments.[13] An

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9 Normative instruments are understood here as instruments that make a claim to guide or regulate conduct of their addresses, rendering it mandatory, prohibited, permitted, or recommended—see Nicole Roughan, 'Sources and the Normativity of International Law', *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) 680, 682. They are legally relevant to the extent that they produce legal effects (namely, influencing the freedom of legal actors), influence future developments in legal regimes, and/or are adopted under an international law framework.

10 On the alternative command model of authority, according to which it corresponds to the exercise of binding powers to create formal obligations, see Samantha Besson, 'The Authority of International Law — Lifting the State Veil' (2009) 31 Sydney Law Review 343; Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 Minn. L. Rev. 1003.

11 I rely heavily on the definition of international public authority developed by several authors of the International Public Authority project, particularly on the revised definition put forward in von Bogdandy, Goldmann and Venzke (n 4) 117.

12 ibid 139–140; Armin von Bogdandy, Philipp Dann and Matthias Goldmann, 'Developing the Publicness of Public International Law: Towards a Legal Framework for Global Governance Activities' (2008) 9 German Law Journal 1375, 1381–1383.

13 Ingo Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law' (2013) 4 Transnational Legal Theory 354, 355.

authoritative directive is complied with, not because the actor finds its content agreeable, reasonable, or persuasive, but because it emanates from a particular person, and/or (I add) was adopted by a particular process. This apparent contradiction can be solved by reference to the social basis of authority: authority rests not on individual choices but on a prior recognition by the relevant community of practice. This community includes an instrument's direct and indirect addressees and law-appliers—i.e., the participants in the international legal system who must make decisions about how to act while considering the level of deference owned to the instrument issued by an authority.[14] It is their internal perspective that matters to determine the normativity of an instrument.[15]

All these characteristics make authority a useful tool to reconceptualise the concept of international legal normativity and our scope of analysis as international lawyers. In this framework, the relevant question is no longer exclusively whether the instruments of international organisations being studied are 'formally law'—i.e., if they fit into one of the formal sources identified in the international legal system. To the extent that these are recognised as authoritative by the relevant community of practice—therefore, impacting the freedom of other actors and requiring regulation under a public law regime—, they are legally relevant, produce legal effects, and are of interest to lawyers.[16]

III. THREE FORMS OF AUTHORITY

The claim that international organisations influence the freedom of other actors through the adoption of various authoritative instruments begs the

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14 Zarbiyev (n 4) 294–296; Michael Zürn, *A Theory of Global Governance: Authority, Legitimacy, and Contestation* (Oxford University Press 2018) 38.

15 Matthias Goldmann, 'Inside Relative Normativity: From Sources to Standard Instruments for the Exercise of International Public Authority' (2008) 09 German Law Journal 1865, 1878; HLA Hart, *The Concept of Law* (Third edition, Oxford University Press 2012) 88–90.

16 Case C-159/02 *Turner v Grovit and others* EU:C:2004:228, paras 27-31.

question of what the basis for their authority is—particularly as the elements traditionally relied on to discuss the authority of international organisations (delegated powers, formally binding status, and use of mandatory wording)[17] cannot provide any answers in relation to non-binding instruments. Focusing on environmental regulation, I propose turning our attention to the decision-making processes though which normative instruments are adopted to find the basis of their deference-entitling properties.

In doing so, we find that there are (at least)[18] three aspects of decision-making processes within international organisations that are recognised by the community of practice as contributing to the authority of environmental instruments: (i) the scientific and technical expertise of the organisation and other participants—epistemic authority; (ii) the wide range of participants and capacity to generate shared understandings in broad and inclusive discursive processes—interactional authority; and (iii) the development of procedural and institutional norms necessary for implementation and compliance with existing obligations—regulatory authority. While some studies have considered the exercise of epistemic authority by international organisations,[19] the other two types of authority, and the specificities of decision-making in environmental law, have not been systematically considered.

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17 E.g., Liesbet Hooghe and Gary Marks, 'Delegation and Pooling in International Organizations' (2015) 10 The Review of International Organizations 305; Allen Buchanan and Robert O Keohane, 'The Legitimacy of Global Governance Institutions' (2006) 20 Ethics & International Affairs 405. See, for an overview of the traditional model for analysing authority, Tim Staal, 'After Agreement: On the Authority and Legitimacy of Environmental Post-Treaty Rules' (UvA 2017) 29–31.

18 These three forms of authority do not intend to be exhaustive and the identification of other forms of international public authority is an ongoing task for international lawyers and scientists of related disciplines.

19 E.g., Pertti Alasuutari and Ali Qadir, *Epistemic Governance: Social Change in the Modern World* (Springer International Publishing 2019); David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2018); Ole Sending, *The Politics of Expertise: Competing for Authority in Global Governance* (University of Michigan Press 2015).

1. *Epistemic Authority*

Epistemic authority refers to the authority that is exercised on the basis of expertise and knowledge.[20] International organisations, particularly their secretariats, build important technical expertise in their specific fields of action, by collecting, generating, and organising information that is not immediately available to member states.[21] As an example, FAO has the most comprehensive statistical database on food, agriculture, fisheries, forestry, natural resources management, and nutrition—FAOSTAT—, covering over 254 countries and territories since 1961.[22] The knowledge produced by international organisations means that their technical advice holds considerable authority, particularly in eminently technical fields such international environmental law, and it often gets translated into normative instruments through their law-making processes.[23]

In addition, the knowledge developed within epistemic communities[24] is often promoted in law-making within international organisations when non-state actors (expert groups, scientists, NGOs) are consulted during the

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20 Klabbers, 'The Normative Gap in International Organizations Law' (n 2) 276; RB Friedman, 'On the Concept of Authority in Political Philosophy' in Joseph Raz (ed), *Authority* (Blackwell 1990) 80–81.

21 Piiparinen Touko, 'Secretariats' in Jacob Katz Cogan, Ian Hurd and Ian Johnstone (eds), *The Oxford Handbook of International Organizations* (Oxford University Press 2016) 843.

22 FAO, 'FAOSTAT - Food and Agriculture Data' <https://www.fao.org/faostat/en/#home> accessed 30 October 2022.

23 Examples in part IV *infra* and in Jan Klabbers, 'Reflections on the International Telecommunication Union: International Organizations as Epistemic Structures' in Andrea Bianchi and Moshe Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (Oxford University Press 2021) 205. On the use of expertise and knowledge as power in global governance, see Kennedy (n 18).

24 Defined as knowledge-based networks focused on scientific or technical matters—Peter Haas, 'Epistemic Communities' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (1st edn, Oxford University Press 2008) 793.

negotiation and drafting stages.[25] For example, main findings from the reports of the Intergovernmental Panel on Climate Change (IPCC) have systematically been used as the basis for legislative developments within the United Nations (UN) system.

2. Interactional Authority

The authority of an instrument can also be the product of discursive practices that both generate and reinforce shared understandings between communities of practice,[26] which are difficult to ignore for the participants in those communities—hence, influencing their freedom.

International organisations are international fora per excellence and often bring a wide range of participants into their legislative procedures: not only member states but also non-member states, other international organisations, NGOs, private actors, and experts. These inclusive discursive processes tend to generate consensus (or shared understandings) around certain concepts and standards of conduct suitable to pursue common interests, which are then incorporated into the normative instruments adopted by the international organisations and subsequently turn into reference points that those wishing to participate in the community are expected to engage with.[27] Ignoring them results in costs or the forgo of benefits. Each time that an actor engages with them, it reinforces the expectation of all participants that they will be considered in the future.

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25 Jutta Brunnée and Stephen J Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010) 59–60.

26 Brunnée and Toope have first emphasised the role of shared understandings generated and reinforced by communities of practices as the basis for effective legal norms—ibid 56. I propose that their framework of interactional law-making is particularly fitting to analyse law-making by international organisations and explain the authority of their outputs. See also, on the role of discourse on the construction of authority, Venzke (n 13) 369.

27 Venzke (n 13) 366–368; Brunnée and Toope (n 24) 56–87; Haas (n 23) 797.

An illustration is the agreement reached by parties to the UN Framework Convention on Climate Change (UNFCCC) on the adoption of a maximum temperature goal for global warming: 2°C above preindustrial levels, to be lowered to 1.5°C in the near future. This agreement gave a more concrete meaning to the overarching aim of the convention of preventing 'dangerous anthropogenic interference' with the climate system.[28] It was preceded by several years of discussion within UNFCCC bodies, involving state parties, non-party stakeholders, and the scientific community—particularly the IPCC.[29] It was finally incorporated in the Cancun Agreements,[30] a set of non-binding decisions adopted by the Conference of the Parties (COP), and later in the Paris Agreement,[31] the first binding international instrument to contain a target for global warming.

3. Regulatory Authority

Several instruments adopted by international organisations do not intend to create new substantive legal obligations but, instead, are aimed at assisting states in implementing existing obligations. These regulatory norms influence the freedom of their addressees by detailing how they should comply with their obligations, namely, guiding implementation of substantive rules, specifying how they are to be given effect, how performance is to be monitored and assessed, and how involvement,

28 United Nations Framework Convention on Climate Change 1992 (UNTS vol 1771, p 107), Art. 3(3).

29 See, for an overview of discussion leading up to the Cancun Agreements, Brunnée and Toope (n 24) 148–151.

30 Decision 1/CP.16 - The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention 2010 (FCCC/CP/2010/7/Add1) para 4.

31 Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), 3156 UNTS, Art. 2.

engagement, communication, and deliberation by relevant actors will take place.[32]

Due to the structure of international environmental law, namely the fact that it establishes numerous obligations of conduct (where compliance depends on following established procedures) and often develops through framework agreements (which require further detailing to be operationalised in practice), this type of instrument is very common in the field.[33] To the extent that certain treaty provisions require additional details to be implemented, it becomes difficult to comply with them without following the procedures established by international organisations, for lack of an alternative course of action that would be recognised as compliance by other actors in the community. This is particularly the case in relation to decisions adopted by the COPs to multilateral environmental agreements, such as the criteria adopted by the COP to the Convention on International Trade in Endangered Species of Wild Fauna and Flora for adding and removing species as endangered in the various appendixes to the convention.[34]

The next part illustrates the application of this framework of authority with an example: the analysis of non-binding instruments adopted by FAO on the regulation of responsible fisheries.

IV. Practical Application and Implications: The Code of Conduct on Responsible Fisheries and Related Instruments

The CCRF, adopted in 1995 by the FAO Conference, is a central piece of the global fisheries regime, containing general principles and international standards of behaviour for responsible fisheries practices and being addressed

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32 Tim Staal, *Authority and Legitimacy of Environmental Post-Treaty Rules* (Hart Publishing 2019) 48–49.

33 Jutta Brunnée, 'Procedure and Substance in International Environmental Law', *Académie de droit international. Recueil des cours*, vol 405 (Brill 2020) 114.

34 CITES, Criteria for amendment of Appendices I and II, Conf. 9.24 (Rev. COP17).

to virtually all stakeholders concerned with fisheries and conservation.[35] Despite its voluntary nature,[36] the CCRF is one of the most authoritative instruments in fisheries management. Going back to the terms of the definition of authority proposed above, there is ample evidence that the relevant community of practice recognises this instrument as commanding deference, and that there is an expectation that participants in the community will consider it in determining their behaviour. According to FAO, the CCRF 'is probably the most cited, high-profile and widely diffused global fisheries instrument after the 1982 United Nations Convention on the Law of the Sea' (UNCLOS).[37] Several binding and non-binding international legal instruments include references to the CCRF, such as the Port State Measures Agreement,[38] several UN General Assembly resolutions,[39] and the Rome Declaration on Illegal, Unreported, and Unregulated Fishing.[40] Numerous references can also be found in literature in the fields of law, management, and science, indicating that these standards are reaching different stakeholders and the public.[41] Additionally, FAO reports positive trends in the implementation and dissemination of the CCRF, also evidencing the belief in its authority. Norms on responsible fisheries are now widely established among states, regional fisheries

35 FAO, *Code of Conduct for Responsible Fisheries* (FAO 1995), Art. 1.2, 1.3.

36 ibid, Art. 1.1.

37 FAO, 'Implementation of the Code of Conduct for Responsible Fisheries: Trends over the Last 25 Years' (2021) 2.

38 FAO, Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing 2009 (Report of the FAO Council, Hundred and Thirty-seventh Session (Rome, 28 September-02 October 2009), Appendix V), Preamble.

39 E.g, UNGA Resolution 75/89, of 8 December 2020 (UN Doc A/RES/75/89) 1–2, stating that the CCRF sets out the 'principles and global standards of behaviour for responsible [fisheries] practices'.

40 Rome Declaration on Illegal, Unreported and Unregulated Fishing 2005 (Outcome of the Ministerial Meeting on Fisheries (12 March 2005), Appendix B, CL 128/INF/11).

41 Joan Parker, David Doulman and Jean Collins, 'Citation Analysis for the 1995 FAO Code of Conduct for Responsible Fisheries' (2010) 34 Marine Policy 139, cited in Friedrich (n 9) 78.

organisations, NGOs, and industry.[42] Where states did not fully comply with the CCRF, they listed insufficient budgetary means, insufficient human resources, and other national constraints as a justification, rather than questioning the relevance of the instrument.[43]

While the authority of this instrument cannot be traced to its formal legal status, it can begin to be explained by reference to FAO's epistemic authority. FAO's expertise on fisheries is widely recognised both in international practice[44] and academia.[45] The FAO Secretariat concentrates important expertise on fisheries, conservation of natural resources, and the development of legal instruments on these topics. It also plays a role in the development of scientific knowledge, publishing, every two years, a comprehensive report on the State of the World Fisheries and Aquaculture.[46] These reports provide a scientific basis for decision-making and the development of normative instruments within the organisation and for establishing the reputation of FAO as an expert organisation. In addition, the development of legal instruments—here included the CCRF—is typically subject to several rounds of expert and technical consultations, during which

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42 FAO, 'Progress in the Implementation of the Code of Conduct for Responsible Fisheries and Related Instruments' (2021) COFI/2020/Inf.7 paras 3, 68, 87.

43 ibid 109–110.

44 E.g., UN, 'Plan of Implementation of the World Summit on Sustainable Development' (2002) Report of the World Summit on Sustainable Development, Johannesburg, 26 August-4 September 2002, UN Doc. A/CONF.199/20 para 31(c); UN, 'Agenda 21' (1992) Report on the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (Vol. I), Annex II para 17.49.

45 Tore Henriksen, 'The FAO and Ocean Governance' in David Joseph Attard, Malgosia Fitzmaurice and Alexandros XM Ntovas (eds), *The IMLI Treatise on Global Ocean Governance: Volume II: UN Specialized Agencies and Global Ocean Governance* (Oxford University Press 2018) 27; Friedrich (n 8) 62–63; Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment* (3rd ed., Oxford University Press 2009) 74.

46 See the most recent report, FAO, 'The State of World Fisheries and Aquaculture 2022: Towards Blue Transformation' (FAO 2022) <https://www.fao.org/documents/card/en/c/cc0461en> accessed 30 October 2022.

the Secretariat develops successive drafts until all parties involved are satisfied with the text and it can be adopted.

Furthermore, because of its inclusive adoption process, the CCRF also benefits from interactional authority. States, international organisations, experts, and NGOs participated in several rounds of consultations and submitted substantial comments that were incorporated into the text.[47] The FAO Conference and the Council regularly bring together diverse stakeholders as observers (in addition to its almost universal membership), facilitating both the emergence of agreements (or shared understandings) between participants in the community of practice of fisheries that become incorporated in FAO's instruments and continued engagement with the instruments after their adoption. These continued interactions are essential in maintaining mutual expectations among participants in the community[48] and, more often than not, are also able to generate new agreements and lead to the adoption of new instruments. In turn, these new instruments reinforce the authoritative status of CCRF principles and standards. To date, more than thirty technical guidelines on fisheries and aquaculture, nine international guidelines, two strategies, and four plans of actions have been adopted by FAO to assist states, industry, and fishers in implementing the provisions of the CCRF.[49]

These follow-up instruments are also examples of the exercise of regulatory authority. The Voluntary Guidelines on Flag State Performance, for instance, were developed as a tool to strengthen compliance by flag states with their obligations regarding the flagging and control of fishing vessels

47 FAO, *CCRF* (n 34), Annex 1.

48 As Brunnée and Toope noted, reference points can only retain their salience "to the extent that actors continue to participate in their production and use"—Brunnée and Toope (n 24) 63.

49 As envisaged in FAO, *CCRF* (n 35), Art. 2(d). See full list of instruments adopted in FAO, 'Implementation of the Code of Conduct for Responsible Fisheries: Trends over the Last 25 Years' (n 36) 5–9.

(arising from provisions of the UNCLOS and the CCRF).[50] They illustrate the authority of this type of instruments, which lies on the fact that, as they define the parameters, steps for action, and even the language necessary to operationalise existing obligations (in this case, conducting flag state performance assessments), they become difficult to escape in practice.

Finally, this brief case study suggests three additional conclusions concerning the relevance of the framework of authority of instruments of international organisations proposed here, as well as its implications for the law of international organisations more broadly.

First, the recognition of certain instruments of international organisations as authoritative, based on the deference-entitling properties of their adoption processes (and/or others elements yet to be identified), helps explaining the growing engagement with those instruments and with their underlying environmental goals, regardless of their formal status. The mutual expectations created in the fisheries community that fisheries actors would engage with the CCRF principles and subsequent regulatory instruments—based on the expertise and scientific knowledge that they embody, on the establishment of shared understandings, and on the need of regulatory norms—make it difficult for those actors to ignore them in their operations. Additionally, the successive adoption of plans of action, strategies, and guidelines to implement specific aspects of the CCRF (such as the implementation of flag state obligations and the elimination of illegal, unreported, and unregulated fishing) illustrates how environmental regimes typically develop progressively. Continuous discursive processes within international organisations gradually generate deeper and more detailed shared understandings and these eventually lead to the adoption of more ambitious normative instruments.[51] Simultaneously, this idea of progressive

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50 FAO, *Voluntary Guidelines for Flag State Performance* (FAO 2015) para 1.

51 Brunnée and Toope have referred to this as the 'hard work of international law': to progressively deepen shared understandings and practices of legality to develop effective legal regimes—Brunnée and Toope (n 24) 82.

commitments, together with the understanding that the claim to authority of environmental instruments of international organisations is often not absolute, with many authorities competing to influence the conduct of addresses,[52] helps to explain why important challenges persist in the conservation of fisheries resources at a sustainable level[53] (as in many other environmental regimes, most notably climate change).

Second, focusing on the decision-making processes that precede the adoption of normative instruments permits shifting the attention from international organisations and member states as the main actors in international regulation to the variety of actors that intervene in the development of these instruments. What is more, it shows that the authority of environmental instruments depends on the intervention of a range of stakeholders, all of which contribute to strengthen different forms of authority—until, eventually, the instruments become difficult to ignore without incurring reputational, economic, or other costs. This change of perspective provides important insights for revisiting the traditional tenets of international institutional law, particularly since one the most persistent criticisms to the functionalist approach to international organisations is that it is designed only to address the relationship between member states and the organisation, and it is blind to all other actors and relationships.[54] The

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52 According with the deference framework, an authoritative instrument provides reasons for action, but it does not necessarily dislodge all alternative reasons—see, Roughan (n 9) 682. On the multiplicity of claimants of authority in international law, see Nicole Roughan, 'Mind the Gaps: Authority and Legality in International Law' (2016) 27 European Journal of International Law 329, 336–340.

53 FAO has reported that there is still an increasing trend in the percentage of stocks fished at biologically unsustainable levels and states report their partial compliance in FAO's implementation questionnaires—FAO, 'The State of World Fisheries and Aquaculture 2022' (n 45) 46–47.

54 Angelo Golia and Anne Peters, 'The Concept of International Organization' in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022) 31; J Klabbers, 'The EJIL Foreword: The Transformation of International Organizations Law' (2015) 26 European Journal of International Law 9, 11, 27–28.

analysis of the authority of normative instruments provides new elements that permit putting international organisations in their context[55] and developing a new framework for understanding the legal relevance of their instruments. Future research could revisit the traditional questions of legitimacy of international instruments, stakeholder participation, and rule of law from this new standpoint.

Third, the findings above have at least two important implications for institutional design. First, they suggest that the design of decision-making processes leading to the adoption of legal instruments might be more determinant for their capacity to influence different actors than the choice between binding and non-binding instruments. Second, they indicate that the existence of procedures that permit continuous interaction between all participants in a community of practice might be the decisive factor for the success of a regime, particularly in international environmental law which tends to develop through progressive commitments.

V. CONCLUSION

This article has made the case for refocusing the analysis of the legal relevance of non-binding instruments of international organisations on the concept of international public authority. It aimed to show that this alternative focus permits stepping away from the formalistic approaches to international law-making and offers better analytical tools to understand both the impact of those instruments on the conduct of different actors and their relevance for the development of international environmental law.

International organisations develop instruments through complex legislative procedures, which typically involve the participation of a variety of actors. These procedures lead to the adoption of provisions that reflect shared

[55] Arguing for the need to bring the context in which international organisations operate into their theory, see Jan Klabbers, 'Beyond Functionalism: International Organizations Law in Context' in Jan Klabbers (ed), *The Cambridge Companion to International Organizations Law* (Cambridge University Press 2022).

commitments and understandings and create mutually reinforcing expectations (and corresponding social pressures) that those provisions will be followed by participants in the relevant community. In addition, international organisations concentrate an important level of scientific and technical expertise, which reinforces the social recognition of their environmental instruments as inducing deference. Finally, they are often in a unique position to provide the institutional, procedural, and operational mechanisms and regulations necessary to implement broadly defined goals, obligations, and mechanisms, which are characteristic of environmental instruments. I have argued that, for these reasons, their instruments frequently become reference points for conduct that are hard to escape for those participating in the respective communities of practice (as ignoring them entails legal, economic, or reputational disadvantages or prevents the obtainment of benefits). In other words, they are authoritative in international legal practice and influence the freedom of other actors.

Furthering the research agenda on the authority of instruments of international organisations can provide insights for a revised approach to international institutional law; one that can better explain and support normative developments in fields such as environmental law, where organisations have taken the front seat in regulation. This approach sheds new light on the merits and limitations of authority-based environmental regimes and offers new tools to investigate the role of different actors and their influence in authoritative outcomes. Finally, an analysis of authority allows deriving lessons for better institutional design and more effective law-making by international organisations, in particular by acknowledging the role of various stakeholders and highlighting the importance of providing for procedures that permit continuous interaction between them.

SEARCHING FOR CLARITY AND DISTINCTION WITHIN 'REGIONALISED COLLECTIVE SECURITY'

Danielle Reeder*

The United Kingdom's decision to leave the European Union raises political and legal concerns regarding their future security and defence relationship. The UK's current stance on establishing a security and defence relationship with the EU and Europe is that 'NATO will remain the foundation of collective security in our home region of the Euro-Atlantic'.[1] The '[c]ollective security through NATO' policy however,[2] is underscored by a fundamental legal question regarding the configuration and placement of regional arrangements and defensive alliances within the global security order.

Regional arrangements and defensive alliances invoke the language of collective security as legal grounds for military operations home and abroad. Increasingly, such arrangements and organisations exercise their inherent right to 'individual or collective self-defence',[3] in view of enacting 'collective measures' without explicit Security Council authorisation,[4] out of seemingly functional necessity. And yet, the

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1 HMG, 'Global Britain in a Competitive Age: The Integrated Review of Security, Defence, Development and Foreign Policy' (March 2021) CP403, 18 [32][iii].

2 ibid.

3 Charter of the United Nations (24 October 1945) 1 UNTS XVI art 51.

4 ibid art 1(1), art 39, art 53.

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definitive character, obligations, and restrictions of these evolving security entities remains unclear.

This article uses the contemporary historical event of Brexit as entry to a legal discussion concerning the distinction between defensive alliances, regional arrangements, and collective security. This article examines the gap between the loose rhetorical treatment of NATO as a collective security institution in likeness to the UN Security Council itself, and the formal legal placement of defensive alliances in the greater collective security architecture. Brexit presents a novel opportunity to assess how the contours of international security may be understood in the current and future security landscape.

Keywords: alliances; regionalised; internationalised; collective security; obligations; universality; selectivity

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I. INTRODUCTION

In withdrawing from the European Union (EU),[1] the United Kingdom (UK) leaves not only a trading bloc, but also a nascent international security actor. Under the provisions of the Common Foreign and Security Policy (CFSP) and the incorporated Common Security and Defence Policy (CSDP),[2] the EU espouses obligations to advance the principles of international peace and security on the global stage.[3] Although the 'dream of an EU army' is still distant,[4] the EU advances its effort to achieve 'strategic autonomy',[5] projecting a particular model of collective security within and beyond Europe, without the UK.

Whilst the scope of the security and defence arrangements between the UK and the EU is in a continual state of development,[6] the most recent articulation of Britain's main strategy regarding collective security arrangements vis-à-vis Europe is that such efforts should be achieved through the North Atlantic Treaty Organisation (NATO). The UK's 2021 Integrated Review of Security, Defence, Development and Foreign Policy

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1 Treaty on European Union (amended by the Lisbon Treaty 2007, consolidated 2008, entered into force 1 December 2009) OJ C 115/13 art 50 [*hereinafter* 'TEU']; The Electoral Commission, 'EU Referendum Results: 48.1% "Remain"; 51.9% "Leave"' <electoralcommission.org.uk/find-information-by-subject/elections-and-referendums/past-elections-and-referendums/eu-referendum/electorate-and-count-information> accessed 21 March 2022.

2 TEU art 21 - 46.

3 TEU art 21(1).

4 Fabrice Pothier, 'A European Army: Can the Dream Become a Reality?' [2019] *IISS Analysis* <iiss.org/blogs/analysis/2019/01/macron-european-army-reality> accessed 22 March 2022.

5 EEAS, *Shared Vision, Common Action: A Global Strategy for the European Union's Foreign and Security Policy* (European Union External Action Service 2016); European Commission, '2021 Strategic Foresight Report: The EU's Capacity and Freedom to Act' (2021).

6 Benjamin Martill and Monika Sus, 'Defence and Security: Why Is There No UK-EU Agreement? [Commentary]' (*UK in a Changing Europe*, 20 December 2021).

('Global Britain in a Competitive Age') has affirmed a foreign and external security policy of '[c]ollective security through NATO'.[7]

On the surface, there is no issue with the UK opting for a policy that favours the security and defence remit of NATO over that of the EU, as the two security and defence entities are 'complementary, coherent and mutually reinforcing'.[8] But underneath the surface of this policy lies a more fundamental question about the legal configuration and placement of regional and non-regional security entities operating within, and arguably in contest to, the global security order.

As regional and defensive entities such as the EU and NATO expand and respond to contemporary threats, nations such as the UK make policy decisions about the scope of maintaining security within and beyond their borders. Such a phenomenon engages a question about how regional forms of collective security interact with the universalist vision underwritten by the Charter of the United Nations (UN Charter) and the centrality of the UN Security Council (UNSC).

The idea of what NATO is as a security actor, in relation to how the EU is understood as a security actor, and in further relation to the UN project of collective security, is at times treated as self-evident.

Given the integrated economic and political form under the EU Treaties,[9] the EU may be considered a regional organisation, that fits within the categorisation of 'regional arrangements or agencies' that may exist under Chapter VIII of the UN Charter to deal 'with such matters relating to the

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7 'Collective security through NATO: the UK will remain the leading European Ally in NATO, working with allies to deter nuclear, conventional and hybrid threats to our security, particularly from Russia. We will continue to exceed the NATO guideline of spending 2% of gross domestic product on defence, and to declare our nuclear and offensive cyber capabilities to Allies' defence under our Article 5 commitment'. HMG (n 1) 20 [ii].

8 NATO, '2022 Strategic Concept (Adopted at Madrid, 29 June 2022)' (2022) [43].

9 TEU (5); Treaty on the Functioning of the European Union (amended by the Lisbon Treaty 2007, consolidated 2008, entered into force 1 December 2009) OJ C 115/47.

maintenance of international peace and security as are appropriate for regional action'.[10] The outline of the EU's security and defence competence is prescribed by the Common Foreign and Security Policy.[11]

Since launching its first military operation in 2003,[12] the EU has continued to enhance its international peace and security functions. Conducting 37 civilian and military missions operations in Europe, Africa and Asia,[13] including arms embargo operations in Libya,[14] and counter-piracy off the horn of Africa,[15] the EU's missions and operations are essential for regional and international security maintenance.

NATO's military architecture has also played an important role for peacekeeping and enforcement action, as evidenced by the frequent delegation to manage international security matters by UN Security Council.[16] Despite a certain 'treatment of NATO as somehow interchangeable with the UN' that started gaining traction at the turn of the

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10 Charter of the United Nations (24 October 1945) 1 UNTS XVI art 52(1) [*hereinafter* 'UN Charter'].

11 TEU art 2; art 21 - 46.

12 CONCORDIA/FYROM (launched 31 March 2003, completed 15 December 2003) [archived 1 January 2015], passed over from NATO's *Allied Harmony* mission for the purpose of implementing the 13 August 2001 Ohrid Agreement between Northern Macedonia and Albania.

13 EEAS, 'Missions and Operations' (*Strategic Communications*, 6 August 2021) <eeas.europa.eu/eeas/missions-and-operations_en> accessed 7 December 2022.

14 EEAS, 'EUNAVFOR MED - IRINI (Launched 31 March 2020)' (2022) <operationirini.eu/> accessed 7 December 2022; UNSC Resolution 2292 (14 June 2016) UN Doc S/RES/2292.

15 EEAS, 'EUNAVFOR - Somalia Operation ATALANTA (Launched 8 December 2008)' (2021) <https://eunavfor.eu/mission/> accessed 7 May 2021; Council Decision 202/2188/CFSP of 22 December 2022 amending 2008/851/CFSP on EU military operation off the Somalia coast OJ L 435/74.

16 UNSC Resolution 1244 (10 June 1999) UN Doc S/RES/1244; UNSC Resolution 1973 (17 March 2011) UN Doc S/RES/1973; NATO, 'Bucharest Summit Declaration on Framework with the UN (3 April 2008)' <nato.int/cps/en/natolive/official_texts_8443.htm> accessed 25 April 2022; NATO, 'Relations with the United Nations' (2022) <nato.int/cps/en/natohq/topics_50321.htm> accessed 8 December 2022.

century,[17] and NATO's own understanding of its operational character since the end of the Cold War,[18] its operational mandate derives from Article 51 of the UN Charter.[19] NATO is a defensive alliance.

Beyond the technical details of the UK's future relationship with its European partners, this article questions the ideal of 'collective security', examining the operational reality and legal structure of how and why regional arrangements, or defensive alliances 'are' or 'become' collective security organisations. This analysis takes particular issue with the distinction between regional arrangements and defensive alliances, acknowledging their functional role for international collective security, whilst also addressing how this functionality has led to a blurred definitive distinction between these collective security actors under international law. The article then provides a contextual explanation of how the traditional legal concepts of mutual assistance and mutual defence specifically developed into the contemporary security and defence entities of the EU and NATO. This overview is used to demonstrate the logic that underscores 'regionalised' collective security, which increasingly spills into the international dimension. This article seeks to address how defensive alliances may be formalised under international law in the future, which remains relevant to the UK's ad hoc alliance based policy decision for security and defence after Brexit.

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17 Anne Orford, 'Regional Orders, Geopolitics, and the Future of International Law' (2021) 74 Current Legal Problems 149, 8.

18 NATO, 'Alliance Strategic Concept (Adopted at Washington, 23–24 April 1999)'; NATO, 'Strategic Concept For the Defence and Security of The Members of NATO: Active Engagement, Modern Defence (Adopted at Lisbon, 19-20 November 2010)' (2010); NATO, '2022 Strategic Concept (Adopted at Madrid, 29 June 2022)' (n 12).

19 UN Charter art 51; The North Atlantic Treaty (Washington Treaty) (concluded 4 April 1949) 34 UNTS 243.

II. The Unsettled Collective Security Doctrine

Discourse and practice surrounding 'collective security' reveals that collective security represents a notion corresponding to a variety of integrated security and defence premises, but lacks a settled, codified understanding. As Danchin points outs 'collective security is notoriously difficult to define. Like democracy, human rights and the rule of law, the term is associated with a loose set of assumptions and ideas and its continued existence rests in no small measure on it remaining an essentially contested concept'.[20] Thus, the term 'collective security' has meant what States and scholarship have needed (or wanted) it to mean at different times.

Historically, the generalised understanding of 'collective security' developed from the concept of 'security' evolving into 'state security'.[21] Under a Kelsenian view of the conceptual origins of collective security, collective security encompasses both the domestic concerns of national security and the universal security of all States.[22] As Kelsen elaborates, '[i]t is in both cases collective security, because it is security afforded by a social order; and a social order always constitutes a certain degree of collectivization.'[23] Entities or States associating with other actors for the purpose of common defence, traditionally juxtaposed against a defined enemy, may be described as 'regionalised collective security'. In current form, 'regionalised collective security' seems to incorporate mutual assistance arrangements, which for

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20 Peter G Danchin, 'Things Fall Apart: The Concept of Collective Security in International Law' in Horst Fischer and Peter G Danchin (eds), *United Nations Reform and the New Collective Security* (CUP 2010) 40.

21 Hans Kelsen, *Collective Security Under International Law*, vol 49 (1957); Kelsen, *Principles of International Law* (3rd edn, The Lawbook Exchange 1959); Alexander Orakhelashvili, *Collective Security* (OUP 2011); Auden Davies-Bright and Nigel D White, 'The Concept of Security in International Law' in Geiß Robin and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (1st edn, OUP 2021).

22 Kelsen, *Collective Security Under International Law* (n 21).

23 ibid 3.

strategic reasons, have come to be understood as 'regional' actors.[24] This conception is easily applied to the EU,[25] or similar organisations like the African Union (AU),[26] which have incorporated security and defence components based on mutual assistance.[27] But, at the same time, collective security also relates to a more universalised project, answerable to a centralised authority, as embodied by intergovernmental projects like the League of Nations and the United Nations.[28]

An early twentieth-century study attempted to tackle the task of defining 'collective security'.[29] The 1934 Bourquin Study emphasised that if any such internationalised system should exist, it must be based on 'fundamental norms', and that '[a]ny system of Collective Security necessarily implies a certain prohibition against resorting to violence for the purpose of justice'.[30] In expressing the understanding of what constituted a 'collective security institution', the Bourquin Study further concluded that '[t]he prohibition of recourse to violence, on the one hand, and the organisation of peaceful procedures, on the other, form the two corner-stones of [a collective security] institution'.[31] The study also attempted to raise questions about the role of self-defence within the understanding of collective security,[32] as well

24 Nicholas Tsagourias and Nigel D White, *Collective Security: Theory, Law and Practice* (paperback, CUP 2015) 40–41; 115–137.

25 TEU, TFEU (n 1).

26 Charter of the Organisation of American States (30 April 1948; amended 6 October, 1993 at Managua, into force 29 January 1996) 1609 UNTS 68.

27 TEU art 42(7); Protocol Relating to the Establishment of the Peace and Security Council of the AU (adopted 9 July 2002, entered into force 26 December 2003) art 2.

28 Covenant of the League of Nations (adopted 28 April 1919); Charter of the United Nations (24 October 1945) 1 UNTS XVI.

29 Maurice Bourquin (ed), 'General Report on the Preparatory Memoranda Submitted to the General Study Conference of "Collective Security" (Paris, 24-26 May 1934)', *A Record of the Seventh and Eighth International Studies Conferences* 7.

30 ibid.

31 ibid 9.

32 ibid 8.

as the issue of regionalism vis-à-vis sovereignty.[33] Such questions highlighted that the international system of collective security had (and still has) a difficulty parsing the distinction between regional structures and defensive organisations; and reconciling these components with universalist ambitions of the internationalised system.

The interest in fixing a definition for collective security seems to have ceased with the Bourquin Study. Although left uncodified, collective security nevertheless relates to core legal principles regarding the prohibition against the use of force,[34] threats to peace and security,[35] acts of aggression,[36] and enforcement against breaches of the peace.[37] Although it may be conceded that '"collective security" is not a term of art',[38] the concept is still supposedly 'distinct from, and more ambitious than, systems of alliance security or collective defence, in which groups of states ally with each other, principally against possible external threats'.[39]

This distinction would uphold the universalist understanding of collective security, as 'all entities that form [the] international society are their stake-holders and beneficiaries' of peace and security.[40] In theory then, it is the condition of universality that distinguishes collective security from 'other security institutions such as regional organisations or collective self-defence arrangements',[41] which are selective, exclusive, and thus extol a 'perspective

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33 ibid 11.

34 UN Charter art 2(4).

35 ibid art 39.

36 ibid; 'UNGA Res 3314 (XXIX) "Definition of Aggression" (14 December 1974)'.

37 UN Charter art 42.

38 Derek W Bowett, 'Collective Security and Collective Self-Defence' in Rama Montaldo (ed), *El derecho internacional* (1994) 427; Sir Michael Wood, 'Self-Defence and Collective Security: Key Distinctions' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (OUP 2017).

39 Adam Roberts and Dominik Zaum, *Selective Security: War and the United Nations Security Council Since 1945* (Tim Huxley ed, Routledge, IISS 2008) 11.

40 Tsagourias and White (n 24) 21.

41 ibid.

on peace and security' that is 'particular and localised'.[42] Yet, whilst universalism seems an important definitive feature of collective security, it seems equally legitimate to maintain that '[r]egional organisations have a good claim to be CS institutions. Collective defence organisations do not have such a claim; further, neither has a state acting alone or in unison with its allies'. [43]

The confusing dichotomy, or essential misunderstanding, of regional arrangements versus defensive alliances versus collective security, is precisely why scholars such as Helal feel that the UN Security Council does not reflect a collective security mechanism at all (it instead should be understood as a 'Great Power Concert'),[44] whereas NATO's structure under article 5 of its establishing treaty is an 'archetypical' example of a collective security mechanism.[45] And yet, the view that a defensive organisation like NATO is similar, or in fact akin, to the UN Security Council, crashes into both conceptual and textual problems.

Although current UK policy does not suggest that the structure of NATO should supplant the role of UN Security Council after Brexit, it does endorse a view that the architecture of NATO may at least supplant the security and defence structure of the EU.[46] Furthermore, even if the UK foreign policy-

42 ibid.

43 ibid 52-53.

44 Mohamed S Helal, 'Am I My Brother's Keeper? The Reality, Tragedy, and Future of Collective Security' (2015) 6 Harvard National Security Journal 383; Mohamed S Helal, 'The Myth of U.N. Collective Security' (2018) 32 Emory International Law Review 1063, 1066.

45 Helal, 'The Myth of U.N. Collective Security' (n 44) 1071.

46 Technical HMG documents from 2017 and 2018 under the Theresa May government detail the UK's previous involvement and understanding of the security and defence competence of the EU's CFSP and embedded CSDP. However, these efforts of negotiation were abandoned, so that the current UK position is that NATO is a sufficient architecture for 'collective security' considerations for Europe. HM Government, 'Framework for the UK-EU Security Partnership' (Department for Exiting the European Union 2018); Political Declaration setting out the framework for the future relationship

makers are uninterested in the technical classification as to whether NATO is a collective security organisation like the UNSC, or a regional arrangement like the EU, the question under international law remains.

III. Distinguishing between Collective Security and Collective Defence

The development of the EU and NATO security and defence competences originated from defensive pacts that grew and transformed over time. The Dunkirk Treaty of Mutual Assistance (1947) between France and the UK held that if Germany committed an armed attack in the meaning of Article 51 of the UN Charter against either party, the other would be considered 'involved in [the] hostilities' and should offer all possible aid and assistance to the attacked party.[47] This Treaty of Dunkirk was thought to be the predecessor to the 1948 Treaty of Economic, Social, and Cultural Collaboration and Collective Self-Defence, the 'Brussels Treaty',[48] which established the Western Union, which eventually became the Western European Union,[49] which eventually became the European Union.[50] Such 'regionalised' collective security relates to defensive pacts and mutual assistance frameworks.

The path from the Western Union to the European Union, alongside NATO – and the evolving decisions about the function of coordinated security and defence, reveal a mapping of integration, separation, and

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between the European Union and the United Kingdom (19 October 2019)(Revised); HMG (n 1).

47 Treaty of Alliance and Mutual Assistance between UK and France (Dunkirk Treaty)(signed 4 March 1947, entered into force 8 September 1947) 9 UNTS 187 art 2.

48 Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence (Treaty of Brussels)(signed 17 March 1948, entered into force 25 August 1948, terminated 30 June 2011).

49 Modified Brussels Treaty (Western European Union)(Paris, signed 23 October 1954, entered into force 6 May 1955).

50 TEU Lisbon Treaty (2009) (n 1).

reintegration which partially explains the current confusion about how these entities are placed within the international system. This complicated intertwining of security and defence components in Europe explains, to a degree, the organisational logic of these policy decisions, but it fails to illustrate how these integrated European components are formally squared against the universalist conception of collective security.

Despite the difficulty of defining collective security, an amalgamation of text, custom, and scholarship advances that collective security may be conceptually described as 'a system, regional or global, in which each state in the system accepts that the security of one is the concern of all, and agrees to join in a collective response to threats to, and breaches of, the peace'.[51] Wood maintains that collective security relates to authorised enforcement under Chapter VII of the UN Charter (articles 39 and 42),[52] whilst collective self-defence just relates to the provisions under Article 51 of the Charter,[53] and as such, these are two conceptually distinct legal precepts.[54] This understanding is supported by the textual reading of the UN Charter, but this does not fully speak to the issue of understanding the differing, overlapping, or blurring categorisation of regional arrangements or defensive alliances.

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51 Vaughan Lowe and others (eds), *The United Nations Security Council and War: The Evolution of Thought and Practice since 1945* (OUP 2008) 13.

52 The UN Security Council 'shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security'. UN Charter art 39. The UN Security Council 'may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security'. Ibid art 41. Charter of the United Nations (24 October 1945) 1 UNTS XVI art 39, 42.

53 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security'. ibid art 51.

54 Wood (n 38).

One issue with understanding regionalism and self-defence in juxtaposition with collective security is the make-up and character of what a collective security organisation does, and for whom (the universal community of States), versus what a regional or collective defence organisation does and for whom (a selective and exclusive group of States). A main reason that scholars such as Helal believes the UN Security is not representative of a collective security arrangement is due to the absence of a provision promoting '*unus pro omnibus, omnes pro uno*—one for all, and all for one'.[55] Functionally, this is a mutual defence clause. As such, there is a more complicated story behind the understanding of collective security, and the mutual obligations within the system and amongst members.

Yet, as Miller critiqued a few decades prior, the 'all-for-one-and-one-for-all idea of collective security' was 'dazzling in its simplicity'.[56] Miller's comment was made in the context of assessing the operations of collective self-defence organisations and the state of collective security shortly after the NATO air campaign against the Former Federal Republic of Yugoslavia.[57] In this assessment, Miller commented that 'regional arrangements' can 'easily masquerade as collective security organizations when they are in fact instruments of collective defense'.[58] Miller elaborates that regional arrangements acting in the capacity of 'collective defense' are 'designed to counter threats emanating from outside their region and outside the community that binds some sovereign actors but not others'. [59] To Miller, the distinction between collective security as an organisational framework, and regional arrangements operating under collective defence, rests on a fundamental difference between the 'source of the threat', which in turn

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55 Helal, 'The Myth of U.N. Collective Security' (n 44) 1070.

56 Lynn H Miller, 'The Idea and the Reality of Collective Security' (1999) 5 Global Governance 303, 303.

57 The Independent International Commission on Kosovo, *The Kosovo Report: Conflict, International Response, Lessons Learned* (OUP 2000).

58 Miller (n 56) 304.

59 Ibid.

alters the 'nature and purpose of the relevant organization'.[60] Miller makes a categorical distinction between the concept of collective security and collective defence.

Unpacking that categorical distinction a step further, a collective security organisation concerns the relation between a universal (or quasi-universal as Kelsen would describe it)[61] organisation managing threats from *internal* members, on behalf of the international community (whether they are members or not).[62] Collective defence concerns the relation between a selected group and a threat *external* to *the members of that group*. Membership to that organisation, and agreed action within the confines of law, are at the full discretion of the organisation.[63] If distinguishing between the *internal* or *external* threat condition, an organisation should meet the condition of being *either* a collective security organisation *or* a collective defence organisation. But, when a collective security organisation begins to respond to threats external to that organisation (threats beyond interstate aggression), or when a collective defence organisation begins to respond on behalf of States or victims not in that group, these distinctions are corrupted.

IV. Moving Away from Universalist Constructions, Blurring Distinctions

Due to the inability of the UN Security Council to function as originally intended,[64] with functional limitations such as the Permanent Member veto

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60 Ibid.

61 Kelsen, *Collective Security Under International Law* (n 21) 31.

62 UN Charter art 11, 32, 35(2), 50.

63 *The case of SS Lotus (France v Turkey) (7 September 1927)(Judgement)* PCIJ Series A no 10 [45]; *Reparation for Injuries Suffered in the Service of the United Nations* (Advisory Opinion)(1949) ICJ Rep 174, 8.

64 'The United Nations was never intended to be a utopian exercise. It was meant to be a collective security system that worked'. UNGA, *A More Secure World: Our Shared Responsibility - Report of the High-Level Panel on Threats, Challenges and Change* (2004) UN Doc A/59/565, p 13.

power,[65] and lack of a centralised military force, [66] the universalist collective security model under the UN Charter still relies on groupings, arrangements, and alliances to carry out collective security aims. This is based on the delegation powers of the UN Security Council to 'take such action…as may be necessary to maintain or restore international peace and security',[67] 'by all the Members of the United Nations or by some of them, as the Security Council may determine',[68] which may also be carried out through 'the appropriate international agencies of which they are members'.[69] Examples of such delegation mandates include appointing NATO to replace the UN stabilisation mission in Bosnia and Herzegovina,[70] appointing Economic Community of West African States (ECOWAS) to quell the military junta in Sierra Leone,[71] and the appointing the EU to take over the Bosnian stabilisation mission from NATO.[72] The reliance on 'outsourced' enforcement, shifts operational control outside of the UN, ultimately testing the authority of the Security Council.[73]

The fact that the universalist collective security model backed by the authority of the UNSC necessarily relies on delegation or outsourcing to various actors has contributed to the current tension between universalist and regional collective security models. This tension, and a lack of formal placement of regional or subregional groups, and further, defensive alliances, has been formally noted by the UN General Assembly. In 2004, a year after

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65 UN Charter art 23(1), 27(3).

66 Ibid art 43; Repertoire of Security Council Practice: Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression s D: art 42.

67 UN Charter art 42.

68 Ibid art 48(1).

69 Ibid art 48(2).

70 UNSC Resolution 743 (21 February 1992) UN Doc S/RES/743.

71 UNSC Resolution 1132 (8 October 1997) UN DOC S/RES/1132.

72 UNSC Resolution 743 (21 February 1992) UN Doc S/RES/743; UNSC Resolution 2658 (22 November 2022) UN Doc S/RES/2658.

73 Niels Blokker, 'Outsourcing the Use of Force: Towards More Security Council Control of Authorized Operations?' in Marc Weller (ed), *The Oxford Handbook of the Use of Force in International Law* (Paperback, 2017).

the US-led coalition invaded Iraq,[74] the UN General Assembly advanced a number of recommendations for modernising the collective security system.[75] This UNGA 2004 High-Level Panel Report acknowledged the international legal trend of relying on regional groups in peacekeeping missions,[76] and noted the need to rely more on regional organisations to operationalise collective security.[77] Calling for the better utilisation of regional and subregional groups, the High-Level Panel Report also specifically stated that 'alliances organizations' such as NATO, '(which have not usually been considered regional organizations within the meaning of Chapter VIII of the Charter but have some similar characteristics) have undertaken peacekeeping operations beyond their mandated areas. We welcome this so long as these operations are authorized by and accountable to the Security Council'.[78] Although an endorsement of NATO's role in internationalised security, the statement recognised that alliance organisations 'have some similar characteristics' to regional arrangements, implying the existence of some discernible differences. But this recognition by the UN General Assembly only served the purpose of acknowledging the lack of formal placement of regional arrangements and defensive alliances, rather than provide further clarity on definitive distinctions. Almost twenty years on from that 2004 High-Level Panel report, there are still further consequences that have yet to be seen in respect to regional arrangements or defensive alliances adopting multiple regional and international security and defence identities.

A two-tiered understanding of collective security—encompassing both regional and international dimensions—in part explains why the distinctions

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74 Alex J Bellamy, 'International Law and the War Within Iraq' (2003) 4 Melbourne Journal of International Law 497; Youssef Bassil, 'The 2003 Iraq War: Operations, Causes, and Consequences' (2012) 4 Journal Of Humanities And Social Science (JHSS) 29.

75 UNGA (n 58).

76 Ibid 60 [220].

77 Ibid 70–71 s 16.

78 Ibid 70 [273].

between regional arrangements and defensive alliances have become blurred, and why perhaps, the UK can rely on an ad hoc alliance policy that moves further away from the universalist ambitions of collective security. As the UK continues to endorse not even a regional (the EU), but defensive (NATO) model of collective security, it is difficult to believe that the international security via delegated-to-regional model will remain desired or effective.

V. CONCLUSION

As the UK disembarks from EU security and defence components, it essentially defaults to the collective security network provided by NATO. And yet, the legal coherence of this policy decision involves a more fundamental question not only about how the EU or NATO compare as organisations, but also about how regional organisations or defensive alliances assume the character of 'collective security' organisations in the first place.

To be sure, it is not the existence of regional security mechanisms, nor their right to operate within the collective security architecture that is in question. Rather, this article observes a reality of the international security landscape whereby regionalised security forms undertake increasingly globalised operations. Although such a phenomenon may have a logical and functional explanation, there is still more to be understood about how the regional and international dimensions of collective security interact.

The ideal of universalised collective security may be dated, yet the remnants of that ideal remain pertinent and live in the current legal structure. The two exceptions to the prohibition on the use of force are still UN Security Council authorisation and individual or collective self-defence.[79] It may be observed that the UN Security Council itself contains asymmetry due to the

[79] UN Charter art 39, 42, 51; Auden Davies-Bright and Nigel D White, 'The Concept of Security in International Law' in Geiß Robin and Nils Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (1st edn, OUP 2021).

presence of the veto power of the permanent Members,[80] but that asymmetric power dynamic is not alleviated by transferring higher degrees of collective security authority to powerful defensive alliances.

To contend that certain regional groups might behave like the UN, but have limited and selective participation, is to accept that not all States are created equal in the international security space, and nor should they be. This element of powerful States, particularly in the North Atlantic and European region – signals other messages and beliefs about the state and function of the international order. It might stand to question further if the rules of engagement that seem to apply to NATO, apply to other alliance organisations like the Shanghai Cooperation Organisation (SCO),[81] or the Collective Security Treaty Organisation (CSTO).[82]

Brexit and the issue of the EU's security and defence identity in relation to NATO's security and defence identity is a contemporary focal point for understanding the relational difference between the regional and international dimensions of collective security, why these realms bleed into each other, and how this legal construction may change in the future. The acceptance of defensive alliances as the *de facto* arm of the regional-cum-international security structure is a practice that warrants continual review.

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80 See address of the UN Security Council permanent member veto power in Thomas M Franck, 'Collective Security and UN Reform: Between the Necessary and the Possible' (2006) 6 Chicago Journal of International Law; Thomas M Franck, 'Rethinking Collective Security' in Michael Schmitt and Jelena Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines* (Brill | Nijhoff 2007).

81 Members include China, Kazakhstan, Kyrgyzstan, Russia and Tajikistan. Charter of the Shanghai Cooperation Organization (entered into force 19 September 2003).

82 Members include Russia, Armenia, Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan. Collective Security Treaty (dated 15 May 1992, signed 10 December 2010, amended 23 April 2012).

RECONSIDERING APPROACHES TOWARDS FACILITATING NON-STATE ACTORS' PARTICIPATION IN THE GLOBAL PLASTICS REGIME

Daniel F. Akrofi* Peixuan Shang† and Jakub Ciesielczuk‡

The current approach to non-State actors' participation in international environmental law is limited. This article, therefore, argues for a reconsideration of non-State actors' participation to create more opportunities to facilitate easy access to meaningful participation in the drafting, negotiation, and subsequent implementation of the proposed global plastic treaty. The article explains how environmental democracy could be at the heart of the negotiation and implementation of the plastic treaty by creating more avenues for participation among relevant non-State actors thereby contributing to accountability efforts. The article proposes that the proposed plastic treaty could be the first multilateral environmental agreement to operationalise Principle 10 of the Rio Declaration which lays down the pillars of environmental democracy (i.e., access to information; access to participation in decision-making processes on environmental issues; and access to justice in environmental matters). This could contribute to strengthening the plastic treaty, especially when regulating major industry players.

Keywords: participation; non-state actors; Aarhus Convention; Principle 10 Rio Declaration; Plastic Treaty

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I. INTRODUCTION

Plastic pollution has become a global issue with dire consequences for the international community including stakeholders at different levels across the entire global plastic value chain. The United Nations Environment Assembly has decided to convene an international negotiation committee to develop an international legally binding instrument on plastic pollution.[1] It was agreed in the resolution that the plastic treaty should consider, among other things, a full-lifecycle solution for plastics, the principles of the Rio Declaration on Environment and Development,[2] as well as national circumstances and capabilities.[3] According to the traditional theory and

1 UNEP/EA.5/L.23/Rev.1.

2 United Nations General Assembly, Rio Declaration on Environment and Development, 21st plenary meeting, Rio de Janeiro, 3-14 June 1992, A/CONF.151/26 (Vol. I), (Rio Declaration) (14 June 1992). The Rio Declaration stems from the United Nations Conference on Environment and Development (UNCED). It is the second global environmental conference held in Rio de Janeiro in June 1992 which inter alia establishes the sovereign right of States to prevent harm to the environment of other States or areas beyond national jurisdiction.

3 UNEP/EA.5/L.23/Rev.1.

practice of international environmental law, the major addressees of the plastic treaty are sovereign States. However, the role of two types of non-State actors, namely, industrial entities (especially multinational corporations) across the plastic value chain, and non-governmental organisations (NGOs) deserve greater attention. This is due to their non-trivial contribution in generating plastic pollution as well as the development of global solutions to halt it (see section II). For this article, non-State actors are understood broadly as all actors which are not States.[4]

Against this background, the article examines: i) the current approach towards non-State actors' participation in international conventions applicable to plastic pollution and its limitations; and ii) how the potential global plastic treaty could offer more avenues for participation by actors beyond States, especially industry players and NGOs. While States are always the main addressees of international treaties, this article argues that the effectiveness of these treaties relies on many other actors as well and therefore advocates for increased participation for non-state actors in the drafting and implementation of the global plastic treaty.

The article begins with a brief discussion of the current approach to non-State actors' participation in the existing international legal framework applicable to plastic pollution and the extent to which the current model can be an obstacle to the uptake of the global plastic treaty by actors (section II). Following an analysis of the obstacles posed by the current model, section III introduces a curative approach to addressing the governance gap. The article then concludes in section IV.

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4 Noemi Gal-Or, 'Preliminary Issues for the ILA' (2008) Conference in Rio de Janeiro, Non-State Actors, International Law Association, 2.

II. Current Approach as an Obstacle to the Global Plastic Treaty

Multinational corporations are the dominating producers, consumers, and shareholders along the global plastic value chain. These corporations hold transboundary resources and influence that States cannot compare with, making them key stakeholders in proposing and more importantly implementing solutions to solving the plastic crisis. Statistics show that in 2019, the top 20 plastic (polymer) producers accounted for 55 percent of plastic waste globally.[5] Furthermore, a brand-audit in 51 countries around the world revealed the top 10 polluters to be multinational fast-moving consumer goods corporations headquartered in the global north with subsidiaries and affiliates of global retailers around the world.[6] This global reach is fuelled by the top 20 banks and asset investment firms based in the global north that fund more than 80 percent of the plastics value chain.[7] Major industry players[8] across the plastic value chain are promoting their concerted stances on plastic governance individually and collectively by enhancing partnerships.[9] While recognising the severity of plastic pollution, industry does not point finger at plastics *per se*, especially single-use plastic, but rephrases the narratives by steering attention to plastic waste.[10] In contrast, various NGOs are of the view that excessive plastic production,

5 See e.g., See Dominic Charles, Laurent Kimman and Nakul Saran, 'The Plastic Waste Makers Index' (2021) Minderoo Foundation, 31.

6 BFFP, 'Branded: Identifying the World's Top Corporate Plastic Polluters' (2019) 50.

7 Dominic, Laurent and Nakul (n 5) 33.; Portfolio Earth, 'Bankrolling plastics: The banks that fund plastic packaging pollution' (2020) 10.

8 These include the top 20 plastic (polymer) producers; Banks funding the plastic industry; Asset management firms; top fast-moving consumer goods; and the top 20 global retailers.

9 Marine Litter Solutions, 'Declaration of the Global Plastic Associations for Solutions on Marine Litter' (2016); Alliance to End Plastic Waste's Official Website <https://endplasticwaste.org/en/about> accessed 13 March 2022.

10 Jennifer Clapp and Linda Swanston, 'Doing away with plastic shopping bags: international patterns of norm emergence and policy implementation' (2009) Environmental Politics 18(3) 317.

especially from petroleum-based sources, should be a thing of the past, and many call for an iron-handed approach to end the plastic crisis.[11]

The current State-centric model has its roots in the Westphalian system that shaped modern international law.[12] Non-state actors participate in multilateral environmental agreements (MEAs) either through informal interaction with sovereign States; or as formal participants (observers).[13] For example, industry players usually participate via the creation of industry codes of behaviour which are lobbied by their representatives and in some cases by the so-called business-initiated non-governmental organisations (BINGOs).[14] In either capacity, non-State actors normally lack direct decision-making powers. MEAs on plastic pollution cannot function well without sufficient participation by non-State actors. For instance, the Basel Convention provides definitions for 'exporter', 'importer', 'carrier', 'generator', and 'disposer' of hazardous wastes,[15] most of which are industry players engaged in the lifecycle of hazardous wastes including plastics.[16] It mandates States, serving as gatekeepers, to adopt measures to control the transboundary movement and ensure environmentally sound management of hazardous waste. The substantive obligations of prior notification,

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11 See e.g., CIEL, 'Plastic & Climate: The Hidden Costs of a Plastic Planet' (2019).

12 Thilo Marauhn, 'The Changing Role of the State', in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (2007) (Oxford University Press) 729-730.

13 Peter J. Spiro, 'Non-Governmental Organizations and Civil Society', in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (2007) (Oxford University Press) 781.

14 Ibid 808.

15 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (adopted 22 March 1989; entered into force 5 May 1992) 1673 UNTS 57. art 2.

16 In 2019, COP14 of the Basel Convention adopted amendments to Annexes II, VIII and IX with the objectives of enhancing the control of the transboundary movements of plastic waste, which has entered into force in 1 January 2021.

disposal, and re-import are ultimately implemented by non-State actors through the translation into domestic law by Contracting Parties.[17]

This scenario applies *mutatis mutandis* to other conventions such as the International Convention for the Prevention of Pollution from Ships (MARPOL)[18] and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (London Convention) and its 1996 Protocol (London Protocol).[19] Under these treaties, the Contracting Parties bear the obligations to prevent, reduce, and control plastic wastes entering the marine environment whether due to normal operation, accidental loss, or deliberate disposal. Nevertheless, the ultimate implementation of the provisions in these treaties depends on the non-State actors that own or operate the vessels instead of the flag State itself. It is noteworthy that the existing treaties only address the downstream disposal of plastic wastes, and none of them mention the upstream production of plastics.

Despite the intrinsic relevance to the non-State actors in terms of their substantive treaty obligations, the texts of the abovementioned treaties do not provide any guarantee of their right to participation. For example, only few rules of procedure for the Conference of Parties (COP) prescribe that NGOs with internationally recognized expertise may participate as observers in the COP.[20] On the other hand, the participation of relevant industry players cannot be found in either the treaty text or the rules of procedures. In addition, literature indicates that there are various limitations

17 Basel Convention (n 15) arts 4, 6, 9.

18 Protocol of 1978 relating to the international Convention for the Prevention of Pollution from Ships of 2 November 1973, as amended, opened for signature 17 February 1978, (entered into force 2 October 1983) ('MARPOL 73/78) 1340 UNTS 184.

19 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter (adopted 29 December 1972; into force 30 August 1975) 1046 UNTS 138.

20 See e.g., Rules of Procedure for the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Rule 7. Rules and guidelines for consultative status of non-governmental international organizations with the International Maritime Organization, Rule 8.

to the participation of non-State actors in the international law-making process. For example, inadequate mechanisms for identifying critical issues and legislative priorities; inadequate participation of all relevant actors in the international law-making process from negotiation, implementation, review, and governance of MEAs especially in developing countries; and weak coordination between international organisations mandated to supervise environmental issues.[21] The complexity of global plastic governance is also related to the aforementioned limitations; hence for a global plastic treaty to be efficacious, these and other limitations need to be addressed (see section III).

Moreover, the seemingly disparate interests and significance of major industry players and NGOs in global plastic governance thus demand their meaningful participation in the international legal architecture. However, the current model of participation neither sufficiently serves the dialogue and cooperation between them, nor does it appropriately reflect their relationship with State actors in the context of plastic governance. As a result, several interrelated problems may arise that might substantively undermine the coverage and uptake of the proposed global plastic treaty. Section III discusses how these hurdles can be surmounted for a global plastic treaty to be realised within the ambitious target of 2024[22] and implemented with the full engagement of NGOs and industry.

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21 Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth MacKenzie 'Principles of International Environmental Law' (2018) (Cambridge University Press) Fourth Edition, New York, USA, 103.

22 UNEP/EA.5/L.23/Rev.1., 2.

III. Principle 10 of the Rio Declaration as a Curative Approach in Establishing a Participatory Global Plastic Treaty

To close the governance gap for non-State actors, the proposed global plastic treaty must seek to catalyse and accelerate the implementation of Principle 10 of the Rio Declaration which states that:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

This should be done because Principle 10 lays down the "*pillars of environmental democracy*", consisting of three different elements (i. access to environmental information, ii. participation in decision-making processes on environmental issues, and iii. access to administrative and judicial proceedings).[23] Furthermore, as Principle 10 has not been fully developed in any global multilateral environmental agreement,[24] the global plastic treaty could provide the perfect opportunity to implement Principle 10 to solve a truly complex environmental governance issue like plastic pollution. Currently, the strongest representation of Principle 10 is the 1998 Aarhus

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23 United Nations Conference on Environment and Development, Agenda 21, Rio Declaration, Forest Principles. (1992) Principle 10.

24 Ellen Hey, 'Advanced Introduction to International Environmental Law' (2016) (Edward Elgar Publishing Limited) 83.

Convention on Access to Information, Public Participation in Decision making, and Access to Justice in Environmental Matters and its Protocol.[25]

Considering that plastic pollution is transboundary, affecting different environmental mediums across local, national, regional, and international levels,[26] Principle 10 provides an avenue to combine both bottom-up and top-down approaches to inform the international law-making process toward the mitigation of plastic pollution. The ensuing subsections explain how adopting the key tenets of Principle 10 (i.e., access to information, participation in the decision-making process, and access to justice) will look like in practice.

1. *Access to information*

Environmental information is defined to mean 'any information relating to the physical elements of the environment such as biodiversity, water, land, and air in addition to information regarding activities be it administrative measures, agreements, policies, legislation, plans, and programmes with the probability of affecting the environment, human health, safety, or conditions of life.'[27] Guaranteeing the rights of Parties to such information is critical to the uptake of any multilateral environmental agreement, and even more so for a global plastic treaty due to the multifarious interactions that occur across the global plastic value chain (see sections I and II). The Aarhus Convention partly operationalises Principle 10 and states in Article 4 that anyone (the public)[28] 'irrespective of their interest in the issue or jurisdiction (Art. 3(9)) is entitled to environmental information *per* national law'.[29] This

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25 1998 Aarhus Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters (adopted in 25 June 1998, entered into force in 30 October 2001) 447 UNTS 2161.; Protocol on Pollutant Release and Transfer Registers (entered into force 8 October 2009) 2629 UNTS 119.; For other forms of implementation of Principle 10 see Ellen Hey (n 24).

26 Nancy L. Ross, 'The "Plasticene" Epoch?' (2018) 14 (5) Elements 291.

27 Aarhus Convention (n 25) art 2(3).

28 Ibid arts 2(5); 6(6).

29 Ibid art 3(9).

is particularly instructive to the regulation of a transboundary pollutant such as plastic. Though Article 4 only applies to public authorities, the related Protocol on Pollutant Release and Transfer Registers requires industry to make information available to the public and therefore a plastic treaty can seek to require this of major industry players.

A global plastic treaty might benefit from the establishment of a specialised body that will provide expert opinion across the plastic value chain considering the fast-moving world of technological advancement, to inform the negotiation and drafting process. Such a body can be modelled after the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection (GESAMP)[30] which assesses the science for sustainable oceans and/or the Intergovernmental Panel on Climate Change (IPCC) which does same for climate change.[31] Considering that plastics pose harm not just to the marine environment but also contribute to climate change,[32] it might be prudent to set up an expert body, for example, a joint Group of Experts on Plastic Pollution Prevention (GEPPP). Such a body hosted by a secretariat established by the plastic treaty may seek to assess not just the scientific but economic, social, environmental, and political information regarding plastics to inform decision-making (more on decision-making in the next section). To enhance the participation of diverse groups of non-State actors, several working groups with established procedures for effective access to relevant information can be created under the body, for example, a working group that focuses on:

i. the scientific and engineering aspects of plastics – charged with assessing the scientific connotations of plastics across the entire lifecycle; research into plastic engineering towards alternatives, etc;

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30 GESAMP, 'Home' <http://www.gesamp.org/> accessed 2 April 2022.

31 IPCC — Intergovernmental Panel on Climate Change <https://www.ipcc.ch/?msclkid=26de3250bfeb11ec87580c10a463fcb5> accessed 2 April 2022.

32 CIEL (n 11).

ii. the economic (trade, transport, and investment) dimensions of plastics – charged with monitoring trade (export and import) data for national plastic inventories, assessing data on financial flow and investment in the plastic sectors, etc;

iii. the impact, vulnerabilities, and adaptation towards plastics – to assess information on emissions or discharges of plastics, the environmental impact, health risks on vulnerable groups and coping strategies, etc;

iv. the socio-ecological aspects of plastics – assess environmental information from governmental and non-governmental sources (e.g. wastewater quality from plastic industries), etc;

v. the legal and management aspects of plastics – assess policies and strategies for the control of agreed plastic pollutants, breaches by multinational corporations, inspection and enforcement schemes at ports, etc; and

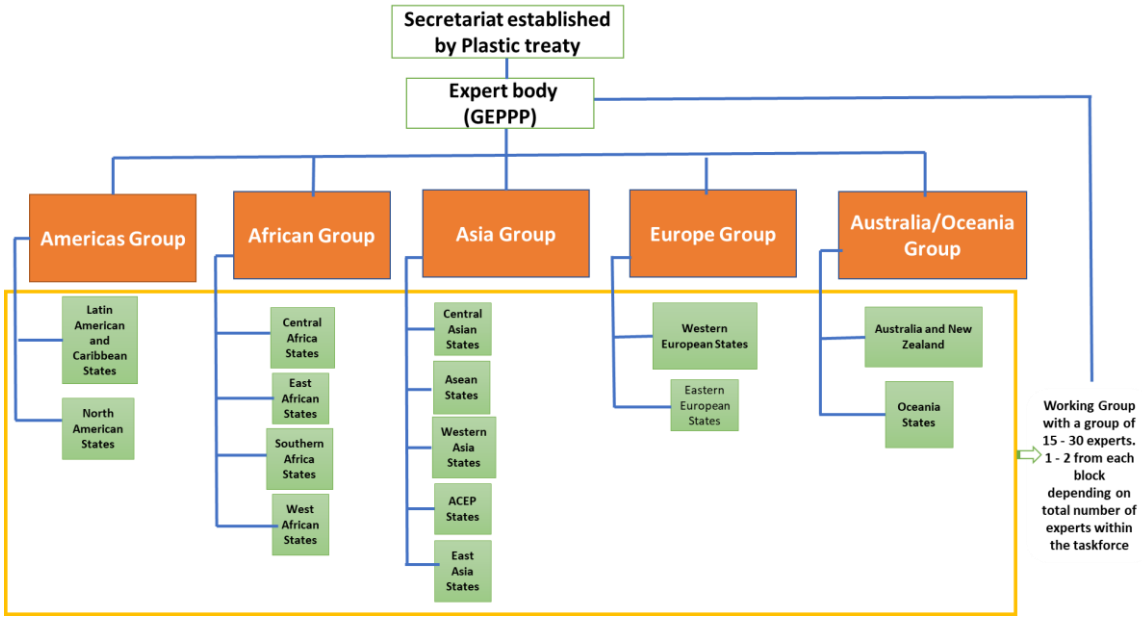
vi. the governance dimensions of plastics – assess institutional arrangements of organisations regulating plastics at all levels, etc.

Representation of members within each working group would take into consideration the current regional groupings under the UN system.[33] This would be to ensure adequate representation and could be drawn from a pool of sub-regional experts from which leading experts within the field may be nominated to be part of the working group (see figure 1 below). This may provide an avenue for the complexity of plastics to be properly diffused as each working group focuses on specific aspects of the plastic pollution problem.

Apart from the network of working groups, an overarching Task-force can also be set up tasked with the coordination and harmonising of information from the working groups to create a plastic data bank relevant for decision-

[33] Philippe Sands et al., (n 21) 54.

making on plastics including (but not limited to) the establishment of a 'National Plastic Inventory' for all 193 member States of the UN and the other two that participate as observers. Mechanisms for collecting and disseminating environmental information can be patterned after Article 5,[34] which ensures mandatory systems are put in place for a seamless flow of information to the public. The coordination of the various working groups by the Task-force, whose members may be nominated from the working groups or separately following a similar format in figure 1, ensures a true representation of information on ground thereby eliminating biases. The information gathered might help the monitoring efforts of the secretariat to check for accuracy and proactively identify problems and proffer countermeasures. The expert body would therefore operate as the world's first and only one-stop-shop for plastic pollution advice and guidance which could influence decision-making. We explore the significance of this level of detailed information and the participation of non-State actors in the global plastic regime in the next section.



[34] Aarhus Convention (n 25) art 5.

Figure 1: Schematic representation of the composition of the proposed expert working groups

2. Access to decision-making and advisory bodies of the Plastic treaty

The independent and transparent participation of non-State actors as discussed in the preceding section would ensure that environmental democracy is at the heart of the negotiation and implementation of the plastic treaty which might contribute to the accountability efforts of actors. Furthermore, the adoption of such a transdisciplinary approach (through a range of fields – science, engineering, waste management, economics, law, etc) ensures the creation of reliable and expert information needed to tackle a transboundary problem like plastic pollution. The plastic treaty may therefore require different actors to take different actions based on the specific issue being addressed. This may also help address the limitations of a lack of adequate mechanisms for identifying critical issues and legislative priorities; ineffective participation by relevant actors in the international law-making process; and weak coordination. In so doing, sub-national administrations, scientific and other experts, industries, and civil society as a whole will have an identifiable presence throughout the agenda-setting, negotiation, drafting, and implementation of the treaty.[35]

Following Article 3(6-9) of the Aarhus Convention, a plastic treaty might seek to fundamentally ensure that the membership of associated institutions/bodies is established under the Convention. This may include a global plastic fund or advisory and implementing bodies such as the World Bank or the Global Environmental Facility to the Convention be it international, regional or national, representing all relevant actors. In the spirit of transparency, a plastic treaty could encourage the adoption of an accountability mechanism among multinational corporations and their

[35] Beatriz Garcia, Mandy Meng Fang and Jolene Lin, 'All Hands on Deck: Addressing the Global Marine Plastics Pollution Crisis in Asia' (2019) 3(1) Chinese Journal of Environmental Law 11-46.

subsidiaries to the general public (i.e., consumers) especially when indigenous and other vulnerable groups are concerned, particularly within the various areas of operation to prevent multinational corporations from operating in a legal vacuum under international environmental law.[36] This might be the first time such an approach is adopted in a multilateral environmental agreement; hence we anticipate resistance particularly from States with state-owned corporations operating across the plastic value chain as well as those with associated interests.

Several benefits accrue from this approach as adequate representation ensures that for example, ESG (thus environmental, social, and governance) is prioritised by industry thus operating with openness and engaging in transparent reporting and compliance to agreed environmental standards under the plastic treaty.[37] This is to ensure decisions made by industry are beneficial to inhabitants and that their environmental rights are upheld including but not limited to responding to plastic pollution be it industrial or during transportation.[38] This will aim at enhancing regulatory decision-making and fostering shared responsibility among actors. Even though shared responsibility among States may be ideal, States (particularly developing States) may still not be sure if they have the resources to protect themselves from potential harm and if assistance from developed States may be readily available. Hence, the concept of informed public scrutiny may help Contracting Parties protect themselves from potential harm posed by plastics.[39] Unfortunately, the foundation needed for informed public scrutiny to thrive - of transparency and public access to decision-making - is

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36 See e.g., OECD, 'Innovative Citizen Participation and New Democratic Institutions: Catching the Deliberative Wave' (2020) (OECD Publishing, Paris).

37 See e.g., Peter Muchlinski, 'Multinational Enterprises and the Law' (2021) Third Edition (Oxford University Press).

38 It is worth noting that unlike shipping source pollution, pollution from industrial accidents are not developed fully in international environmental law save the regional 1992 UNECE Industrial Accidents Convention - See art 2(1).

39 Patricia Birnie, Alan Boyle and Catherine Redgwell, 'International Law & the Environment' (2009) (Oxford University Press) 485.

currently absent in for example the Basel Convention. Since the plastic pollution problem is also partly a chemical and trade problem, the legal framework of a plastic treaty could ensure that a level of transparency is achieved in monitoring the transboundary movement of plastic-related chemicals and waste. As Birnie and colleagues rightly observe, 'in general, effective treaty institutions are those which combine political direction and inclusive, transparent, informed decision-making processes…with significant NGO participation'.[40]

While plastic-using and producing industries are key to include in decision-making and implementation of a global plastic treaty due to their direct role in enforcement, banks are important actors because their investment decisions determine where and how many plastic-producing plants are built. Additionally, bankrollers of the plastic industry operate in a legal vacuum as their investment decisions are not regulated under international environmental law. Therefore, another approach for the plastic treaty to promote environmental accountability by industry and ensure public access to decision-making is to encourage financiers of the plastic industry to be bound to Social and Environmental Sustainability policies; for example, the performance standards on Social and Environmental Sustainability adopted by the International Finance Corporation (IFC) of the World Bank Group to regulate the risk associated with each project before financing it.[41] Such an approach can be tailored towards operationalising environmental standards required to finance the plastic industry. Conversely, environmental management systems such as ISO 14001 which covers pollution prevention and compliance could be adopted by the plastic treaty.[42] This may close another governance gap – thus making the plastic treaty the first multilateral environmental agreement to regulate plastic industry

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40 Ibid 86-88.

41 International Finance Corporation [IFC], Performance Standards on Social and Environmental Sustainability (2012).

42 ISO, 'ISO 14001:2015 Environmental management systems — Requirements with guidance for use' < https://www.iso.org/standard/60857.html> accessed 4 April 2022.

financiers. One has to acknowledge that such a bold move could be met with opposition, however, till the financiers of these large plastic industries are regulated, plastic pollution will continue unabated as increased investment will lead to more plastic production. In jurisdictions where the environmental standards of the IFC failed to materialise, some scholars attribute it largely to weak regulatory, judicial, and enforcement systems, corruption, and the conclusion of weak bilateral investment treaties which allows foreign investors to adopt binding arbitration in settling breaches.[43] Currently, national laws that empower enforcement agencies may be the best option available to States in regulating multinational corporations within their jurisdiction despite possible emerging constraints, for example, the *forum non conveniens* which shields US-based multinational corporations from being prosecuted in US courts for their overseas activities.[44] The next subsection focuses on ensuring access to justice.

3. Access to justice in environmental matters

In line with Principle 10 of the RD which states that: '….[e]ffective access to judicial and administrative proceedings, including redress and remedy, shall be provided'; Article 9 of the Aarhus Convention mandates Contracting Parties to 'ensure that members of the public having a 'sufficient interest' or who claim an 'impairment of a right where the administrative procedural law of a Party requires this as a precondition' have access to 'a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission subject to Article 6 of the Convention and, where so provided for under national law.'[45] The Convention also makes provisions for 'members of the public to be able to challenge acts and omissions by private persons and public authorities which contravene national law relating to the environment…and that all the procedures

43 Patricia Birnie, Alan Boyle and Catherine Redgwell, (n 39) 326.

44 Ibid 327.

45 Aarhus Convention (n 25) art 9(2).

available should provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.'[46] Article 9 limits the provision to the public and does not include State-owned multinational corporations which the plastic treaty could include to subject State-owned multinational corporations to the law. In addition, the non-discriminatory article of the Convention – Article 3(9) ensures that the public can bring lawsuits in environmental matters to national courts 'without discrimination as to citizenship, nationality, or domicile and, in the case of a legal person, without discrimination as to where it has its registered seat or an effective centre of its activities.'[47] This addresses the rights of non-nationals or transboundary claimants in transboundary cases which is particularly instructive as plastics are transboundary pollutants.

The adoption of this approach under a plastic treaty would ensure plastic justice by encouraging inter alia affected persons to bring lawsuits to national courts against multinational corporations whose activities maybe causing detrimental effects on the environment. As one commentator rightly puts it 'the real test of Principle 10's significance lies less in international treaties, however than in national law. It is here that most of the important applications of the principle have taken place.'[48] The outcome of court proceedings may go a long way in shaping national environmental laws and policies and ensuring that the activities of the plastic industry (both private and State-owned) are made to be accountable under international law. The role national courts have to play in implementing international environmental law might also be enhanced although an in-depth discussion of this role is beyond the scope of this article.

Furthermore, in cases where a party is not compliant, Article 15 of the Aarhus Convention encourages as an option the adoption of a 'non-

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46 Ibid art 9(3-4).

47 Ibid art 3(9).

48 Patricia Birnie, Alan Boyle and Catherine Redgwell (n 39) 268-334.

confrontational, non-judicial and consultative approach' to review compliance where public involvement is allowed. The non-compliance mechanism established under the Aarhus Convention has members independent of Contracting Parties who are selected by consensus and sit on the Aarhus Convention's compliance committee with NGOs being able to also nominate candidates for election thus widening the participatory rights of members of the public.[49] For industry and their financiers, the plastic treaty could adopt the approach modelled after the inspection panel of the World Bank - an arm of the World Bank's Accountability Mechanism. The Panel conducts independent investigations into Bank-financed projects to determine their level of compliance with the Bank's operational policies and procedures upon complaint by aggrieved persons.[50]

Both approaches (i.e., the non-compliance mechanism of the Aarhus Convention and the Inspection Panel of the World Bank) can be adopted by the proposed plastic treaty which may provide formal mechanisms to enhance the participatory rights of non-State actors. For example, in cases where affected non-State actors have concerns about the establishment of plastic-related industries. In this regard, the plastic treaty may also encourage the financiers of multinational corporations to be subjected to independent investigations modelled after the inspection panel of the World Bank to mitigate the level of harm caused by non-environmentally friendly plastic investments. This will ensure that plastic industry financiers such as banks become accountable to the public for the harm caused to communities by their investment decisions; and that their decisions are guided by agreed operational policies and environmental standards under the plastic treaty. These avenues ensure all relevant actors participate fully and their activities

49 Aarhus Convention, Decision 1/7: Review of Compliance, Report of 1st Mtg of Parties, UN Doc ECE/ MP PP/2/Add 8 (2004).

50 World Bank Group, 'About the Inspection Panel' <https://www.inspectionpanel.org/about-us/about-inspection-panel> accessed 15 April 2022.

particularly industry and their financiers are regulated effectively under the legal framework of the plastic treaty.

IV. Conclusion

In rethinking how a globally complex problem like plastic pollution can be mitigated, the world cannot afford to leave anyone behind especially those with resources needed for action to be taken. In this case, using influential non-State actors like NGOs, individual citizens through environmental litigation and representation on corporate boards, as well as industry, and their financiers as a showcase, which could shed light on how other non-State actors could participate in the global plastic treaty regime. This article has shown that adopting the key tenets of Principle 10 of the RD in the global plastic treaty could help extend the procedural rights of non-State actors and may contribute to strengthening the global plastic treaty, especially when regulating industry. The article has also demonstrated how incorporating the Aarhus-style of rights stemming from the foremost international convention on environmental rights (Aarhus Convention) could enhance environmental democracy through increased avenues for participation, empowerment, and regulation of non-State actors towards effective global plastic governance. As shown above, this approach might meet some resistance especially when there is no political will, however, if the global COVID-19 pandemic has taught us anything, it is how adjustable to change we as the people of the world can be *if* we want to.

HOLDING STATES RESPONSIBLE FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW IN PROXY WARFARE: THE CONCEPT OF STATE COMPLICITY IN ACTS OF NON-STATE ARMED GROUPS

Kilian Roithmaier*

Proxy warfare in the form of state support to non-state armed groups is a recurrent feature of armed conflicts. While states have long recognized the strategic advantages of this form of indirect conflict intervention, several studies have linked proxy warfare to a protraction of conflicts and an increased probability of violations of international humanitarian law. However, instances of states being held responsible for facilitating such violations by non-state armed groups have remained rare. This article contends that this responsibility gap is caused by the requirement of state control over acts of non-state armed groups under the current state responsibility framework. It argues that in view of the collusive nature of proxy warfare, the concept of state complicity in wrongful acts is best suited to close the identified responsibility gap. Amidst different normative propositions, the article concludes that complicity should be incorporated into Common Article 1 of the Geneva Conventions as part of the external dimension of the duty 'to ensure respect' for international humanitarian law. According to this approach, states would be under a continual obligation to neither encourage nor aid or assist as well as to prevent and stop violations of international humanitarian law by proxy non-state armed groups.

Keywords: proxy warfare; belligerent support relationships; indirect conflict intervention; complicity; state responsibility; non-state armed

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groups; international humanitarian law; law of armed conflict; armed conflict; ARSIWA

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I. INTRODUCTION

States have long recognized the strategic advantages of proxy warfare as a form of indirect conflict intervention.[1] A predominant manifestation thereof is the provision of support by states to non-state armed groups (NSAGs), i.e., groups with a military chain of command and the ability to use armed force, without being part of a state's military structure.[2] Establishing such support relationships enables states to influence armed conflicts overseas while

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1 Seyom Brown, 'Purposes and pitfalls of war by proxy: A systemic analysis' (2016) 27(2) Small Wars & Insurgencies 243, 244-245; Andreas Krieg, 'Externalizing the burden of war: the Obama Doctrine and US foreign policy in the Middle East' (2016) 92(I) International Affairs 97, 100; Geraint Hughes, *My Enemy's Enemy: Proxy Warfare in International Politics* (Sussex Academic Press 2012) 6.

2 In this vein Gerard Mc Hugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners* (United Nations Office for the Coordination of Humanitarian Affairs 2006) 6, 14-16.

avoiding direct inter-state confrontations as well as the material, financial, and political costs associated with direct military interventions.[3]

However, state support to belligerent parties, NSAGs in particular, has also been linked to a protraction of conflicts and an increased probability of violations of international humanitarian law (IHL).[4] For example, before launching its full-scale invasion against Ukraine in February 2022, the Russian Federation had provided weaponry and other equipment, funds, and assistance to separatist NSAGs in Eastern Ukraine,[5] resulting in an eight-

3 Andrew Mumford, 'Proxy Warfare and the Future of Conflict' (2013) 158(2) The RUSI Journal 41; James Pattison, 'The Ethics of Arming Rebels' (2015) 29(4) Ethics & International Affairs 455, 455-456; Groh L Tyrone, *Proxy War: The Least Bad Option* (Stanford University Press 2019) 31; Daniel L Byman, 'Why engage in proxy war? A state's perspective' (*Brookins*, 21 May 2018) <https://www.brookings.edu/blog/order-from-chaos/2018/05/21/why-engage-in-proxy-war-a-states-perspective/> accessed 27 October 2020;

4 Matthew Moore, 'Selling to Both Sides: The Effects of Major Conventional Weapons Transfers on Civil War Severity and Duration' (2012) 38(3) International Interactions 325; Bethany Lacina, 'Explaining the Severity of Civil Wars' (2016) 50(2) Journal of Conflict Resolution 276, 286-287; Patrick M Regan, 'Third-party Interventions and the Duration of Intrastate Conflicts' (2016) 46(1) Journal of Conflict Resolution 55; Hughes (n 1) 50-51; Jeremy M Weinstein, *Inside Rebellion: The Politics of Insurgent Violence* (Cambridge University Press 2007) 209; David E Cunningham, 'Blocking resolution: How external states can prolong civil wars' (2010) 47(2) Journal of Peace Research 115; Lerna K Yanik, 'Guns and Human Rights: Major Powers, Global Arms Transfers, and Human Rights Violations' (2006) 28(2) Human Rights Quarterly 357, 359 with further references.

5 Vanessa Meier and others, 'UCDP External Support Dataset (ESD)1975-2017' (*Uppsala Conflict Data Program*, 2022) <https://ucdp.uu.se/downloads/> accessed 27 October 2022; International Crisis Group, 'Rebels without a Cause: Russia's Proxies in Eastern Ukraine' (2019) Europe Report No 254 <https://icg-prod.s3.amazonaws.com/254-rebels-without-a-cause%20%281%29.pdf> accessed 25 October 2022, 5; International Crisis Group, 'Russia and the Separatists in Eastern Ukraine' (2016) Crisis Group Europe and Central Asia Briefing No 79 <https://icg-prod.s3.amazonaws.com/b79-russia-and-the-separatists-in-eastern-ukraine.pdf> accessed 2 December 2022.

year-long conflict with more than 14,000 casualties, many of them civilians.[6] In 2014, Malaysia Airlines Flight 17 was brought down with a Russian-delivered Buk surface-to-air missile, killing all 298 civilian passengers on board.[7] However, Russia has denied any legal responsibility for the downing of MH17 and other law of armed conflict violations in Eastern Ukraine and efforts to invoke its responsibility has, thus far, remained unsuccessful.[8] As this case illustrates, holding states responsible for proxy warfare oftentimes remains futile, challenging the adequacy of the current state responsibility framework as codified in the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts* (ARSIWA).[9]

Against this background, this article attempts to answer the following question: Do the current rules of state responsibility result in a responsibility gap in instances of proxy warfare and – if so – how could such gap be closed? To provide an answer, Section 2 offers a description of proxy warfare with reference to relevant literature. Section 3 contends that the current state responsibility framework creates a responsibility gap in instances of proxy warfare, and that this gap requires a normative response. Finally, Section 4

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6 International Crisis Group, 'Conflict in Ukraine's Donbas: A Visual Explainer' (*International Crisis Group*, 29 June 2021) <https://www.crisisgroup.org/content/conflict-ukraines-donbas-visual-explainer> accessed 27 October 2022.

7 Dutch Safety Board, 'Crash van Malaysia Airlines vlucht MH17 (Hrabove, Oekraïne, 17 juli 2014)' (*Onderzoeksraad voor Veiligheid*, October 2015) <https://www.onderzoeksraad.nl/nl/page/3546/mh17-crash-17-juli-2014> accessed 2 December 2022.

8 For ongoing efforts, see *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* (Pending) <https://www.icj-cij.org/en/case/166> accessed 5 December 2022; Government of the Netherlands, 'The Netherlands and Australia Submit Complaint against Russia to the International Civil Aviation Organization' (*Rijksoverheid*, 14 March 2022) <https://www.government.nl/latest/news/2022/03/14/netherlands-and-australia-submit-complaint-against-russia-to-icao> accessed 2 December 2022.

9 ILC, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries' (2001) II Yearbook of the International Law Commission 31. For this, see also Oona A. Hathaway and others, 'Ensuring Responsibility: Common Article 1 and State Responsibility for Non-State Actors' (2017) 95(3) Texas Law Review 539, 542-543.

argues that the concept of state complicity in wrongful acts is best suited to close the identified responsibility gap and that it should be incorporated into Common Article 1 of the Geneva Conventions as a regime-specific, primary rule of IHL.

II. Proxy Warfare: A Complex Belligerent Support Relationship between States and Non-State Armed Groups

No generally accepted definition of the term 'proxy warfare' exists in either legal or other scholarship.[10] For the purpose of this article, 'proxy warfare' refers to a type of indirect conflict intervention by which states – for the main purpose of attaining their own foreign policy objectives[11] – enhance the capabilities of NSAGs to engage in sustained military operations through the provision of goods (e.g., weaponry and other military equipment), financial assets, and/or resources and services (e.g., provision of intelligence or training).[12] This article focuses on state support to NSAGs specifically as this kind of belligerent support relationship poses particular challenges for the invocation of state responsibility.

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10 Vladimir Rauta, 'Proxy Warfare and the Future of Conflict: Take Two' (2020) 165(2) The RUSI Journal 1, 40; ICRC, *Allies, Partners and Proxies: Managing Support Relationships in Armed Conflict to Reduce the Cost of War* (International Committee of the Red Cross 2021) 14; Candace Rondeaux and David Sterman, 'Twenty-First Century Proxy Warfare: Confronting Strategic Innovation in a Multipolar World Since the 2011 NATO Intervention' (*New America*, 20 February 2019) <https://d1y8sb8igg2f8e.cloudfront.net/documents/Twenty-First_Century_Proxy_Warfare_Final.pdf> accessed 26 February 2021, 18.

11 Eli Berman and David A Lake (eds), *Proxy Wars: Suppressing Violence Through Local Agents* (Cornell University Press 2019) 1 ff.

12 Mumford, 'Proxy Warfare and the Future of Conflict' (n 3) 40; Andrew Mumford, *Proxy Warfare* (Polity Press 2013) 61-69; Hughes (n 1) 4, 12; Rondeaux and Sterman (n 10) 26; Brendan Sozer, 'Development of Proxy Relationships: A Case Study of the Lebanese Civil War' (2016) 27(4) Small Wars & Insurgencies 636, 643. Similarly, Geraint Hughes, 'Ukraine: Europe's New Proxy War?' (2014) I(II) Fletcher Security Review 105, 106; ICRC (n 10) 46-47.

Hence, in first instance, proxy warfare needs to be distinguished from direct state interventions, i.e., the employment of a state's own military personnel in combat capacity,[13] as well as situations in which a third state becomes party to an armed conflict *ratione personae* due to its support being an integral part of specific military operations.[14] Proxy warfare should further be distinguished from collective military engagements, such as coalitions, in which different parties 'work together with each making significant contributions'[15] and in which the 'precise functioning and modalities [of the engagement] are negotiated on a case-by-case basis'[16] in a 'direct, cooperative strategic [manner]'.[17] Instead, proxy warfare lacks formalized arrangements, comprehensive strategic cooperation, and conventional lines of command.[18] While the provision of support may enable states to

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13 Anthony Pfaff, 'Proxy War Ethics' (2017) 9(1) Journal of National Security Law & Policy 305, 310-311; Vladimir Rauta, "Proxy War' – A Reconceptualisation' (2021) 23 Civil Wars 1, 15; Yelena Biberman, *Gambling with Violence: State Outsourcing of War in Pakistan and India* (Oxford University Press 2019) 16; Cecily G Brewer, 'Peril by Proxy: Negotiating Conflicts in East Africa' (2011) 16 (1) International Negotiation 137, 137-138, 141-142; Jennifer L De Maio, 'Plausible Deniability: Proxy Wars in Africa' (2014) I(II) Fletcher Security Review 34, 35; Andrew Mumford, 'The New Era of the Proliferated Proxy War' (*The Strategy Bridge*, 16 November 2017) <https://thestrategybridge.org/the-bridge/2017/11/16/the-new-era-of-the-proliferated-proxy-war> accessed 26 February 2021.

14 For this, see, e.g., Tristan Ferraro, 'The ICRC's Legal Position on the Notion of Armed Conflict Involving Foreign Intervention and on Determining the IHL Applicable to this Type of Conflict' (2015) 97(900) International Review of the Red Cross 1227.

15 Byman (n 3). See also Pfaff (n 13) 310.

16 Berenice Boutin, 'The Interplay of International Obligations Connected to the Conduct of Others: Toward a Framework of Mutual Compliance Among States Engaged in Partnered Warfare' (2020) 96 International Law Studies 529, 532.

17 Vladimir Rauta, 'Conceptualising the Regular-Irregular Engagement: The Strategic Value of Proxies and Auxiliaries in 'Wars Amongst the People" in David Brown and others (eds), *War Amongst the People: Critical Assessments* (Sandhurst Military Academy 2019) 107-108. See further Rauta, "Proxy War' – A Reconceptualisation' (n 13) 15; Yelena Biberman, *Gambling with Violence: State Outsourcing of War in Pakistan and India* (Oxford University Press 2019) 20-21.

18 Rauta, 'Conceptualising the Regular-Irregular Engagement' (n 17) 101. See also Rauta, "Proxy War' – A Reconceptualisation' (n 13) 16; Hughes (n 1) 12.

informally exercise a certain degree of influence over NSAGs, in most instances of proxy warfare this would not amount to operational military authority and command over the conduct of hostilities.[19]

III. Proxy Warfare's Responsibility Gap: The Need for a Normative Response

This understanding of proxy warfare reveals the complex relationship between supporting states and proxy NSAGs that manifests itself in the absence of operative authority of the former over the conduct of hostilities. Indeed, existing literature suggests that many NSAGs continue to operate independently even when receiving comprehensive support from states.[20] It is this aspect of proxy warfare in particular that challenges the invocation of state responsibility under the ARSIWA.

According to Article 2 ARSIWA, an internationally wrongful act not only requires the breach of an international obligation, but also that such breach is attributable to a state under the customary rules of attribution.[21] While a detailed inquiry into the rules of attribution lies outside the scope of this

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19 Mumford, 'Proxy Warfare and the Future of Conflict' (n 3) 40; Mumford, *Proxy Warfare* (n 12) 78; Rondeaux and Sterman (n 10) 17; Vladimir Rauta, 'Proxy Agents, Auxiliary Forces, and Sovereign Defection: Assessing the Outcomes of Using Non-State Actors in Civil Conflicts' (2016) 16(1) Southeast European and Black Sea Studies 91, 93; Biberman (n 17) 21-22. See also Rondeaux and Sterman (n 10) 17. See also *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14 (*Nicaragua*) para 109.

20 See, e.g., Idean Salehyan, 'The Delegation of War to Rebel Organizations' (2010) 54(3) Journal of Conflict Resolution 493; Bulbul Khaitan, 'Alternative to the Existing Rule of Attribution for Use of Force by Non-State Actors in an Armed Conflict' (2021) 26(1) Journal of Conflict and Security Law 41; Kai M Thaler, 'Delegation, Sponsorship, and Autonomy: An Integrated Framework for Understanding Armed Group–State Relationships' (2022) 7(1) Journal of Global Security Studies 1.

21 ARSIWA, Arts 1, 2. See also Hathaway and others (n 9) 545; Kubo Mačák, 'Decoding Article 8 of the International Law Commission's Articles on State Responsibility: Attribution of Cyber Operations by Non-State Actors' (2016) 21(3) Journal of Conflict & Security Law 405, 406.

article, it suffices to conclude that the particularly relevant Articles 4 ('organs of a state')[22] and 8 ('instructions, direction, or control of a state')[23] require institutional or factual authority or control of a state over third entities, i.e., a relationship of subordination between a principal and an agent.[24] Although the required degree of subordination and control – 'complete dependence' (Article 4)[25] and 'effective'[26] or 'overall'[27] control (Article 8) – remain context-specific, the absence of military command and authority of states over proxy NSAGs renders attribution of acts in proxy relationships highly unlikely. This is because these standards would require (1) the complete absence of an NSAG's operational autonomy due to a state's comprehensive authority (complete dependence),[28] (2) a state's 'control [over specific] military or paramilitary operations [of an NSAG] in the course of which the alleged violations were committed' (effective control),[29] or (3) a state's 'participation in the planning and supervision of military operations [of an NSAG]' (overall control),[30] all of which go 'beyond the mere financing and equipping of [an NSAG]'.[31] While states may occasionally acquire effective control over particular military operations or temporary overall control, in particular in long-term support relationships, most instances of proxy

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22 For the constitutive requirements of *de jure* or *de facto* State organs under Article 4 ARSIWA, see ILC (n 9) Art 4, paras 1, 5-9; *Nicaragua* (n 19) para 109; *Case Concerning Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 (*Bosnian Genocide*), paras 386-389, 391-393.

23 Vladyslav Lanovoy, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct' (2017) 28(2) European Journal of International Law 563, 579-580; Mačák (n 21) 427.

24 ICRC (n 10) 8, 21 ff. Similarly, Lanovoy (n 23) 579; Hathaway and others (n 9) 542-543.

25 As pronounced in *Nicaragua* (n 19) para 109; *Bosnian Genocide* (n 22) paras 391-393.

26 As pronounced in *Nicaragua* (n 19) para 115.

27 As pronounced in *Prosecutor v Tadić* (Appeals Judgment) ICTY-94-1-A (15 July 1999) (*Tadić*) paras 131, 137.

28 *Nicaragua* (n 19) paras 109-114.

29 Ibid para 115.

30 *Tadić* (n 27) paras 145.

31 Ibid para 137. See also Lanovoy (n 23) 576.

warfare entail horizontal, collusive interactions rather than principal-agent relationships.[32] For that reason, even systematic and comprehensive support to NSAGs would regularly not meet the requirements for attribution and, hence, invocation of state responsibility.[33] This, as *Hathaway and others* conclude, 'has led to a critical accountability gap', regularly allowing states to evade legal responsibility when facilitating IHL violations by NSAGs.[34]

However, whether this responsibility gap requires a normative response is not straightforward. This is because at least in the realm of *jus in bello*,[35] NSAGs have direct international obligations under Common Article 3 of the Geneva Conventions,[36] Additional Protocol II to the Geneva Conventions,[37] and customary IHL, which are largely identical to those of states.[38] As such, NSAGs can be held internationally responsible for violations of IHL independently of a supporting state.

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32 Khaitan (n 20) 55-56.

33 ABA Center for Human Rights, 'The Legal Framework Regulating Proxy Warfare' (*American Bar Association*, 1 December 2019) <https://www.americanbar.org/content/dam/aba/administrative/human_rights/chr-proxy-warfare-report-2019.pdf> accessed 3 August 2021, 2; Hathaway and others (n 9) 563.

34 Hathaway and others (n 9) 542. See also Jean d'Aspremont and others, 'Sharing Responsibility Between Non-State Actors and States in International Law: Introduction' (2015) 62(1) Netherlands International Law Review 49, 54-55; Lanovoy (n 23) 584.

35 For the accountability gap in the *jus ad bellum*, see Khaitan (n 20); Ilias Plakokefalos, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy' (2017) 28(2) European Journal of International Law 587, 588.

36 E.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31.

37 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.

38 Customary IHL in particular has widely converged the rules binding upon States and NSAGs. For this, see, e.g., Veronika Bílková, 'Armed Opposition Groups and Shared Responsibility' (2015) 62(1) Netherlands International Law Review 69, 76; Miles Jackson, *Complicity in International Law* (Oxford University Press 2015) 176.

However, it appears inadequate to rely solely on the responsibility of NSAGs in instances of proxy warfare for three reasons. Firstly, as *Fortin* and *Kleffner* point out, there currently exist no legal rules 'on the content and implementation of [NSAGs'] responsibility, nor are there judicial or arbitral fora which can adjudicate [their] international responsibility'.[39] Similarly, obligations to provide reparations for violations of IHL under Chapter II ARSIWA and customary IHL Rule 150 are deemed to apply solely to states.[40] Hence, while NSAGs may be legally responsible for violations of IHL, invoking their responsibility oftentimes remains elusive in practice. Secondly, as *Hathaway and others* point out, the identified responsibility gap allows states to 'escape responsibility for violations of the laws of armed conflict if they act through non-[S]tate partners'.[41] This in turn provides 'perverse incentives' for states to rely on non-state proxies as a form of indirect conflict intervention,[42] which not only runs against the foundational rules of non-use of force and non-intervention but also carries the inherent risk of conflict escalation and protraction. Thirdly, from a normative point of view, relying solely on the responsibility of NSAGs challenges the coherence of the state responsibility framework. Whenever third states provide support to belligerent parties, they may facilitate IHL violations by the latter.[43] In the inter-state context such states would be internationally responsible by virtue of Article 16 ARSIWA which provides that a 'state which aids or assists another state in the commission of an internationally wrongful act by the latter is internationally responsible for doing so'. This

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39 Katharine Fortin and Jann Kleffner, 'Responsibility of Organized Armed Groups Controlling Territory: Attributing Conduct to ISIS' in Rogier Bartels and others (eds) *Military Operations and the Notion of Control Under International Law: Liber Amicorum Terry D. Gill* (Asser Press/Springer 2021) 314. See also d'Aspremont and others (n 34) 55.

40 See Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules* (International Committee of the Red Cross/Cambridge University Press 2005) Rule 150.

41 Hathaway and others (n 9) 543.

42 Ibid 562.

43 Jackson (n 38) 132.

rule is deemed applicable solely in the inter-state context as it requires a primary internationally wrongful act, which non-state actors can generally not commit as they lack international legal personality.[44] However, as demonstrated above, NSAGs have direct international obligations under IHL similar to those of states. Hence, not applying the principle of Article 16 ARSIWA to support relationships between states and NSAGs results in a significant incoherence:[45] while states can be held responsible for facilitating law of armed conflict violations by other states, they will not incur responsibility for facilitating such violations by proxy NSAGs despite the latter being bound by the same primary rules of IHL.

In view of these arguments, there exists a need for a normative response that closes proxy warfare's responsibility gap and remedies identified inconsistencies.

IV. Closing the Responsibility Gap: The Concept of State Complicity in Violations of International Humanitarian Law by Non-State Armed Groups

In view of the horizontal and collusive nature of proxy warfare, such normative response must provide a framework that accommodates the contributory role of supporting states in proxy relationships. This is most accurately accounted for by the concept of state complicity because it entails an important difference to the general conception of state responsibility under Article 2 ARSIWA:[46] Instead of a state's *direct* responsibility for *perpetrating* an internationally wrongful act, complicity establishes a state's

44 Olivier de Frouville, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford and others (eds), *The Law of International Responsibility* (Oxford University Press 2010) 275-277; Khaitan (n 20) 42-43; Jackson (n 38) 128.

45 Similarly, de Frouville (n 44) 277; d'Aspremont and others (n 34) 65.

46 Cf. Lanovoy (n 23); Jackson (n 38) ch 8; Daniele Amoroso, 'Moving towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law' (2011) 24(4) Leiden Journal of International Law 989.

ancillary or *derivative* responsibility for *facilitating and supporting* another entity's wrongful act.[47] Originally a concept found in (inter)national criminal law,[48] it has been incorporated into the state responsibility framework by virtue of Article 16 ARSIWA, a provision equated with the prohibition of complicity in wrongful acts in both the case law of the ICJ as well as legal scholarship.[49] Because Article 16 is not as such applicable to acts of NSAGs, several propositions have been put forward on how to apply the concept of complicity to relationships between states and NSAGs.

Firstly, as *Lanovoy* propounds, complicity could be construed as a specific secondary norm of attribution. This would entail that 'the conduct of a non-[S]tate actor is attributable to [a S]tate because of that [S]tate's knowing and causal aid or assistance facilitating that conduct'.[50] *Lanovoy* and *Jackson* identify this approach[51] in the case law of the European Court of Human Rights – invoking states' responsibility for acts of non-state occupational forces that '[survive solely] by virtue of [those states'] military, economic, financial and political support'[52] – as well as the Inter-American Court of Human Rights – invoking states' responsibility due to their 'acquiescence'

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47 Kimberley Trapp, *State Responsibility for International Terrorism* (Oxford University Press 2011) 45; Harriet Moynihan, 'Aiding and Assisting: Challenges in Armed Conflict and Counterterrorism' (2016) Chatham House Research Paper <https://www.chathamhouse.org/sites/default/files/publications/research/2016-11-11-aiding-assisting-challenges-armed-conflict-moynihan.pdf> accessed 5 December 2022, para 15; James Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 396; Jackson (n 38) 11.

48 See, e.g., Jackson (n 38) 10-11 and ch 2 more generally.

49 See, e.g., *Bosnian Genocide* (n 22) para 419; Crawford (n 47) 330; Helmut P Aust, *Complicity and the Law of State Responsibility* (Cambridge University Press 2011) ch 5; Antonio Cassese, 'On the Use of Criminal Law Notions in Determining State Responsibility for Genocide' (2007) 5(4) Journal of International Criminal Justice 875, 881; Bernhard Graefrath, 'Complicity in the Law of International Responsibility' (1996) 29 Revue Belge de Droit International 371, 373 (referring to an earlier draft ARSIWA).

50 Lanovoy (n 23) 584.

51 Ibid 582-583; Jackson (n 38) 190-194.

52 *Ilaşcu and Others v Moldova and Russia* App No 48787/99 (ECtHR, 8 July 2004) para 390 reaffirming its findings in *Cyprus v Turkey* App No 25781/94 (ECtHR, 10 May 2001).

and 'involvement' in NSAGs' wrongful acts as well as their general 'cooperation' with these groups.[53] However, employing complicity as rule of attribution risks fragmenting the otherwise unified state responsibility regime because inter-state complicity as laid down in Article 16 ARSIWA constitutes an independent rule of derivative liability. While it may be interpreted as primary or secondary norm,[54] it clearly does not entail a rule of attribution. Hence, construing complicity as rule of attribution solely in regard to relationships between states and NSAGs appears to disarrange the internal coherence of the rules of state responsibility, resulting in two different forms of responsibility – primary or derivative – for the same act depending on the primary actor.

Alternatively, it is conceivable to invoke complicity as an independent rule of responsibility and, hence, to apply Article 16 ARSIWA directly to acts of NSAGs. This approach was suggested by Austria when opposing a European Union decision to allow arms transfers to Syrian NSAGs,[55] as well as by the United Nations Human Rights Committee in a recent General Comment asserting that states 'have obligations under [Article 16 ARSIWA] not to aid or assist activities undertaken by other states *and non-state actors* that violate the right to life'.[56] However, because Article 16 ARSIWA as a rule of derivative responsibility presupposes the breach of an international obligation, it can only apply to instances in which the primary actor has such obligations directly under international law. For NSAG, this only the case

53 *19 Merchants v Colombia* Series C No 109 (IACtHR, 5 July 2004) paras 124, 135, 141; *Ituango Massacres v Colombia* Series C No 148 (IACtHR, 1 July 2006) paras 132-135; *Rochela Massacre v Colombia* Series C No Series 163 (IACtHR, 11 May 2007) para 78.

54 See ILC (n 9) Art 16, para 7.

55 Austrian Ministry of Foreign Affairs, 'SYRIA: Austrian Position on Arms Embargo' (*Financial Times*, 13 May 2021) <https://im.ft-static.com/content/images/1721c482-bcbc-11e2-b344-00144feab7de.pdf> accessed 25 October 2021, 3.

56 UN Human Rights Committee, 'General comment No. 36: Article 6: right to life' (3 September 2019) UN Doc CCPR/C/GC/36, para 63 (emphasis added).

under IHL.[57] It follows that a direct application of Article 16 to NSAGs would – under current international law – be confined to IHL violations and, hence, incorporate a regime-specific rule into a generally applicable norm. However, as *Plakokefalos* rightly cautions: 'The rules on state responsibility are general and residual in their application [and it] is very difficult to address the inadequacies of the primary rules by tweaking the rules of state responsibility.'[58] Indeed, it appears favorable to incorporate complicity through a regime-specific, primary rule instead, which could account more adequately for the particularities and needs of the respective regime.

Hence, the most adequate response to proxy warfare's responsibility gap appears to incorporate the concept of state complicity into primary rules of IHL. In that regard, several authors have suggested invoking a broad interpretation of Common Article 1 of the Geneva Conventions, imposing on states external negative[59] as well as positive obligations[60] 'to ensure respect' for IHL by other states *as well as* private entities.[61] While the exact scopes of these obligations remain debated, they would incorporate a complicity-type rule of responsibility into the law of armed conflict directly, a breach of which would entail an independent internationally wrongful act of a supporting state resulting in an obligation to provide reparation (Articles 31, 34-39 ARSIWA). As will be shown in the remainder of this section, such

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57 For a discussion of human rights obligations of NSAGs, see, e.g., Jean-Marie Henckaerts and Cornelius Wiesener, 'Human Rights Obligations of Non-State Armed Groups: An Assessment Based on Recent Practice' in Ezequiel Heffes, Marcos D. Kotlik, and Manuel J. Ventura (eds), *International Humanitarian Law and Non-State Actors Debates, Law and Practice* (Springer 2020).

58 Plakokefalos (n 35) 588.

59 See also *Nicaragua* (n 19) para 220.

60 See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* (Advisory Opinion) [2004] ICJ Rep 136, para 158.

61 Hathaway and others (n 9) 565; Hannah Tonkin, 'Common Article 1: A Minimum Yardstick for Regulating Private Military and Security Companies' (2009) 22(4) Leiden Journal of International Law 779; ABA Center for Human Rights (n 33) 26-30.

61 See also *Nicaragua* (n 19) para 220.

approach would provide for a regime-specific rule imposing comprehensive obligations on states for the entirety of their support relationship with NSAGs while overcoming the limitations and drawbacks of the aforementioned approaches.

The negative external dimension of Common Article 1 – accepted by the International Court of Justice, the International Committee of the Red Cross, and the vast majority of legal scholars[62] – obliges states to refrain from encouraging and aiding or assisting IHL violations by others, including NSAGs. This obligation, hence, applies before and up to the moment support is provided to NSAGs. If states know, i.e., it is likely and foreseeable,[63] that their support would facilitate IHL violations, Common Article 1 would require them to refrain from providing such support.[64]

Under the positive external obligation of Common Article 1 – if accepted[65] – states would be required to adopt all reasonable measures to stop ongoing and prevent foreseeable IHL violations by others, again including NSAGs.

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62 Ibid; Jean-Marie Henckaerts, 'Article 1: Respect for the Convention' in International Committee of the Red Cross (ed), *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (International Committee of the Red Cross/Cambridge University Press 2020), paras 197-206; Henckaerts and Doswald-Beck (n 40) Rule 144; Michael N. Schmitt and Sean Watts, 'Common Article 1 and the Duty to "Ensure Respect"' (2020) 96 International Law Studies 674, 694; Marten Zwanenburg, 'The "External Element" of the Obligation to Ensure Respect for the Geneva Conventions: A Matter of Treaty Interpretation' (2021) 97 International Law Studies 621; Helmut P Aust, 'Complicity in Violations of International Humanitarian Law' in Heike Krieger (ed) *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region* (Cambridge University Press 2015); Knut Dörmann and Jose Serralvo, 'Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations' (2015) 96(895-896) International Review of the Red Cross 707.

63 *Nicaragua* (n 19) para 256. On the 'fault element' of Common Article 1, see also Marko Milanović, 'Intelligence Sharing in Multinational Military Operations and Complicity under International Law' (2021) 97 International Law Studies 1269, 1324-1328.

64 See Henckaerts (n 62) paras 192-195.

65 For a recent holistic interpretation of Common Article 1, see Zwanenburg (n 62).

Hence, this obligation would apply primarily after support has been provided to NSAGs. While supporting states remain in principle free to choose the measures they deem adequate to ensure respect for IHL,[66] the gravity of the potential wrongful acts (IHL violations) as well their proximity to proxy NSAGs and their status as potential facilitator would require them to adopt particularly robust measures,[67] such as investigating and prosecuting alleged violations and halting or terminating support relationship altogether.[68]

V. Conclusion

This article engaged with proxy warfare in the form of belligerent support relationships between states and NSAGs. It identified that this form of indirect conflict intervention results in a critical responsibility gap that is caused by the requirement of the current rules of state responsibility of state control over acts of NSAGs. It argued that this situation requires a normative response and contended that the concept of state complicity in wrongful acts is best suited to close the identified responsibility gap because it most accurately accounts for the collusive nature of proxy warfare. Amidst three normative propositions, the article suggested to incorporate the concept of complicity into Common Article 1 of the Geneva Conventions as a regime-specific, primary rule of IHL. Under the external negative as well as positive dimension of Common Article 1, states would be under an obligation to neither encourage nor aid or assist and to prevent and stop violations of IHL for the entire duration of their support relationships with NSAGs.

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66 Henckaerts (n 62) paras 197-198.

67 Ibid paras 199-200; *Bosnian Genocide* (n 22) para 430.

68 See also Hathaway and others (n 9) 588-589.

BOOK REVIEWS

NICOLAS LEVRAT, YULIYA KASPIAROVICH, CHRISTINE KADDOUS AND RAMSES A WESSEL (EDS), *THE EU AND ITS MEMBER STATES' JOINT PARTICIPATION IN INTERNATIONAL AGREEMENTS (HART 2022)*

Paulien Van De Velde-Van Rumst*

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I. INTRODUCTION

'Torn between two lovers': as the title of the introductory chapter aptly puts it, the European Union (EU) and its Member States are subject to both EU

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and international law when participating in international agreements.[1] Indeed, EU external relations law finds itself at the intersection of these two fields of law which results in complex legal constellations. These complexities are exactly the topic of the volume on 'The EU and its Member States' Joint Participation in International Agreements' edited by Nicolas Levrat, Yuliya Kaspiarovich, Christine Kaddous, and Ramses A Wessel.[2] The volume collects the output of an online conference on the same topic organised in November 2020 at the Global Studies Institute of the University of Geneva. In the spirit of 'joint participation', each chapter of the volume has been written by a team 'more or less made up of a senior and a more junior scholar', a set-up that this reviewer is appreciative of.[3]

The introductory chapter of the volume, written by all four editors, identifies the two core themes of the book. The volume tackles, on the one hand, competence allocation in the context of mixed agreements and in the EU's international relations more broadly and, on the other hand, the differing international and EU law perspectives on how to integrate the EU with its legal specificities into the international legal order.[4] Accordingly, the edited book has two parts on mixed agreements in the light of EU and international law respectively (Part I and II). Part III of the edited volume subsequently offers insights in the EU and its Member States' parallel participation in international agreements more broadly. Finally, EU international agreements in uncertain times are discussed (Part IV). In essence, the concrete and practical issue that the volume focusses on is the 'joint

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1 Nicolas Levrat, Yuliya Kaspiarovich, Christine Kaddous and Ramses A Wessel, 'Introduction: Torn between Two Lovers: The Application of both EU and International Law to the Participation of the EU and its Member States in International Agreements' in Nicolas Levrat and others (eds), *The EU and Its Member States' Joint Participation in International Agreements* (Hart Publishing 2022) 1–20 <http://www.bloomsburycollections.com/book/the-eu-and-its-member-states-joint-participation-in-international-agreements> accessed 26 February 2022.

2 Levrat and others (n 1).

3 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 12.

4 ibid 2–11.

participation of the EU and its Member States, in any form (mixed agreements, parallel participation, succession)' and 'the need of a converging approach between the two perspectives [of EU and international law]'.[5] It is thus 'restricted to issues related to international treaty participation and implementation'.[6]

The volume contributes to the vast amount of scholarly writing on the relationship between EU and international law[7], and to the extensive literature on mixed agreements[8], by providing a comprehensive update of the state of the art on these issues. The fast-moving international stage pushes EU external relations law scholarship to remain dynamic and to keep pace with rapid geopolitical developments. Inevitably, some individual chapters could already be updated in the light of changing or new (international) circumstances. However, this is simply proof of how much research in this

5 ibid 11.

6 ibid.

7 Such as: Martti Koskenniemi (ed), *International Law Aspects of the European Union* (Kluwer Law International 1998); Malcolm D Evans and Panos Koutrakos (eds), *The International Responsibility of the European Union: European and International Perspectives* (Hart Publishing 2013); Inge Govaere and others (eds), *The European Union in the World: Essays in Honour of Marc Maresceau* (Martinus Nijhoff Publishers 2014); Christine Kaddous (ed), *The European Union in International Organisations and Global Governance: Recent Developments* (Hart Publishing 2015); Andrés Delgado Casteleiro, *The International Responsibility of the European Union: From Competence to Normative Control* (First paperback edition, Cambridge University Press 2018); Inge Govaere and Sacha Garben (eds), *The Interface between EU and International Law: Contemporary Reflections* (Hart 2019).

8 Such as: David O'Keeffe, Henry G Schermers and Rijksuniversiteit te Leiden (eds), *Mixed Agreements* (Kluwer Law and Taxation Publishers 1983); Joni Heliskoski, *Mixed Agreements as a Technique for Organizing the International Relations of the European Community and Its Member States* (Kluwer Law International 2001); Eleftheria Neframi, *Les accords mixtes de la Communauté européenne: aspects communautaires et internationaux* (Bruylant 2007); Christophe Hillion and Panos Koutrakos (eds), *Mixed Agreements Revisited: The EU and Its Member States in the World* (Hart 2010); Niki Aloupi and others, *Les accords internationaux de l'Union européenne* (2019); Merijn Chamon and Inge Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity* (Brill Nijhoff 2020).

field is needed and the edited volume is more than capable of bringing scholars up to speed with the current situation.

The relationship between international and EU law is an important leitmotif and focal point of the volume (Section II). As this review will show, two additional, and related themes can however be identified throughout the individual contributions. The book's chapters contrast the effectiveness of the EU as a single international actor with the autonomy of the Member States (Section III), and with the autonomy of the EU legal order (Section IV). As Allan Rosas writes in the foreword, it is important that the volume dedicates academic attention to these themes as 'the great complexity of the institutional and other aspects of EU and Member States' external relations […] contributes to the formidable problems the EU is facing in trying to assert a role as a global player'.[9]

II. First overarching theme: the Relationship between EU and International Law as regards Joint Participation in International Agreements

Throughout the book's chapters, the tension between the Member States' double status as Member of the EU and subject of international law is explored. Unlike most international organisations, the EU has legal personality in accordance with Article 47 of the Treaty on European Union. This legal personality results in the specificity and autonomy of EU law in an international system organised around states. At the same time, EU law is considered internal law in this international legal system which means that Member States cannot invoke their obligations under EU law to justify their potential violations of international law.[10] As appears from the edited volume, mixed agreements confront Member States the most with the

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9 Allan Rosas, Foreword in Levrat and others (n 1) v.

10 See Article 27 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331; Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 18.

tension caused by this double status.[11] The editors therefore suggest that it might be time for international law to come to terms with the specificity of the EU.[12] How the international order should proceed to do so, is a question that the book leaves rather open. Indeed, in the book's introductory chapter, the editors put forward that 'it is far from certain that the EU will be able to unilaterally impose the recognition of its genuinely original and unique nature on foreign partners'.[13] They do, however, hold that the contributions to the volume 'point to the need of a converging approach between the two perspectives'.[14]

Such a converging approach could make a difference for the EU's international partners. Currently, these partners are confronted with a highly complex reality when entering into relations with the EU. Chapter one, in which Heliskoski and Kübek propose a revisited typology for EU mixed agreements, is illustrative of this reality.[15] Based on a first criterion, the distribution of competences, Heliskoski and Kübek distinguish 'mandatory mixed agreements', 'facultative mixed agreements', and 'false mixed agreements'.[16] A second criterion, the number of parties, allows for a differentiation of mixed agreements into the categories of 'complete mixed agreements', 'incomplete mixed agreements', 'bilateral mixed agreements', and 'multilateral mixed agreements'. In the case of incomplete mixed agreements, the EU is a party to an international agreement alongside only a part of its Members.[17] Chapter eleven, by Molnár and Brière, offers a very specific example of this highly complex reality when the EU and its Member

11 Yuliya Kaspiarovich and Ramses A Wessel, 'Unmixing Mixed Agreements: Challenges and Solutions for Separating the EU and its Member States in Existing International Agreements' in ibid 299.

12 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 19.

13 ibid 1.

14 ibid 11.

15 Joni Heliskoski and Gesa Kübek, 'A Typology of EU Mixed Agreements Revisited' in ibid 23–42.

16 ibid 24–34.

17 ibid 34–41.

States are parties to mixed agreements.[18] As Molnár and Brière explain, both the EU and its Member States will participate in the new Review Mechanism of the UN Smuggling of Migrants Protocol. It is, however, still unclear how the specificities of mixity will be taken into account for the review and for the allocation of responsibility as implementation of the Protocol occurs by both EU and national acts.[19]

An additional layer of complexity is added when a Member State leaves the EU legal order and thus returns to its status as a subject of international law only. Kaddous and Touré tackle this topical issue in Chapter fourteen by addressing the status of the United Kingdom (UK) regarding EU mixed agreements after Brexit.[20] When it comes to bilateral mixed agreements between the EU and partner third countries, Member States are formally parties but they do 'not enjoy the autonomy that is attached to this under international law'. Since the UK was thus only a party to these agreements as an EU Member State, it was necessary to negotiate new agreements with these partner countries.[21] More generally, Kaspiarovich and Wessel cover the question of how to 'unmix' mixed agreements in Chapter fifteen.[22] They argue that it would be beneficial for the EU Institutions to be more precise on the division of competences to facilitate the withdrawal of a Member State and the more active role that national parliaments seem to play recently.[23]

As Vanackère and De Witte show in Chapter six, the tension between EU and international law does not only occur within the context of the EU's

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18 Tamás Molnár and Chloé Brière, 'The New Review Mechanism of the UN Smuggling of Migrants Protocol – Challenges in Measuring the EU's and its Member States' Compliance' in ibid 207–230.

19 ibid 224–225.

20 Christine Kaddous and Habib Badjinri Touré, 'The Status of the United Kingdom Regarding EU Mixed Agreements after Brexit' in ibid 271–286.

21 ibid 275–277 and 279–284.

22 Yuliya Kaspiarovich and Ramses A Wessel, 'Unmixing Mixed Agreements...' in ibid 287–304.

23 ibid 304.

external relations.[24] Using the Single Resolution Fund and the conclusion of MoUs for Financial Assistance as examples, the authors illustrate how the EU's economic policy has turned to international agreements between Member States but outside the EU's legal framework.[25] Consequently, complexities similar to those in the case of international mixed agreements arise, for instance, in relation to the allocation of responsibility.[26]

III. Second overarching theme: the Effectiveness of the EU as a Single International Actor vs. the Autonomy of the Member States

Many contributions of the edited volume appear to contrast the EU's effectiveness as a single international actor with the autonomous external action of the Member States. Although Member States are generally protective of their own foreign policy, EU membership implies certain limitations to autonomous external action. For instance, in the second chapter, Kuisma and Larik offer a refreshing view on the much-analysed ERTA doctrine.[27] They argue that the doctrine is essentially meant to safeguard the EU's internal legislative work, which includes the Member States in the Council. Consequently, in its case-law, the Court of Justice (CJEU) reconciles the principle of conferral with the furthering of EU objectives.[28] The third chapter, by Öberg and Klamert, builds further on the idea of pre-empting autonomous international action by the Member States.[29] When acting internationally, Member States are required to respect EU law 'as it is but also to foresee or anticipate its future development' and

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24 Flore Vanackère and Bruno De Witte, 'EMU "Mixity" - Overlap Between EU and Member States Action in Economic Governance' in ibid 117–130.

25 ibid 118–126.

26 ibid 126–129.

27 Mirka Kuisma and Joris Larik, 'The Continuing Contestation of ERTA - Conferral, Effectiveness and the Member States' Participation in Mixed Agreements' in ibid 43–58.

28 ibid 44, 46 and 56–58.

29 Marja-Liisa Öberg and Marcus Klamert, 'Foreseeability and Anticipation as Constraints on Member State Action under Mixed Agreements' in ibid 59–76.

to abstain from acting internationally at least when there is a concerted strategy in the Council.[30]

Even when autonomous external action of the Member States falls within the aforementioned limitations, such action can at times interfere with the EU's effectiveness as a single international actor. Several contributions in the edited volume show that the competence allocation between the EU and its Member States has an important impact on the EU's reliability as an autonomous international actor.[31] For example, in Chapter four, Damestoy and Levrat discuss the mixed nature of the EU-Canada Free Trade Agreement and how the Walloon veto showed that involving national parliaments only at the very end of the conclusion procedure endangers the EU's reputation as a reliable trading partner.[32] Therefore, they propose to organise these parliaments' involvement at an earlier stage by making use of the existing Early-Warning Procedure for internal legislative work.[33] Furthermore, as Chamon and Cremona point out in the fifth chapter, the EU has to accept its joint representation with the Member States in a multilateral forum covering issues of shared competence in the specific set-up of the *AMP Antarctique* case.[34] Indeed, mixed representation in the Commission of the Canberra Convention (for the establishment of Marine Protected Areas) is obligatory following the CJEU's judgment.[35]

In these contexts of joint participation, it is difficult for the EU to appear as a single actor. This is illustrated in the edited volume's Chapter ten in which Koutrakos and Soņeca describe the specific example of the Istanbul Convention on preventing and combating violence against women and

30 ibid 59 and 74–75.

31 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' in ibid 2–5.

32 Manon Damestoy and Nicolas Levrat, 'The Mixed Nature of the EU-Canada FTA - Between Competences Distribution and Democratic Legitimacy' in ibid 77–96.

33 ibid 93–95.

34 Merijn Chamon and Marise Cremona, 'The Representation of the EU and its Member States in Multilateral Fora - The AMP Antarctique Effect' in ibid 97–114.

35 ibid 102–107.

domestic violence.[36] The conclusion of the Istanbul Convention was the object of an Opinion procedure before the CJEU (*Opinion 1/19*) and it is characterised by disagreements amongst the Member States as well as the EU Institutions. One of these disagreements concerns the fundamentally important question of the Council's margin of discretion to decide whether to exercise EU shared competence externally.[37] Schaefer and Odermatt argue in Chapter seven that, linguistically, the use of the term 'EU Party' can accommodate shifts in competences and show unity 'to create the perception of a single party'.[38] They conducted the impressive exercise of analysing a large group of mixed trade agreements and concluded that whilst the Member States are fully-fledged parties to these agreements, the use of the term 'EU Party' allows the EU 'to maintain the bilateral character of the mixed agreements'.[39]

Finally, it is also important to consider the potential impact of autonomous actions on behalf of the Member States on the EU's credibility as a defender of good global governance. In this regard, Fahey and Brsakoska Bazerkoska fill a gap in the literature by examining the social and legal relevance of the principle of sincere cooperation in the context of China's Belt and Road Initiative in Chapter thirteen.[40] They argue that the EU's Member States 'increasingly disrespect the duty of cooperation within trade and at its margins' leading to an erosion of the legal principle.[41]

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36 Panos Koutrakos and Viktorija Soņeca, 'The Future of the Istanbul Convention before the CJEU' in ibid 189–206.

37 ibid 195–200.

38 Sabrina Schaefer and Jed Odermatt, 'Nomen est Omen? The Relevance of "EU Party" in International Law' in ibid 131–150; Sabrina Schaefer and Jed Odermatt, 'Nomen est Omen? ...' in ibid 132.

39 ibid 149-150.

40 Elaine Fahey and Julija Brsakoska Bazerkoska, 'Social and Legal Relevance of Sincere Cooperation in EU External Relations Law in an Era of Expanding Trade - The Belt and Road Initiative in Context' in Levrat and others (n 1) 253–270.

41 ibid 253–256.

IV. Third overarching theme: the Effectiveness of the EU as a Single International Actor vs. the Autonomy of the EU Legal Order

In the introductory chapter, the editors write that they 'are aware of and understand the reasons for the CJEU to stress the importance of the EU's autonomy from international law'.[42] Consequently, they do not 'pretend[…] to be able to align the international and EU law horizons'.[43] In the book, this strain between the EU's effectiveness as a single international actor and the necessity to safeguard the autonomy of the EU legal order and its specific characteristics comes forward the most in chapters eight and twelve.

In Chapter eight, Soloch and Mbengue examine whether the EU's participation in international dispute settlement mechanisms matters for the conformity of these mechanisms with EU law.[44] The CJEU's jurisprudence on Investor-State Dispute Settlement lowered the predictability for stakeholders in this regard: the conformity of an international dispute settlement mechanism with EU law is now dependent on its actual impact on the EU's legal system rather than on the formal criterion of the EU's participation.[45] As regards the EU's accession to the European Convention on Human Rights (ECHR), the principle of autonomy is precisely the reason it is burdensome for the EU to accede and become an ECHR party together with its Member States. Chapter twelve, written by Pergantis and Johansen, consists of a fresh take on the EU's accession to the ECHR.[46] The authors explain that 'a more elaborate set of internal EU law rules on responsibility

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42 Nicolas Levrat et al., 'Introduction: Torn between Two Lovers...' ibid 11.

43 ibid.

44 Bartosz Soloch and Makane Moïse Mbengue, 'Conformity of International Dispute Settlement Mechanisms with EU Law - Does the EU's Participation Really Matter?' in ibid 151–170.

45 ibid 162–170.

46 Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR and the Responsibility Question - Between a Rock and a Hard Place' in ibid 231–250.

allocation' in the context of the ECHR should be adopted to safeguard the EU's autonomous legal order.[47]

When it comes to establishing such internal rules on responsibility allocation, Chapter nine by Delgado Casteleiro and Contartese offers valuable insights.[48] These authors argue that 'the EU [should] bear responsibility internationally only to the extent that the CJEU effectively controls how Member States participate [*stricto senso*] and "participate" [*lato sensu*] in international agreements concluded by the EU'.[49] As Pergantis and Johansen point out, fully internalising the issue of the allocation of responsibility could indeed offer a solution to ensure respect for the principle of autonomy. It is nevertheless not a perfect one: relying on internal rules can undermine individuals' right to an effective remedy as these rules form additional obstacles and could lead to a 'blame game' between the EU and its Member States.[50] This reviewer considers that this is crucial to keep in mind because the EU's autonomy and effectiveness at the international stage should not be at the expense of EU or third country citizens.

V. Concluding Remarks and Avenues for Further Research

In today's world, it is considered of exceptional importance that the EU and its Member States effectively jointly participate at the international stage. It is the role of (legal) scholarship to constructively reflect on how to continue organising and improving this participation to ensure the EU's relevance as an international legal actor. The edited volume should be applauded for the manner in which it addresses a large variety of issues and complexities pertaining to mixed agreements and the relationship between the

47 ibid 243–246.

48 Andrés Delgado Casteleiro and Cristina Contartese, 'International Responsibility of the EU and/or its Member States in International Agreements – From Joint Participation to "Participation"' in ibid 171–186.

49 ibid 180–186.

50 Vassilis Pergantis and Stian Øby Johansen, 'The EU Accession to the ECHR...' in ibid 247–249.

international and the EU legal order. Since the book is a volume with many different individual contributions, a fully coherent and unifying view on how to address these issues is lacking. Although this mainly goes to show how intricate these issues are, this book review sought to contribute to the debate by juxtaposing - on the basis of the volume's chapters - the EU's effectiveness as a single international actor with the autonomy of the Member States on the one hand, and the autonomy of the EU legal order on the other hand.

In addition, this reviewer regrets the rather limited insights into the concrete joint implementation and 'day-to-day management' of international agreements. This is a major gap in EU external relations law scholarship more generally and, as Allan Rosas states, 'it is to be hoped that scholars do not limit their focus to legal rules and official documents while turning a blind eye to the actual practice of Union and Member States' institutions and the "reality on the ground"'.[51] Be that as it may, the book covers a large number of observations on more overarching controversies and it presents an array of constructive suggestions on how to continue organising and improving the joint participation of the EU and its Member States in international agreements.

Finally, the volume offers considerable avenues for further research in EU external relations law. It became clear from several chapters that the ambit of certain legal principles, such as the Member States' duty to anticipate and to sincerely cooperate, is not yet fixed. The proliferation of soft law instruments in the EU's international relations presents a challenge in this regard. Moreover, the recent *Opinion 1/19* on the Istanbul Convention gives more insight into the Council's margin of discretion to decide whether to exercise EU shared competence externally. As regards the EU's international responsibility, Hoffmeister's concept of 'normative control' could be further explored and the parallel with the EMU could be delved into when it comes

[51] Allan Rosas, Foreword in ibid v.

to the concrete 'day-to-day management' of mixed agreements.[52] From the perspective of international law, it could be considered further how the international legal system can come to terms with the specificity of the EU while safeguarding citizens' legal remedies. In short, the edited volume offers a stimulating read and considerable food for further thoughts on how to organise the EU's joint participation in international agreements.

[52] Frank Hoffmeister, 'Litigating against the European Union and Its Member States - Who Responds under the ILC's Draft Articles on International Responsibility of International Organizations?' (2010) 21 European Journal of International Law 723.