

A Love Triangle? Mapping Interactions between International Human Rights Institutions, Meta and Its Oversight Board

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Abstract

Three years ago, the Oversight Board commenced its work 'to make principled, independent, and binding decisions ... based on respect for freedom of expression and human rights' for Meta's platforms Facebook and Instagram. From the very beginning, the vocabulary employed to talk about the Oversight Board was laden with court metaphors. Wary that these metaphors have stirred legal analysis into a specific direction, we move away from trying to fit the Oversight Board within established institutional categories. Instead, we shift the focus from institutions to interactions – that is, to the 'in-between'. Rather than continuing to debate what the Oversight Board is, we focus on what the Oversight Board does. Our study maps different stages and modes of interaction between Meta, the Oversight Board and international human rights institutions. We show how different actors carefully craft entry points for constructing their respective semantic authority and what kind of strategies they pursue to contest semantic authority of others. Thereby, we uncover the first traces of emerging conversations between Meta, the Oversight Board and international human rights institutions and highlight who is included and excluded and who refuses to participate or to respond. With our intervention, we intend to offer empirically grounded insights into the dynamics at play and paint a more detailed picture of the various roles that novel actors, such as Meta and the Oversight Board, are beginning to assume in the protection of international human rights online.

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1 Introduction

How should and can human rights be protected online? Despite ongoing debates, this question remains a reliable source of perplexity and legal quandaries.¹ With a growing consciousness of the inadequacies of the statement that ‘the same rights that people have offline must also be protected online’,² a shift of scholarly interest from law to institutions has occurred. In the focus of this new interest are multinational corporations, which operate social media platforms and possess significant power to shape individual and collective behaviour³ in and beyond online communication spaces. However, and as a meta-analysis of the scholarly debate reveals, there is a tendency of scholars to resort to metaphors⁴ or analogies⁵ when searching for suitable descriptions for these actors. The framing of Meta’s Oversight Board (hereinafter, the

¹ Land, ‘Toward an International Law of the Internet’, 54 *Harvard International Law Journal* (2013) 393, at 442ff; Aswad, ‘The Future of Freedom of Expression Online’, 17 *Duke Law and Technology Review* (2018) 26; Benesch, ‘But Facebook’s Not a Country: How to Interpret Human Rights Law for Social Media Companies’, 39 *Yale Journal on Regulation Online Bulletin* (2020) 86; Douek, ‘The Limits of International Law in Content Moderation’, 6 *University of California Irvine Journal of International, Transnational, and Comparative Law (UCIJITCL)* (2021) 37; Sander, ‘Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human Rights-Based Approach to Content Moderation’, 43 *Fordham International Law Journal* (2020) 989, at 971; Sander, ‘Democratic Disruption in the Age of Social Media: Between Marketized and Structural Conceptions of Human Rights Law’, 32 *European Journal of International Law (EJIL)* (2021) 159; Gordon, Mignot-Mahdavi and Van Den Meerssche, ‘The Critical Subject and the Subject of Critique in International Law and Technology’, 117 *American Journal of International Law Unbound (AJILB)* (2023) 134; Endres, Hedler and Wodajo, ‘Bias in Social Media Content Management: What Do Human Rights Have to Do with It?’, 117 *AJILB* (2023) 139; Wodajo, ‘The User State: An Alternative Reading of the State Role and Duty in the Age of Platformized Harm’, 31 *International Journal of Law and Information Technology (IJLIT)* (2023) 1.

² Established by the Human Rights Council (HRC) in 2012. Since then reiterated in HRC Res. 20/8, 16 July 2012, at 2, para. 1; HRC Res. 26/13, 14 July 2014, at 2, para. 1; HRC Res. 38/7, 5 July 2018, at 3, para. 1; see also GA Res. 69/166, 15 February 2015, para. 3; GA Res. 71/199, 19 December 2016, para. 3; GA Res. 73/179, 17 December 2018, para. 3. Eloquently fleshed out as a ‘normative equivalency paradigm’ by Dror-Shpoliansky and Shany, ‘It’s the End of the (Offline) World as We Know It: From Human Rights to Digital Human Rights – A Proposed Typology’, 32 *EJIL* (2021) 1249.

³ O. Schwarz, *Sociological Theory for Digital Society: The Codes That Bind Us Together* (2021).

⁴ Often embedded in theoretical approaches under the label of ‘digital constitutionalism’. See E. Celeste, *Digital Constitutionalism: Mapping the Constitutional Response to Digital Technology’s Challenges* (2018); Suzor, ‘Digital Constitutionalism: Using the Rule of Law to Evaluate the Legitimacy of Governance by Platforms’, 4(3) *Social Media + Society* (2018) 1; De Gregorio and Radu, ‘Digital Constitutionalism in the New Era of Internet Governance’, 30 *IJLIT* (2022) 68. For recent critiques, see Costello, ‘Faux Ami? Interrogating the Normative Coherence of “Digital Constitutionalism”’, 12(2) *Global Constitutionalism (GC)* (2023) 1; Gonçalves Pereira and C. Iglesias Keller, ‘Constitucionalismo Digital: Contradições de Um Conceito Impreciso’, 13 *Revista Direito e Práxis* (2022) 2648.

⁵ On the blurriness of distinctions between similes, analogies and metaphors, see Gentner *et al.*, ‘Metaphor Is Like Analogy’, in D. Gentner, K.J. Holyoak and B.N. Kokinov (eds), *The Analogical Mind: Perspectives from Cognitive Science* (2001) 199. For discussions of (dis)similarities with (nation) states, see Chander, ‘Facebookistan’, 90 *North Carolina Law Review* (2012) 1807; S. Deva, *Facebook as the New Sovereign? International Law’s Continued Struggle to Regulating Transnational Corporate Human Rights Abuses* (2022), available at www.lcil.cam.ac.uk/press/events/2022/03/lcil-friday-lecture-facebook-new-sovereign-international-laws-continued-struggle-regulating.

Oversight Board) as a ‘court’⁶ is one prominent case in point and will be the focus of our ensuing inquiry.

Curiously, the critical engagement with the metaphor remains rare,⁷ despite the fact that it was Meta’s chief executive officer, Mark Zuckerberg, himself who introduced the ‘Supreme Court’ metaphor.⁸ Ever since, it has been reproduced by media coverage⁹ and has influenced scholarship on the Oversight Board. While Kate Klonick proposed to use the court metaphor ‘to contextualize and understand’ the Oversight Board,¹⁰ Evelyn Douek dubbed it ‘one of the most ambitious constitutional projects of the modern era’,¹¹ comparing its role to courts in authoritarian regimes.¹² Rishi Gulati, by presupposing the ‘quasi-judicial’ nature of the Oversight Board, could not escape the framing that results in characterizing it as a ‘special type of “transnational hybrid adjudication”’,¹³ whereas Andreas Kulick’s insightful inquiry is permeated by a sense of disappointment that the Oversight Board does not live up to ‘the initial idea to create a “Facebook Supreme Court”’.¹⁴ In fact, court metaphor-inspired vocabulary has become so pervasive that even those leery of it cannot quite disentangle themselves from it.¹⁵

This brief summary shows how metaphors determine what may become the *problematique* of interest to us – the question we will focus on in our research.¹⁶ While metaphors are able to bring about change by inspiring our imagination, they can also

⁶ Gorwa, ‘What Is Platform Governance?’, 22 *Information, Communication and Society* (2019) 854; J. Cowsls *et al.*, ‘Constitutional Metaphors: Facebook’s “Supreme Court” and the Legitimation of Platform Governance’, *New Media and Society* (2022) 1.

⁷ R. Griffin, ‘Metaphors Matter: Why We Shouldn’t Call the Facebook Oversight Board a Court’, *Hertie School* (2021), available at www.hertie-school.org/en/news/detail/content/metaphors-matter-why-we-shouldn-t-call-the-facebook-oversight-board-a-court.

⁸ E. Klein, ‘Mark Zuckerberg on Facebook’s Hardest Year, and What Comes Next’, *Vox* (2018), available at www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge.

⁹ Cowsls *et al.* *supra* note 6.

¹⁰ Klonick, ‘The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression’, 129 *Yale Law Journal* (2020) 2232, at 2476.

¹¹ Douek, ‘Facebook’s “Oversight Board”: Move Fast with Stable Infrastructure and Humility’, 21 *North Carolina Journal of Law and Technology* (2019) 1, at 2.

¹² *Ibid.*, at 9.

¹³ Gulati, ‘Meta’s Oversight Board and Transnational Hybrid Adjudication: What Consequences for International Law?’, 24 *German Law Journal* (2023) 473, at 475ff.

¹⁴ Kulick, ‘Meta’s Oversight Board and Beyond: Corporations as Interpreters and Adjudicators of International Human Rights’, 22 *Law and Practice of International Courts and Tribunals* (2022) 161, at 180.

¹⁵ Criticizing the metaphor, but retaining comparisons to courts and referring to Board members as ‘judges’, see Schultz, ‘Six Problems with Facebook’s Oversight Board: Not Enough Contract Law, Too Much Human Rights’, in J. Bayer *et al.* (eds), *Perspectives on Platform Regulation: Concepts and Models of Social Media Governance* (2021) 145, at 161. Proposing instead ‘constitutional advice giving’, see Miloš and Pelić, ‘Constitutional Reasoning There and Back Again: The Facebook Oversight Board as a Source of Transnational Constitutional Advice’, in J. de Poorter *et al.* (eds), *European Yearbook of Constitutional Law* (2021) 197, at 205–206. Arguing in favour of framing the Oversight Board as a human rights tribunal, see Helfer and Land, ‘The Facebook Oversight Board’s Human Rights Future’, 44(6) *Cardozo Law Review* (2023) 5.

¹⁶ Johns, ‘Theorizing the Corporation in International Law’, in A. Orford and F. Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (2016) 645.

create path dependencies for our research.¹⁷ In that light, our intervention can be read as a plea for complementing current research on the Oversight Board with an alternative perspective. In short, instead of debating what the Oversight Board is, we are going to focus on describing what the Oversight Board does. Bringing the creative potential of metaphors into conversation with a more empirically grounded descriptive approach, on the one hand, allows us to question the actual epistemological gain, explanatory potential and theoretical insights associated with the leap to court metaphors and, on the other hand, to practise reflexivity and to take responsibility for the objects we study.¹⁸

To be sure, the description we offer here is only one possible way to describe the Oversight Board's interactions with other institutions among others. For the purposes of the ensuing inquiry, we trace and analyse the interactions of Meta and the Oversight Board with a variety of international institutions involved in international (and regional) human rights protection. We refer to them as international human rights institutions (IHRIs). This umbrella term includes any kind of intergovernmental human rights institutions – in particular, treaty bodies such as committees as well as charter-based institutions such as the Human Rights Council and its subsidiary bodies as well as (regional) human rights courts, while excluding non-governmental organizations (NGOs). Although we acknowledge that NGOs and transnational advocacy networks can influence the development and implementation of international human rights law (IHRL),¹⁹ our focus is justified by our key interest in tracing the Oversight Board's role *vis-à-vis* those institutions that states have tasked with the interpretation and application of IHRL. Our approach is rooted in the conviction that interactions between international institutions are not merely confirmations of some preconceived and predetermined institutional role but also the very construction and continuous reconstruction of these roles.²⁰ In this regard, our approach resonates with Chinmayi Arun's interest in situating the Oversight Board within a broader landscape of institutions,²¹ while deepening the scope of inquiry and focusing on the evolving complexity of interactions as practices of referencing and addressing each other and publicly available documents.

First, we will explain how shifting the perspective to the in-between allows us to concentrate on how semantic authority is constructed and contested. Second, we will engage in a detailed mapping of institutional interactions between the Oversight

¹⁷ M.A. Arbib and M.B. Hesse, *The Construction of Reality* (1986), at 157.

¹⁸ Dao, 'Resisting the Inevitable: Human Rights and the Data Society', 11 *London Review of International Law* (2023) 1, at 27ff.

¹⁹ Murdie and Polizzi, 'Human Rights and Transnational Advocacy Networks', in J.N. Victor *et al.* (eds), *The Oxford Handbook of Political Networks* (2016) 715; N. Reiners, *Transnational Lawmaking Coalitions Human Rights* (2021).

²⁰ Brunnée and Toope, 'Constructivism and International Law', in J.L. Dunoff and M.A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations* (2012) 119.

²¹ Arun, 'Facebook's Faces', 135 *Harvard Law Review* (HLR) (2022) 236, at 263. For interplay and tension between the Oversight Board's human-rights-based approach and the companies' 'probabilistic' content moderation system, see O'Kane, 'Meta's Private Speech Governance and the Role of the Oversight Board: Lessons from the Board's First Decisions', 25 *Stanford Technology Law Review* (2022) 167.

Board, Meta and IHRIs. Finally, we will conclude by pointing to potentially promising and less promising strategies for improving the protection of human rights online.

2 Moving from Metaphors to Tracing Semantic Authority *in-between* Institutions

For the moment, it may seem like moving away from court metaphors leaves us without a frame of reference. This sense of disorientation can be used productively, reminding us that, amidst the growing diversity and complexity of the global institutional landscape, to look at one single institution in isolation is a cul-de-sac as it neglects the relationality of institutions and their normativities. To put it simply, in order to understand with whom and how the Oversight Board interacts, a rigid frame of reference is neither necessary nor immediately helpful. By revisiting a thought experiment undertaken by Hannah Arendt, we illustrate the analytical advantages of concentrating on the in-between and, further, how this perspective can be productively used when tracing the way in which 'semantic authority' travels between different institutions.²²

In her seminal work *The Human Condition*, when trying to give a better understanding of how constitutions work, Arendt afforded the image of a table as the material thing separating, and at the same time relating, individuals involved in this endeavour: 'To live together in the world means essentially that a world of things is between those who have it in common, as a table is located between those who sit around it; the world, like every in-between, relates and separates men at the same time.'²³ Jeremy Waldron, in his book *Political Political Theory*, takes up this thread but detaches Arendt's account of the 'in-between' from her focus on physical objects. He carries her thoughts forward and explains that 'the in-between is not physical but normative: it consists of rules, not barriers; practices and commitments, impediments'.²⁴ Waldron's progressive interpretation of Arendt's 'in-between' carries three valuable and immediately practical insights for our analysis. The first one draws our attention to the importance of institutions for any kind of normative conceptualization of governance and authority. The second one highlights the need to turn away from institutional ready-mades and allows us instead to appreciate institutions and their situatedness in a broader international institutional landscape. Moreover, it reminds us that institutions come to life as a co-production of inter-institutional interactions that are influenced by different normative self-understandings of involved institutions. The third insight brings to the fore the shared sphere(s) of authority that international law

²² Venzke, 'Semantic Authority, Legal Change and the Dynamics of International Law', in P. Capps and H. Palmer Olsen (eds), *Legal Authority beyond the State* (2018) 104, referring to Venzke, 'Between Power and Persuasion: On International Institutions' Authority in Making Law', 4 *Transnational Legal Theory* (2013) 354.

²³ H. Arendt, *The Human Condition* (2nd edn, 1998), at 52.

²⁴ J. Waldron, 1. *Political Political Theory* (2016), at 294, referring to Arendt, *supra* note 23, at 52.

and, in particular, IHRL occupy.²⁵ Thus, it draws our attention to the different ways in which these institutions construct and reconstruct themselves and their authority through interacting with each other. It allows us to appreciate that ‘norms and actors are co-constitutive’.²⁶

For our investigation into the interactions between Meta, the Oversight Board and IHRIs, we built on Ingo Venzke’s account of international law as the product of communicative processes in which different actors with varying degrees of semantic authority struggle for law. Venzke has employed this concept to understand different examples for examining law-making by interpretation by actors who enjoy no formal law-making authority in international law.²⁷ Focusing on ‘semantic authority’ as an analytical lens for once makes it possible to examine how the dialogue between different institutions was initiated and continues to evolve,²⁸ and thereby enables us to account for the dynamic momentum that these practices introduce.²⁹

At the same time, semantic authority may be justified or unjustified and ‘does not by itself identify legitimacy problems or offer their solution’.³⁰ Considering these features, using semantic authority as an analytical lens, allows for careful investigation but, at the same time, does not immediately call for strong normative claims regarding legitimacy. In our view, any such claims would be necessarily premature considering the relatively short time frame and the dynamics of the current situation. Understanding authority as one institution’s capacity to find recognition for its claims about human rights by establishing reference points for human rights discourse that other actors can hardly escape³¹ enables us to describe in detail how the mobilization of IHRL across different spheres of authority occurs.³² Importantly, the ostensible ‘wrapping’ of the Oversight Board in a judicial cloak³³ as a formal, symbol-laden form of decision-making³⁴ can still be taken into consideration in this line of analysis. Consequently, (self-)descriptions that speak to the normative self-understanding may

²⁵ Birkenkötter, ‘International Law as a Common Language across Spheres of Authority?’, 9 *GC* (2020) 318, at 326 (framing human rights as potential conflict management tools, with further references in n. 9).

²⁶ I. Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (2012), at 45, with reference to A. Wendt, *Social Theory of International Politics* (2000).

²⁷ *Ibid.* Ingo Venzke focuses specifically on the United Nations (UN) High Commissioner on Refugees (at 72–134) and trade law dispute settlement mechanisms within the General Agreement on Tariffs and Trade 1994, 55 UNTS 194, and World Trade Organization (at 135–195).

²⁸ Venzke, *supra* note 22 (who defines semantic authority as the ‘capacity to find recognition for their claims about international law and to establish reference points for legal discourse that other actors can hardly escape’).

²⁹ *Ibid.*, at 105.

³⁰ Venzke, *supra* note 26, at 64.

³¹ Venzke, *supra* note 22, at 107.

³² Birkenkötter, *supra* note 25 (referring to international law as a common language across spheres of authority).

³³ E. Douek and T. Swell, ‘Meta’s Oversight Board Often Turns Its Homework in Late – Does It Matter?’, *Lawfare Blog*, 15 July 2022, available at www.lawfareblog.com/metass-oversight-board-often-turns-its-homework-late-does-it-matter.

³⁴ M. Goldmann, *Internationale öffentliche Gewalt: Handlungsformen internationaler Institutionen im Zeitalter der Globalisierung* (2015), at 352.

be one aspect – yet not the single or dominant one – to consider when looking at how the Oversight Board’s semantic authority is constructed. In this way, the analytical lens that we propose is precise and, at the same time, flexible and inclusive as it allows for a broader spectrum of features to be considered and a dynamic evolution to be appreciated.

3 Mapping Interactions between Meta, the Oversight Board and IHRIs

With our mapping, we follow in the footsteps of Anne Orford.³⁵ We turn away from efforts that try to find the essence of what the Oversight Board ‘really’ is and, with a Foucauldian turn, instead explore how it operates and, at the same time, examine its ‘consciousness of itself’.³⁶ For the purpose of this article, we trace and contextualize different strategies of confirming, and contesting, semantic authority between Meta, the Oversight Board and IHRIs. Importantly, our interest goes beyond determining what the meaning of the law is, whose interpretation of the law sticks and whose semantic authority prevails over time. What we seek to make visible is the variety of strategies that different IHRIs, as well as Meta and the Oversight Board, pursue to establish, maintain and solidify their semantic authority and how they built their capacity to establish reference points that other institutions can hardly escape.³⁷ Despite painting a detailed picture of what these strategies look like, we will also be able to identify possibilities and trajectories for guidance on the protection of human rights online.

Our investigation chronologically traces five different stages of interactions between Meta, the Oversight Board and IHRIs, starting from 2018 up to 1 November 2023. We first look at when and how Meta started to use human rights vocabulary, and then we continue to examine the references of IHRIs to the platform’s rule setting and, in turn, of the Oversight Board’s governing documents to IHRIs that predate the Oversight Board’s first decisions. Subsequently, we look at how IHRIs and the Oversight Board have referred to one another since the Oversight Board started publishing decisions. The fourth section traces and lays out the different ways of engagement between the Oversight Board, Meta and different IHRIs. The final section shifts the focus and explains who is not taking part in the conversation. Before starting with our inquiry, one point of clarification is in order. For the purposes of the ensuing analysis, we refer to Meta’s and the Oversight Board’s documents with the names that these institutions have ascribed to them. This choice can be justified by practical reasons of referencing

³⁵ Orford, ‘In Praise of Description’, 25(3) *Leiden Journal of International Law* (2012) 609. Concentrating on vocabulary and semantic authority offers a specific kind of image via description that could surely look different if one were to adapt a different analytical lens. On there being no ‘innocent description’, see Dao, *supra* note 18, at 6, with further references.

³⁶ *Ibid.*, referring to M. Foucault, *Birth of Biopolitics* (1979), at 612, 613, n. 16.

³⁷ Venzke, *supra* note 22, at 107.

but should not be misconstrued as normative statements about how these documents should be understood.

A Meta's Use of Human Rights Vocabulary and Commitments

By becoming an industry member of the 'Global Network Initiative', Meta (then Facebook) voluntarily committed to the UN Guiding Principles on Business and Human Rights (UNGPs) as early as 2013.³⁸ In its initial commitment, Meta focused heavily on the companies' processing of government requests, leaving little impact on the companies' broader communicative strategies or business practices relating to its own rule setting and enforcement.³⁹ Since the inception of the Oversight Board in 2020, Meta has increased the stroke rate and the volume of its public commitments to IHRL. Next to putting forward an individual commitment in the form of its Human Rights Policy in March 2021,⁴⁰ it joined the UN Global Compact later that year,⁴¹ issued its first annual compliance report related to 'human rights' in 2022⁴² and provided input to the Global Digital Compact initiative in April 2023.⁴³ Across these self-commitments, the relationship between obligations arising from human rights and (national) fundamental rights is often left unclear.⁴⁴ The commitments, in turn, have enabled the Oversight Board to frame its own strong focus on IHRL, which predates these latter commitments, as something Meta itself has asked for.⁴⁵

³⁸ 'Facebook Joins the Global Network Initiative', *Global Network Initiative*, 22 May 2013, available at <https://globalnetworkinitiative.org/facebook-joins-the-global-network-initiative/>; Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework (UNGPs), Doc. A/HRC/17/31, 21 March 2011.

³⁹ Jørgensen, 'Rights Talk: In the Kingdom of Online Giants', in R.E. Jørgensen (ed.), *Human Rights in the Age of Platforms* (2019) 163, at 168ff.

⁴⁰ 'Corporate Human Rights Policy', *Meta*, available at <https://about.fb.com/wp-content/uploads/2022/10/Meta-Corporate-Human-Rights-Policy.pdf>; M. Sissons, 'Our Commitment to Human Rights', *Meta*, 16 March 2021, available at <https://about.fb.com/news/2021/03/our-commitment-to-human-rights/>.

⁴¹ 'UN Global Compact', *Meta Platforms*, available at <https://unglobalcompact.org/what-is-gc/participants/148173>.

⁴² 'Meta's Annual Human Rights Reports', *Meta*, <https://about.fb.com/news/2022/07/first-annual-human-rights-report/>.

⁴³ 'Meta's Submission of Inputs to the Global Digital Compact (GDC)', *Meta*, April 2023, available at www.un.org/techenvoy/sites/www.un.org.techenvoy/files/GDC-submission_Meta.pdf (stating that "[i]t is well acknowledged that no entity or stakeholder group can provide or sustain the internet, digitalization, and information society on their own. Work is ongoing to define the respective roles of governments, industry, and civil society" [at 8]).

⁴⁴ *Inter alia*, Meta's Corporate Human Rights Policy also prides itself on publishing reports on national civil rights audits for the USA, whereas these reports conveniently bypass the differences between 'the principles of free expression represented by the U.S. Constitution and international human rights treaties'. 'Progress on Civil Rights Audit Commitments', *Meta*, November 2021, at 14, 54, available at <https://about.fb.com/wp-content/uploads/2021/11/Metas-Progress-on-Civil-Rights-Audit-Commitments.pdf>.

⁴⁵ Oversight Board, PAO-2021-01 (Sharing private residential information), 8 February 2022, at 6, para. 18, available at www.oversightboard.com/decision/PAO-2021-01/.

B Who Started It? References and Interactions Predating the Oversight Board's First Decisions

It is worth noting that the debate on the potential and limits of IHRL to improve Internet governance, generally,⁴⁶ and content governance, more specifically,⁴⁷ is not novel but predates the Oversight Board. However, the Oversight Board engages with and publishes detailed documents on what and how it is interpreting and applying IHRL, which allows us to conduct a much more detailed investigation.

1 First Steps: David Kaye's Report to the Human Rights Council

Guided by growing sensibility for the challenges human rights face online, IHRIs had voiced calls for an effective protection of human rights online years before the development of the Oversight Board was even announced.⁴⁸ Already in 2018, before the Oversight Board was formally set up and had delivered its first decisions, David Kaye, then United Nations Special Rapporteur (UNSR) on the promotion and protection of the right to freedom of opinion and expression, referred in his report to the Human Rights Council (HRC) to platform companies as 'enigmatic regulators, establishing a kind of "platform law" in which clarity, consistency, accountability, and remedy are elusive'.⁴⁹ In the same report, Kaye called on platform companies to implement a 'human rights by default' approach, building on the language of the UNGPs.⁵⁰ Further, he demanded that any restrictions to the freedom of expression should comply with the three-step test under Article 19(3) of the International Covenant on Civil and Political Rights (ICCPR) as 'the same standard of legality, necessity and legitimacy that bind State regulation of expression'.⁵¹

He proposed to subject company rules to a legality test, including the test of clarity and specificity as well as predictability.⁵² In the 'Recommendations' part of his report, he specifically addressed information and communication technology (ICT) companies.⁵³ After requesting companies to 'recognize that the authoritative global

⁴⁶ For the International Corporation for Assigned Names and Numbers (ICANN), see Zalnieriute, 'From Human Rights Aspirations to Enforceable Obligations by Non-State Actors in the Digital Age: The Case of Internet Governance and ICANN', 21 *Yale Journal of Law and Technology* (2019) 278; Zalnieriute, 'Reinvigorating Human Rights in Internet Governance: The UDRP Procedure through the Lens of International Human Rights Principles', 43 *Columbia Journal of Law and the Arts* (2020) 197.

⁴⁷ Douek, 'The Limits of International Law in Content Moderation', 6(1) *UCIJITCL* (2020) 37.

⁴⁸ C. Botero Marino (now co-chair of the Oversight Board), Freedom of Expression and the Internet: Report by the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, 31 December 2013 at 110ff, available at www.oas.org/en/iachr/expression/docs/reports/2014_04_08_Internet_ENG%20_WEB.pdf; Dror-Shpoliansky and Shany, *supra* note 2.

⁴⁹ HRC, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/HRC/38/35, 6 April 2018, para. 1.

⁵⁰ UNGPs, *supra* note 39.

⁵¹ *Ibid.*; International Covenant on Civil and Political Rights (ICCPR) 1966, 999 UNTS 171.

⁵² HRC, *supra* note 50, paras 45ff.

⁵³ HRC, Disinformation and Freedom of Opinion and Expression: Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/HRC/47/25, 13 April 2021, para. 46.

standard for ensuring freedom of expression on their platforms is human rights law’,⁵⁴ he continued to demand that ‘rules should be rooted in rights’, by which he referred to content moderation standards.⁵⁵ Further, he called on ICT companies to ‘embark on radically different approaches to transparency at all stages of their operations, from rule-making to implementation and development of “case law” framing the interpretation of private rules’.⁵⁶ Despite this pronounced criticism, the reference to the private rules of platform companies as law is interesting and will be discussed in more detail in the following sections.

2 Mixed Messages: The Oversight Board’s Normative System

While comments by NGOs during the public input process initiated by Facebook in the lead-up to the Oversight Board’s inception explicitly referred to Kaye’s recommendations,⁵⁷ the references to IHRL within the Oversight Board’s governing documents remained ambiguous.⁵⁸ Broadly speaking, the ‘lower’ a document sits within the Oversight Board’s normative system (from the charter, to community standards, bylaws, the rulebook, case decisions [as precedent]) and the more substantial the influence the Oversight Board has had on drafting these documents, the more explicit and concrete the references to IHRL are.

While the Oversight Board’s ‘governing documents’ contain references to IHRL, its specific function within the normative system remains undetermined.⁵⁹ The ‘charter’, as the hierarchically superior document in the Oversight Board’s normative system, merely states that, ‘[w]hen reviewing decisions, the Oversight Board will pay particular attention to the impact of removing content in light of human rights norms protecting free expression’.⁶⁰ What remains unclear is what the requirements and threshold for ‘pay[ing] particular attention to’ are, what this means for cases of conflicts between the companies’ content policies (for example, the community guidelines or standards) and IHRL and, more generally, which human rights frameworks and specific norms will actually be considered. Regarding the latter, one might debate, for instance, whether the limitation refers to norms protecting free expression per se – that is, norms explicitly referring to free expression such as, *inter alia*, Articles 19 and 20 of the ICCPR, Article 19 of the Universal Declaration of Human Rights,⁶¹ Articles

⁵⁴ HRC, *supra* note 50, para. 70.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, para 71.

⁵⁷ ‘Protecting Free Expression in the Era of Online Content Moderation’, *Access Now* (2019), at 9, available at www.accessnow.org/cms/assets/uploads/2019/05/AccessNow-Preliminary-Recommendations-On-Content-Moderation-and-Facebooks-Planned-Oversight-Board.pdf.

⁵⁸ The role of the UNGPs for the Oversight Board remained ambiguous for scholars to justifiably worry about ‘a missed opportunity for alignment’ with the UNGPs at the time. See Di Stefano, ‘The Facebook Oversight Board and the UN Guiding Principles on Business and Human Rights: A Missed Opportunity for Alignment?’, in J. Andrew and F. Bernard (eds), *Human Rights Responsibilities in the Digital Age: States, Companies and Individuals* (2021) 93, at 110–114.

⁵⁹ ‘Oversight Board Charter’, *Meta*, February 2023, available at <https://oversightboard.com/governance/>.

⁶⁰ *Ibid.*, Art. 2, s. 2.

⁶¹ Universal Declaration of Human Rights, GA Res. 217A (III), 10 December 1948.

13 and 14 of the American Convention on Human Rights,⁶² Article 9 of the African Charter of Human and Peoples' Rights,⁶³ Article 10 of the European Convention on Human Rights⁶⁴ and Article 13 of the Convention on the Rights of the Child (CRC)⁶⁵ – or *in casu* – that is, norms that happen to weigh in favour of free expression in a given constellation, such as the right to health when measures against health awareness content have been taken.

Either way, the Oversight Board's charter seems to envisage only a soft, secondary consideration of IHRL ('in light of') and some limitation on the scope of relevant IHRL, with a focus on 'free expression'. This vague commitment is not reiterated in the bylaws, the document containing operational procedures for the Oversight Board in which specific obligations and recommendations to the Oversight Board and its staff are set out. Instead, the bylaws hint at a broader understanding of the relevant human rights, demanding that Board members participate in training in international human rights standards;⁶⁶ that expertise in human rights is considered during the selection process of administration staff;⁶⁷ that Meta's notice of a posting and/or reporting person of the implementation of an Oversight Board decision will be guided by relevant human rights principles;⁶⁸ and that the Oversight Board's annual report includes an analysis of the consideration of international human rights by the Oversight Board.⁶⁹ Interestingly, unlike the charter⁷⁰ the bylaws had to be approved by the Oversight Board,⁷¹ indicating and amplifying ambiguity in its institutional (self-)conception.

None of the presented references to international human rights standards echo the limitation to a particular human right ('protecting free expression') that is set out in the charter.⁷² This is noteworthy considering that the bylaws state that, '[i]n cases where there is a potential conflict between interpretations of the charter and bylaws, the charter shall prevail'.⁷³ For instance, Meta has argued that it prohibits speech

⁶² American Convention on Human Rights ('Pact of San José'), OAS 1969, 1144 UNTS 123.

⁶³ African Charter of Human and Peoples Rights ('Bajul Charter'), OAU 1981, 1520 UNTS 217.

⁶⁴ Convention for the Protection of Human Rights and Fundamental Freedoms 1950, 213 UNTS 222.

⁶⁵ Convention on the Rights of the Child (CRC) 1989, 1577 UNTS 3; N. Wenzel, 'Opinion and Expression, Freedom of, International Protection', in *Max Planck Encyclopedia of Public International Law (MPEPIL)* (2014).

⁶⁶ 'Oversight Board Charter', supra note 59, Art. 1, s. 1.4.4 ('[a]ll Members will perform their duties in accordance with the board's charter, bylaws, and contract, which includes: ... Participating in training on Facebook's policies, values, enforcement practices and international human rights standards').

⁶⁷ *Ibid.*, Art. 1, s. 2.2.

⁶⁸ *Ibid.*, Art. 2, s. 2.3.2.

⁶⁹ *Ibid.*, Art. 1, s. 4.1.

⁷⁰ B. Harris, 'Preparing the Way Forward for Facebook's Oversight Board', *Meta* (2020), available at <https://about.fb.com/news/2020/01/facebooks-oversight-board/>.

⁷¹ 'Oversight Board Charter', supra note 59, introduction.

⁷² Similarly, see J. Barata, 'The Decisions of the Oversight Board from the Perspective of International Human Rights Law', *Columbia University Global Freedom of Expression*, available at <https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2022/10/The-Decisions-of-the-OSB-from-the-Perspective-of-Intl-Human-Rights-Law-Joan-Barata-.pdf>.

⁷³ 'Oversight Board Charter', supra note 60, introduction.

under the standard of incitement to violence in, among others, ‘contexts with severe human rights risk’, yet it does not define such risks.⁷⁴

Further, in the Oversight Board’s Rulebook for Case Review and Policy Guidance (hereinafter, the rulebook), which comprises a set of rules that the Oversight Board members have given themselves, the Oversight Board contends that it ‘was created to make principled, independent, and binding decisions (...) based on respect for freedom of expression and human rights’.⁷⁵ In fact, the rulebook reads ‘human rights’, meaning any human rights. Perhaps even more importantly, the rulebook states that its purpose was to provide greater transparency to users and the public regarding the functioning of the Oversight Board ‘in line with the UN Guiding Principles on Business and Human Rights’ and that, by sharing the rulebook, the Oversight Board aims for its processes to be more ‘accessible’ and ‘predictable’,⁷⁶ mirroring the language of requirements set out for grievance mechanisms in the UNGPs.⁷⁷

This description of the Oversight Board’s normative architecture shows us how it initially was not set up to interact with IHRIs. The Oversight Board’s ‘capacity to find recognition for claims about international law and to establish reference points for legal discourse that others can hardly escape’, and, thus, its semantic authority, originally remained undetermined.⁷⁸ At the time, the indeterminacy of the normative aspiration of human rights law references fuelled concerns that the Oversight Board represented ‘a missed opportunity for alignment’ with the UNGPs.⁷⁹ However, the fact that there were references to begin with, in retrospect, appears as a result of the significant semantic authority of the UNSR, David Kaye, who managed to establish a reference point for the legal discourse around platform companies’ responsibilities under the UNGPs that Meta could hardly escape. In doing so, Kaye may have put a foot in the door of Meta’s content governance system. More, he created a sufficient degree of indeterminacy to create space for possible self-authorization by the Oversight Board and ultimately paved the way for possible future institutional dialogue between the Oversight Board and IHRIs. A dialogue which occurs, as we will see, largely independent from the company.⁸⁰ In order to learn more about how the dialogue is playing out, we examine more closely how the Oversight Board’s normative system works in practice by taking a deep dive into what the Oversight Board refers to as its ‘case decisions’ and ‘policy advisory opinions’ as well as into Meta’s ‘corporate human rights policy’.

⁷⁴ Oversight Board, CD 2020-002-FB-UA (Myanmar post about Muslims case), 28 January 2021, at 6, available at www.oversightboard.com/decision/FB-I2T6526K/.

⁷⁵ ‘Rulebook for Case Review and Policy Guidance’, *Oversight Board* (2020), at 3, available at <https://oversightboard.com/sr/rulebook-for-case-review-and-policy-guidance>.

⁷⁶ *Ibid.*

⁷⁷ UNGPs, *supra* note 39, Principle 31(a), (b).

⁷⁸ Venzke, *supra* note 22, at 105.

⁷⁹ Di Stefano, *supra* note 59.

⁸⁰ *Cf.* Miloš and Pelić, *supra* note 15, at 202.

C The Oversight Board's Engagement with IHRIs

In the 53 case decisions published before November 2023, the Oversight Board has referenced most frequently one particular human rights framework – that is, the ICCPR.⁸¹ In addition, the Oversight Board regularly references the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the CRC, the Convention on the Elimination of All Forms Discrimination of Women and the Convention on Rights of Persons with Disabilities.⁸² Even though both the question of ‘what’ and ‘how’ the Oversight Board refers to IHRL will be of importance here, our investigation is not promising comprehensive quantitative analysis.

Against this backdrop, we first examine the intricacies of the Oversight Board's engagement with different documents of IHRIs. Subsequently, we zoom in and examine the design and structure of the Oversight Board's case decisions and policy advisory opinions and continue to trace the re-enactment of the ‘three-step test’ under Article 19(3) of the ICCPR.⁸³ Then we turn to one case decision to explain tentative solidifying efforts to look at the mode of engagement that the Oversight Board has shown in its first three policy advisory opinions.

1 The Intricacies of the Oversight Board's Engagement with Different IHRIs

Apart from the various human rights treaties mentioned above, the Oversight Board refers broadly to different general comments and general recommendations of treaty bodies as well as resolutions and reports of and to the HRC and its subsidiary bodies. Very rarely and selectively, the Oversight Board refers to individual communications of the treaty bodies⁸⁴ and to concluding observations on state party reports.⁸⁵ As of

⁸¹ See ‘Empirical Facebook Oversight Board’, *Lawfare Blog*, available at <https://www.lawfaremedia.org/test/fob-blog/empirical-fob>.

⁸² International Covenant on Economic, Social and Cultural Rights, 1966, 993 UNTS 3; Convention on the Elimination of All Forms of Discrimination against Racial Discrimination 1965, 660 UNTS 195; CRC, *supra* note 65; Convention on the Elimination of All Forms of Discrimination against Women 1979, 1249 UNTS 13; Convention on the Rights of Persons with Disabilities, Doc. A/RES/61/106, 13 December 2006.

⁸³ Miloš and Pelić, *supra* note 15, at 202.

⁸⁴ The Oversight Board refers to communications under Article 5(4) of the Optional Protocol to the ICCPR only four times: in Oversight Board, CD 2022-009-IG-UA and 2022-010-IG-UA (Gender identity and nudity), 17 January 2023, available at www.oversightboard.com/decision/BUN-IH313ZH/, referring to *Nepomnyashchiy v. Russia* (CCPR/C/123/D/2318/2013) (2018); in Oversight Board, CD 2022-003-IG-UA (Reclaiming Arabic words), 13 June 2022, available at www.oversightboard.com/decision/IG-2PJ00LAT, referring to *Toonen v. Australia* (CCPR/C/50/D/488/1992) (1994); in Oversight Board, PAO-2021-01, *supra* note 45, referring to *Mavlonov and Sa'di v. Uzbekistan* (CCPR/C/95/D/1334/2004) (2009) and *Giménez v. Paraguay* (CCPR/C/123/D/2372/2014) (2018).

⁸⁵ UN Committee on the Rights of the Child, Concluding Observations on Nepal (2005) (CRC/C15/Add. 261), in Oversight Board, CD 2021-016-FB-FBR (Swedish journalist reporting sexual violence against minors), 1 February 2022, available at <https://oversightboard.com/decision/FB-P9PR9RSA/>; UN Committee on the Elimination of Racial Discrimination, Concluding Observations on the Netherlands (2015) (CERD/C/NLD/CO/19-21), in Oversight Board, CD 2021-002-FB-UA (Depiction of Zwarte Piet), 13 April 2021, available at <https://oversightboard.com/decision/FB-S6NRTDA/>.

1 November 2023, we could not find any references to reports and statements submitted under the Universal Periodic Review mechanism.⁸⁶ Interestingly, the Oversight Board predominantly refers to documents that are not part of what scholars have framed as the ‘quasi-judicial’⁸⁷ function of treaty bodies but, instead, to general comments and general recommendations that are considered ‘non-binding guidance on specific treaty provisions and/or on the relationship between treaty provisions and specific themes’.⁸⁸ From the perspective of semantic authority, this focus on general comments and recommendations warrants closer attention as these are documents that only over time ‘became a tool for the CCPR to exercise its mandate in a more proactive manner’.⁸⁹

Today, general comments and recommendations – while formally not binding⁹⁰ – are considered an authoritative interpretation of the respective treaty.⁹¹ A classification, echoed by Max Lesch and Nina Reiners, when referring to treaty bodies as ‘deliberately act[ing] as human rights lawmakers’⁹² or by Hinako Takata and Shotaro Hamamoto when explaining that those documents ‘reflect the treaty bodies’ “law-making function”’.⁹³ Treaty bodies have established semantic authority that goes beyond the authority to assess individual cases or issue concluding observations in state reports. The ‘great weight’ that the International Court of Justice in *Diallo* attributes to the interpretations of treaty bodies in turn provides the Oversight Board with the opportunity to draw on their authority.⁹⁴ However, the Oversight Board’s strategy does not exclusively rely on references to general comments and recommendations. While the generality of these documents allows the Oversight Board to stand on the (quite broad) shoulders of those committees’ semantic authority, it is only by adding references to UNSR reports and by using the leeway that it has in terms of case selection that the Oversight Board’s strategy to create space for its own interpretation of IHRL online plays out.

⁸⁶ Tomuschat, ‘Universal Periodic Review Procedure: Human Rights Council’, in *Max Planck Encyclopedia of International Procedural Law (MPEIPrL)* (2019).

⁸⁷ Ullstein, ‘Individual Complaints’, in H. Keller and G. Ullstein (eds), *UN Human Rights Treaty Bodies* (2012) 92, with further references in n. 52; S. Joseph, ‘Committees: Human Rights Bodies’, in *MPEIPrL* (2019), at 1.

⁸⁸ H. Takata and S. Hamamoto, ‘Human Rights, Treaty Bodies, General Comments/ Recommendations’, in *MPEIPrL* (2023), para. 2, with reference to UN Secretariat, Consultation Process for the Elaboration of Treaty Body General Comments: Note by the Secretariat (2015).

⁸⁹ *Ibid.*, at 20. For details, see Alston, ‘The Historical Origins of the Concept of “General Comments” in Human Rights Law’, in L. Boisson de Chazournes and V. Gowlland-Debbas (eds), *The International Legal System in Quest of Equity and Universality: Liber amicorum Georges Abi-Saab* (2001) 763.

⁹⁰ Takata and Hamamoto, *supra* note 89, paras 1, 66.

⁹¹ *Ibid.*, para. 49.

⁹² Lesch and Reiners, ‘Informal Human Rights Law-Making: How Treaty Bodies Use “General Comments” to Develop International Law’, 12 *GC* (2023) 378, at 379.

⁹³ Takata and Hamamoto, *supra* note 89, para. 23.

⁹⁴ *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Judgment, 30 November 2010, ICJ Reports (2010) 644, para. 66 (‘[a]lthough the Court is in no way obliged ... to model its own interpretation of the Covenant on that of the Committee, it believes that it should ascribe great weight to the interpretation adopted by this independent body that was established specifically to supervise the application of that treaty’).

First, drawing on general comments and recommendations provides the Oversight Board with both a source for semantic authority and room for interpretation. This room for interpretation is quite significant considering the fact that, as of 1 November 2023, there are merely two general comments – namely General Comment no. 37 on the Right to Freedom of Assembly and Association of the ICCPR and General Comment no. 25 on Children’s Rights in Relation to the Digital Environment of the CRC – which consider the changing circumstances of human rights protection in the digital context explicitly.⁹⁵ Yet the guidance remains generic as General Comment no. 37 merely prescribes that ‘increased private ownership’ of ‘communication platforms ... need[s] to inform a contemporary understanding’ of Article 21 of the ICCPR,⁹⁶ and General Comment no. 25 only refers to social networking platforms and businesses generically.⁹⁷ The room for manoeuvring is further enlarged by the way in which the Oversight Board selects its cases.⁹⁸ The strong focus on contemporary and often politically contingent questions not only raises attention for the Oversight Board’s decisions but also helps to establish them as reference points.⁹⁹

Second, by referring to the reports of the UNSR and reiterating specific passages of these reports, the Oversight Board conveys the impression of doing merely what is demanded of it. UNSRs enjoy a high level of independence and flexibility in their operations as they are mandate holders within the special procedure system of the HRC but are not UN officials.¹⁰⁰ While ‘the ways and means of action of Special Procedures are different from those applicable by treaty bodies’,¹⁰¹ and their normative self-understanding differs, they do interact with one another.¹⁰² Next to monitoring the human rights situation, the UNSR also issues in its reports (general and specific) recommendations to actors and institutions beyond states (that is companies¹⁰³ or, more specifically, ‘Internet Intermediaries’¹⁰⁴ as well as civil society and

⁹⁵ General Comment no. 37 on the Right to Freedom of Assembly and Association, Doc. CCPR/C/GC/37 (2020); General Comment no. 25 on Children’s Rights in Relation to the Digital Environment, Doc. CRC/C/GC/25 (2021).

⁹⁶ General Comment no.37, *supra* note 96, para. 10. Referenced explicitly by the Oversight Board in Oversight Board, CD 2021-010-FB-UA (Colombia protests), 27 September 2021, available at <https://oversightboard.com/decision/FB-E5M6QZGA/>.

⁹⁷ General Comment no. 25, *supra* note 96, paras 35ff, 122.

⁹⁸ Oversight Board, Overarching Criteria for Case Selection, available at <https://oversightboard.com/sr/overarching-criteria-for-case-selection>.

⁹⁹ Oversight Board, CD 2021-001-FB-FBR (Former President Trump’s suspension), 5 May 2021, available at <https://oversightboard.com/decision/FB-691QAMHJ/>; Oversight Board, CD 2023-007-FB-UA, 2023-008-FB-UA, 2023-009-IG-UA (Political dispute ahead of Turkish elections) and CD 2023-011-IG-UA, 2023-012-FB-UA, 2023-013-FB-UA (United States posts discussing abortion), 6 September 2023, available at www.oversightboard.com/decision/FB-T8JDDDJV/. Done

¹⁰⁰ A. C. Berger, ‘Special Rapporteurs of Human Rights Bodies’, in *MPEPIL* (2013), paras 15ff.

¹⁰¹ *Ibid.*, at 66.

¹⁰² *Ibid.*, at 65.

¹⁰³ See, *inter alia*, HRC, *supra* note 50, paras 64–69, 70–72.

¹⁰⁴ Report of the Special Rapporteur on violence against women, its causes and consequences on online violence against women and girls from a human rights perspective, UN Doc. A/HRC/38/47, 18 June 2018, paras 115–119. Calling for an active cooperation with treaty bodies, and the special procedures in particular, referenced in Oversight Board, CD 2023-006-FB-UA (Image of gender-based violence), 1 August 2023, available at www.oversightboard.com/decision/FB-1RWUJUAT/.

the HRC itself).¹⁰⁵ Yet, those are less an interpretation of relevant provisions and more intended to exert public pressure to advance the protection of international human rights.

To sum up, by combining references to two very different sources of IHRL authorities, the Oversight Board is advancing its own authoritative interpretations of human rights online, which go beyond individual cases but do convey a certain degree of generality. In that, it crafts reference points that may still be moving fluidly but are taking more shape and will slowly solidify through the Oversight Board's continuous practices of referring to its own case decisions as precedent.¹⁰⁶ The strategic nature of this referencing practice becomes even clearer when looking more closely at what the Oversight Board does not refer to. In its case decisions and policy advisory opinions, the Oversight Board does not pay attention to the existing (and growing) body of case law addressing human rights problems in the digital sphere of, *inter alia*, regional human rights courts.¹⁰⁷ Nor does the Oversight Board engage in detail with the more specific and recent individual communications published by treaty bodies concerning, *inter alia*, hate speech-related questions.¹⁰⁸ Considering that General Comment no. 34 was drafted in 2011,¹⁰⁹ the more recent guidance offered by individual communications as well as regional human rights bodies¹¹⁰ would inevitably have to be considered or at least consulted if the aim really was to ensure 'that outcomes and remedies accord to internationally recognized human rights law', according to Principle 31 of the UNGP.¹¹¹

At this point, it is important to note that there is a certain tension between the way in which the Oversight Board operates and its self-description as 'an independent

¹⁰⁵ *Inter alia*, Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, UN Doc. A/HRC/41/41, 17 May 2019, paras 65ff.

¹⁰⁶ Since Oversight Board, CD 2022-002-FB-MR (Sudan graphic video), 13 June 2022, available at <https://oversightboard.com/decision/FB-APONSBVC/>.

¹⁰⁷ *Inter alia*, ECtHR, *Beizaras and Levickas v. Lithuania*, Appl. no. 41288/15, Judgment of 14 January 2020; ECtHR, *Melike v. Turkey*, Appl. no. 35786/19, Judgment of 15 June 2021 (in French); ECtHR, *Üçdağ v. Turkey*, Appl. no. 3314/19, Judgment of 31 August 2021 (all ECtHR decisions are available at <http://hudoc.echr.coe.int/>); IACtHR, *Palamara Iribarne v. Chile*, Series C No. 135, para. 234, Judgment (Merits, Reparations, and Costs) of 22 November 2005 (decision available at www.corteidh.or.cr/index.php/en/jurisprudencia); ACtHPR, *Lohé Issa Konaté v. Burkina Faso*, Appl. no. 004/2013, Judgment (Merits) of 5 December 2014 (decision available at <https://www.african-court.org/cpmt/storage/app/uploads/public/633/40b/e27/63340be2743c3757080189.pdf>).

¹⁰⁸ *Inter alia*, *Bodrožić v. Serbia and Montenegro* (CCPR/C/85/D/1180/2003) (2006); *Rabbae v. Netherlands* (CCPR/C/117/D/2124/2011) (2017); *Jallow v. Denmark* (CERD/C/108/D/62/2018) (2023).

¹⁰⁹ General Comment no. 34: Article 19 – Freedoms of Opinion and Expression, UN Doc. CCPR/C/GC/34, 12 September 2011.

¹¹⁰ *Inter alia*, *Rabbae*, *supra* note 109; *Jallow*, *supra* note 109; African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression and Access to Information in Africa, 10 November 2019; Edison Lanza, Special Rapporteur for Freedom of Expression, Standards for a Free, Open and Inclusive Internet, Doc. EA/Ser.L/V/II CIDH/RELE/INE.17/17, 15 March 2017; Aswad and Kaye, 'Convergence and Conflict: Reflections on Global and Regional Human Rights Standards on Hate Speech', 20 *Northwestern Journal of Human Rights* (2022) 165.

¹¹¹ UNGPs, *supra* note 39, at 74.

non-judicial grievance mechanism’, according to Article 31 of the UNGP,¹¹² or ‘an external, autonomous supervisory board as a self-regulatory mechanism’, as one current member of the Oversight Board has framed it publicly.¹¹³ What the Oversight Board does – in the interplay with Meta – goes beyond ‘ensuring that outcomes and remedies accord to internationally recognized human rights law’¹¹⁴ and, thus, adhere to the benchmark set out by the UNGP. The Oversight Board has gradually established its own interpretation of digital human rights, shaping the standard it applies by way of interpretative law-making. However, this overview can only provide us with some insights into what documents the Oversight Board references. In order to get a more granular picture of the strategies pursued by the Oversight Board, we now zoom in and showcase the strategies pursued by the Oversight Board when interacting with IHRIs and consider what role Meta plays in this context.

2 Design and Structure of the Oversight Board’s Case Decisions and Policy Advisory Opinions

In the following, we examine in detail the design and structure of the Oversight Board’s two major categories of decisions – namely, case decisions and policy advisory opinions. In its first case decision, the Oversight Board put forward a structure for its decisions that has since been largely maintained. Its decisions are divided into a short ‘case summary’ and a ‘full case decision’ that consists of nine subsections. The ‘relevant human rights standards’ – outlined by the Oversight Board in section 4.III of every decision – are contextualized with a reference to the UNGPs.¹¹⁵ Subsequently, a wide variety of IHRL sources, especially UN treaty provisions, are cited next to the ‘authoritative guidance of UN human rights mechanisms’,¹¹⁶ which include predominantly general comments and recommendations issued by treaty bodies as well as reports of UNSRs. References to national or regional court decisions or judgments – so far – are scarce. As of 1 November 2023, the only court decisions that the Oversight Board has referenced in its case decisions are, first, a European Court of Human Rights (ECtHR) case on the solitary

¹¹² Oversight Board, Submission to the OHCHR: Operationalizing the UN Guiding Principles on Business and Human Rights, February 2022, at 2, n. 6 (with further references). For an interesting inquiry into how the Oversight Board differs from an ‘internal complaint-handling system’ (then Art. 17, now Art. 20, of the Digital Services Act [DSA]) and an ‘Out-of-court dispute settlement’ (then Art. 18, now Art. 21 DSA), see Wong and Floridi, ‘Meta’s Oversight Board: A Review and Critical Assessment’, 2 *Minds and Machines* (2022) 2.

¹¹³ Botero Marino and Tuchtfield, ‘Quasi-Judicial Oversight Mechanisms for Social Platforms: A Conversation with Catalina Botero Marino, Co-Chair of the Oversight Board’, 2 *Recht und Zugang* (2022) 254, at 256.

¹¹⁴ UNGPs, *supra* note 39, at 74.

¹¹⁵ Reference to the UNGPs are sometimes qualified, explained or limited to acknowledgements of their existence. For the former, see, e.g., Oversight Board, CD 2020-003-FB-UA (Armenians in Azerbaijan case), 28 January 2021, available at <https://oversightboard.com/decision/FB-QBJDASCV/>; for the latter, see Oversight Board, CD 2020-004-IG-UA (Breast cancer symptoms and nudity case), 28 January 2021, at 4, available at <https://oversightboard.com/decision/IG-7THR3SI1/>.

¹¹⁶ Oversight Board, CD 2020-004-IG-UA, *supra* note 114.

confinement of Abdullah Öcalan to illustrate the underlying facts of a post inviting users to debate his confinement.¹¹⁷ Second, the US Supreme Court decisions *Dobbs v. Jackson Women's Health Organization* and *Roe v. Wade*.¹¹⁸ Third, one reference to the International Criminal Tribunal for Rwanda to support an argument that the spread of dehumanizing expressions on Meta's platforms through its '[c]umulative impact can amount to causation through a "gradual build-up of effect"'.¹¹⁹

The design of the Oversight Board's decisions foresees entrance points for IHRL at different stages: first, in the context of case description and background; second, when relevant human rights standards considered by the Oversight Board are determined and recited as 'sources of authority'; and, third, in the analysis of the Oversight Board when compliance with community standards is assessed in light of human rights standards and compliance of the decision with human rights standards directly is evaluated. Further, there is a public comment procedure in place by which third parties can submit comments to the Oversight Board prior to its decision.¹²⁰ The Oversight Board refers to them, first, generically and, later, with detailed references in its decisions.¹²¹ Sometimes, however, the references become more specific and demanding – for example, *inter alia*, when the Oversight Board has called on Meta to support the enforcement of international criminal law, emphasizing the companies' 'unique position to assist in the preservation of evidence that may be of use in the prosecution of international crimes and in support of human

¹¹⁷ Oversight Board, CD 2021-006-IG-UA (Öcalan's Isolation), 8 July 2021, available at www.oversight-board.com/decision/IG-I9DP23IB/ at 2. For the case description, see ECtHR, *Ocalan v. Turkey*, Appl. no. 46221/99, 12 March 2003. Illustrating the deliberateness, see Oversight Board, CD 2021-001-FB-FBR, *supra* note 99 (when the statement on behalf of Donald Trump referred to US Supreme Court case law (at 6), the Oversight Board explains that it 'does not apply the First Amendment of the U.S. Constitution, which does not govern the conduct of private companies' (at 8.3). SCOTUS, *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 US __ (2022) Judgment of 23 June 2022 and SCOTUS *Roe v. Wade*, 410 US 113 (1973) (SCOTUS decisions available at <https://www.supremecourt.gov/opinions/USReports.aspx>).

¹¹⁸ Oversight Board, CD 2023-011-IG-UA, 2023-012-FB-UA, 2023-013-FB-UA *supra* note 100.

¹¹⁹ Oversight Board, CD 2021-014-FB-UA (Alleged crimes in Raya Kobo), 14 December 2021, available at <https://oversightboard.com/decision/FB-MP4ZC4CC/>. This reference is repeated in the Oversight Board's submission to the special rapporteur on the promotion and protection of the right to freedom of opinion and expression in Oversight Board, Challenges in Times of Conflicts and Disturbances, July 2022, available at www.ohchr.org/sites/default/files/documents/issues/expression/cfis/conflict/2022-10-07/submission-disinformation-and-freedom-of-expression-during-armed-conflict-UNGA77-other-oversight-board.pdf.

¹²⁰ The flexibility of the Public Comment procedure resembles *amicus curiae* in human rights bodies and less the stricter (and varying) rules that are established by different international courts and tribunals. F. Piovesan and J. Cortez da Cunha Cruz, 'Amicus Curiae: Human Rights Bodies', in *MPEIPrL* (2020); P. Sands and R. Mackenzie, 'International Courts and Tribunals, Amicus Curiae', in *MPEPIL* (2008).

¹²¹ There is a Public Comment Appendix reference made available by the Oversight Board with and since Oversight Board, CD 2020-07-FB-FBR (Protest in India against France), 12 February 2021, available at <https://oversightboard.com/decision/FB-R9K87402/>. Since Oversight Board, CD 2021-006-IG-UA, *supra* note 118, public comments are made available via hyperlink in the case heading summary section of every case decision. Since Oversight Board, CD 2021-005-FB-UA ('Two buttons' meme), 11 August 2021, the public comments are numbered as 'PC-[number]'.

rights litigation'.¹²² In doing so, the Oversight Board implicitly promotes its own significance, alongside Meta's broader normative system, in enabling the effective protection of human rights online as well as offline as an addition to pre-existing procedures and institutions. On the basis of this detailed description, we acquire a better understanding of how carefully and deliberately the Oversight Board is creating conversation openers and entry points for exchanges with IHRIs. These insights are indispensable to ultimately understand the details of their relationships and how they evolve.

Beyond case decisions, Meta can also request policy guidance from the Oversight Board, which may either decline the request or issue a policy advisory opinion. These opinions allow the Oversight Board to 'focus[es] directly on Meta's policy choices, including development and enforcement processes, to assess whether the company is upholding its pledge to respect rights under the UNGPs'.¹²³ If the Oversight Board issues an opinion, Meta has committed not to implement but, rather, to respond to it at least publicly.¹²⁴ As of 1 November 2023, the Oversight Board had issued three policy advisory opinions. In these opinions, the re-enactment of IHRL via the UNGPs and the dominance of references to general comments and UNSR reports mirrors the practice within the case decisions that we address in more detail below.¹²⁵ The Oversight Board has picked up on inklings of, *inter alia*, the treaty bodies that emphasize the need for considering context for rights protected under the ICCPR.¹²⁶ In a notable difference to what we have found within the case decisions, one advisory opinion on Meta's (supposedly global) policy on divulging users' addresses 'notes' regional and national case law by the ECtHR and the US Supreme Court, if only in passing.¹²⁷ Next to comparative considerations, the Oversight Board uses the discursive leeway of the longer format and more flexible scope to reiterate previous policy recommendations either to

¹²² Oversight Board, CD 2023-004-FB-MR (Armenian prisoners of war video), 13 June 2023, available at www.oversightboard.com/decision/FB-YLRV35WD/. For the challenges involved, see Laux, 'A New Type of Evidence? Cyberinvestigations, Social Media, and Online Open Source Video Evidence at the ICC', 56 *Archiv des Völkerrechts* (2018) 324.

¹²³ Oversight Board, PAO-2021-02 (Meta's cross-check program), 6 December 2022, at 23–24, para. 61, available at <https://oversightboard.com/decision/PAO-NR7300FI/>.

¹²⁴ Oversight Board, *supra* note 60, Art. 2, s. 2.1.3, bylaws; Art. 3.7.3.

¹²⁵ Oversight Board, PAO-2021-01, *supra* note 46, paras 18–27; Oversight Board, PAO-2021-02, *supra* note 123, paras 58–67 (general), 117–121 (transposing the three-part test under Art. 19(3) of the ICCPR); Oversight Board, PAO-2022-01 (Removal of COVID-19 misinformation), 20 April 2023, paras 42–56, available at <https://oversightboard.com/decision/PAO-SABU4P2S/>.

¹²⁶ In this context, see General Comment no. 37, *supra* note 96, para. 10 ('[m]oreover, there is increased private ownership ... of communication platforms. Considerations such as these need to inform a contemporary understanding of the legal framework that Art. 21 requires'). Cited in Oversight Board, PAO-2021-01, *supra* note 45, para. 39.

¹²⁷ Oversight Board, PAO-2021-01, *supra* note 46, at 18, para. 49 (presumably picking up on public comments submitted to the Oversight Board, such as PC-10157 in *Schillings International LLP*, available at <https://osbcontent.s3.eu-west-1.amazonaws.com/PC-10157.pdf> [at 2.1.1] or PC-10154 in *Arhegas et al.*, available at <https://osbcontent.s3.eu-west-1.amazonaws.com/PC-10154.pdf> [at 3]).

critique Meta's responses or failure to implement them¹²⁸ or to express its reservations against the 'guardrails' set by Meta for its advice.¹²⁹

3 *Re-enacting Legality: The Three-Step Test under Article 19(3) of the ICCPR*

Under section '8.3 Compliance with Human Rights Standards', every single Board decision is re-enacting the three-step test established for the evaluation of the permissibility of a state's limitations of freedom of expression under Article 19(3) of the ICCPR.¹³⁰ As we have mentioned before, the re-enactment of the three-step test responds to the demands made by Kaye in his 2018 report. Back then, he called on companies to 'incorporate directly into their terms of service and "community standards" relevant principles of human rights law that ensure content-related actions will be guided by the same standards of legality, necessity and legitimacy that bind State regulation of expression'.¹³¹ By resorting to this particular kind of vocabulary, he laid out the thread to be picked up by the Oversight Board. However, to be guided by standards does not necessarily imply a re-enactment of the three-step test. By modelling its structure of reasoning after the three-step test, the Oversight Board went beyond what Kaye had requested, which conveys two specific messages. First, it established a normative hierarchy as the test directly leads to the evaluation of the compliance of Meta's community guidelines against IHRL, and, second, with this way of communicating in the vocabulary of IHRL, the Oversight Board continues to carefully construct and cultivate specific entry points for future inter-institutional dialogue through mobilizing the framing of legality as opposed to a normativity or a policy framing.

Let us look at this more closely and start with revisiting the legality criterion set out by Article 19(3) of the ICCPR. The legality criterion consists of formal and substantive elements.¹³² It is met if the restriction 'is set down in formal legislation or in an enactment of lower rank than a statute, in an equivalent unwritten norm of common law or in court decisions interpreting a norm'.¹³³ Yet it expressly excludes any 'restriction to be enshrined in traditional, religious or other such customary law'¹³⁴ and, thus, any other normativities. Further, General Comment no. 34 continues by setting out the substantive criteria for the legality requirement: 'For the purposes of paragraph 3, a norm, to be characterized as a "law", must be formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly and it must be made

¹²⁸ Oversight Board, PAO-2021-01, *supra* note 46, at 6–13, paras 33–36.

¹²⁹ Oversight Board, PAO-2022-01, *supra* note 126, executive summary and para. 61, questioning Meta's insistence on global, uniform policy for COVID-19 misinformation.

¹³⁰ We understand 're-enactment' and 're-enacting' as performative practices and not as a re-enactment in the strictly legal sense of the word. See *Cambridge Online Dictionary*, 'Re-Enactment'.

¹³¹ HRC, *supra* note 50, para 45, citing a submission by the non-governmental organization Global Partners Digital.

¹³² W. Schabas and M. Nowak (eds), *UN International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (3rd rev. edn, 2019) 565, paras 46ff.

¹³³ HRC, *supra* note 50, para. 45.

¹³⁴ Schabas and Nowak, *supra* note 132, at 565, referring to General Comment no. 34, *supra* note 109, para. 24.

accessible to the public. A law may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution'.¹³⁵

The normative desirability and adequacy of the transposition of the three-step test to the evaluation of content moderation decisions of social media companies is a highly problematic topic in and of itself, as the 'adoption' of these criteria is certainly more complicated and less straight forward than, *inter alia*, Michael Lwin suggests.¹³⁶ In fact, scholars seem to be divided about whether this transposition is in fact good news for the international rule of law. The transposition may be either, as one of the Oversight Board's co-chairs views it, 'one of the most challenging questions the Oversight Board faces'¹³⁷ or, as Barrie Sander argues, 'the simplest condition to translate to the platform moderation context'.¹³⁸ Sander appears to accept the focus on certain elements of 'legality' that the Oversight Board mobilizes, while largely neglecting others, thus being satisfied with the current curtailed version of the 'rule of law', concentrating merely on functional aspects of 'legality' while omitting its defining formalistic components. In contrast, both Sander and the Oversight Board seem to regard the legality requirement more as an abstract goal than as an operationalisable, delineable requirement, given suggestions for 'accompanying criteria with case studies to further assist users to understand how the policy is applied in practice'.¹³⁹

This does not only seem questionable from a practical point of view but also may reflect a rather uncritical attitude when it comes to human rights application and interpretation by (social media) companies.¹⁴⁰ At the same time, such overly pragmatic application of IHRL bears the risk of levelling down intricacies between human rights, such as, *inter alia*, the different legality requirements of Article 19 and Article 21 of the ICCPR.¹⁴¹ While the described mode of reasoning may not necessarily be in line

¹³⁵ Wenzel, *supra* note 66, para. 30.

¹³⁶ Lwin, 'Applying International Human Rights Law for Use by Facebook', 38 *Yale Journal on Regulation* (2020) 53, at 68 et seq.

¹³⁷ Botero Marino and Tuchtfield, *supra* note 114, at 256.

¹³⁸ Sander, *supra* note 1, at 971.

¹³⁹ *Ibid.* The Oversight Board also called for increased use of hypotheticals in a policy advisory statement, again citing David Kaye's 2018 report. Oversight Board, CD 2020-006-FB-FBR (Claimed COVID-19 cure case), 28 January 2021, at 9.2, available at www.oversightboard.com/decision/FB-XWJQBU9A (recommending that Meta's health misinformation standard should 'be accompanied with "detailed hypotheticals that illustrate the nuances of interpretation and application of [these] rules" to provide further clarity for users [see report A/HRC/38/35, para. 46 (2018)]'), repeated, for instance, in Oversight Board, CD 2021-009-FB-UA (Shared Al Jazeera Post case), 14 September 2021, at 8.3, available at www.oversightboard.com/decision/FB-P93JPX02/.

¹⁴⁰ For a critical evaluation of human rights interpretation, see Kulick, *supra* note 14, at 164ff, 181ff (for suggestions to remedy the situation).

¹⁴¹ The requirement of a legal basis for any restriction of the freedom of peaceful assembly in Art. 21 of the ICCPR only demands that limitations are imposed 'in conformity with the law'. This is understood to describe a lower threshold than the legality requirement of Art. 19(3), so that 'interference with freedom of assembly must not be set forth in a law in the formal sense, but may be undertaken independently by administrative authorities on the basis of general statutory authorization'. Schabas and Nowak, *supra* note 133, Art. 21, para. 25. These nuances between limitation clauses are lost when the formalistic components of Art. 19's legality requirement are simply omitted when it is mobilized to formulate requirements for companies.

with what the Oversight Board’s charter ‘originally’ had foreseen, the normative superiority of IHRL constructed through the three-step test can be explained within Meta’s normative system by pointing to Meta’s Corporate Human Rights Policy, published subsequently on 16 March 2021,¹⁴² which opts not for a focus on free speech but for more of a general commitment to ‘interrelated, interdependent and indivisible’ human rights.¹⁴³ This includes examining the Oversight Board’s governing documents against the effectiveness criteria for grievance mechanisms under the UNGPs.¹⁴⁴ In fact, the Oversight Board reiterated this commitment in a submission responding to a call by the Office of the UN High Commissioner for Human Rights (OHCHR) for consultation on the practical application of the UNGPs to the activities of technology companies issued in early March 2022.¹⁴⁵ Catalina Botero Marino, one of the current Board co-chairs, echoed this in an interview published in the summer of 2022.¹⁴⁶ Tellingly, the Oversight Board does not limit its application of human rights to the scope of Meta’s human rights policy – quite the opposite – the Oversight Board has demanded to expand the scope of the corporate human rights policies so as to match Meta’s – from the Oversight Board’s viewpoint – pre-existing responsibility.¹⁴⁷

However, what is of interest to us here is how the Oversight Board, after having picked up the thread of the originally descriptive framing of platform law and legality laid out by Kaye, continues to use this framing to initiate a conversation with IHRLs. Reviewing the decisions revealed that the Oversight Board has repeatedly found community standards to be too ambiguous to meet the legality criteria.¹⁴⁸ Interestingly, since 8 July 2021, the Oversight Board has qualified the legality criterion as ‘clarity and accessibility of the rules’,¹⁴⁹ over-emphasizing specific substantive elements of the legality criterion and under-emphasizing formal elements such as the importance of the origin or the norm for its ‘legal’ character. Yet, already by applying the test and even by rejecting the compliance with the (curtailed) legality requirements of the community standards in certain cases, the Oversight Board has carefully crafted itself as a persuasive international human rights-interpreting institution. Drawing on the concept of legality and established ways of reasoning and relying on a specific institutional design¹⁵⁰ are all relevant when looking at how the Oversight Board constructs its semantic authority.

¹⁴² Sissons, *supra* note 41.

¹⁴³ General Comment no. 34, *supra* note 110, para. 24.

¹⁴⁴ The Oversight Board’s governing documents as of 1 November 2023 do not reflect such a commitment.

¹⁴⁵ Oversight Board, ‘Operationalizing the UN Guiding Principles on Business and Human Rights: Submission to the Office of the High Commissioner for Human Rights, United Nations on the practical application of the UNGPs to the Activities of Technology Companies’, OHCHR, available at www.ohchr.org/sites/default/files/2022-03/Oversight-Board.pdf.

¹⁴⁶ Botero Marino and Tuchtfield, *supra* note 114, at 256.

¹⁴⁷ Oversight Board, CD 2021-001-FB-FBR, *supra* note 100, at 10 (‘Facebook’s corporate human rights policy should make clear the protocols the company has in place in this regard. The policy should also make clear how information previously public on the platform can be made available to researchers conducting investigations that conform with international standards and applicable data protection laws’).

¹⁴⁸ Oversight Board, CD 2021-003-FB-UA (Punjabi concern over the RSS in India case), 29 April 2021, available at <https://oversightboard.com/decision/FB-H6OZKDS3/>.

¹⁴⁹ Oversight Board, CD 2021-006-IG-UA, *supra* note 118, at 8.3.

¹⁵⁰ Goldmann, *supra* note 35.

4 Solidifying Efforts: The Zwarte Piet Decision

The Oversight Board has been solidifying its position as an interlocutor for IHRIs and as a human rights interpreter by addressing norm development aspects. In its *Zwarte Piet* decision,¹⁵¹ the Oversight Board had to grapple with the removal of content under an explicit prohibition on posting caricatures of Black people in the form of blackface, which had to be reconciled with a corresponding ‘longstanding Dutch cultural tradition without apparent racist intent’.¹⁵² In this decision, the Oversight Board paid detailed attention to, first, the creation process of this specific provision in the platform’s community standards and, second, to norm-justification obligations. The Oversight Board found that the removal of the user’s content under the community standards on hate speech was consistent with Meta’s human rights due diligence responsibility under the UNGPs as it was the ‘outcome of a wider process [that] involved extensive research and engagement with ... stakeholders’ and, further, because it was ‘in line with international standards for ongoing human rights due diligence to evolve the company’s operations and policies (Principle 17(c) and 18(b) UNGPs; UN Special Rapporteur on freedom of expression, report A/74/486, paras 44 and 58(e))’.¹⁵³

After performing its established legality test, the Oversight Board echoed another demand from one of Kaye’s reports: ‘[W]hen departing from the high standard that states must meet to justify restrictions ... on expression, companies must provide a reasoned explanation of the policy difference in advance, clarified in accordance with human rights standards.’¹⁵⁴ Along these lines, the Oversight Board has continued to demand participatory improvements to Meta’s process of content policy development.¹⁵⁵ The Oversight Board further diagnosed that ‘[t]he errors in this case show that it is incumbent on Meta to demonstrate that it has undertaken human rights due diligence to ensure that its systems are operating fairly and are not exacerbating historical and ongoing oppression (UNGP, Principle 17)’.¹⁵⁶ This case is interesting in two respects. First, it shows how, by leveraging the IHRIs’ guidance against

¹⁵¹ Oversight Board, CD 2021-002-FB-UA, *supra* note 86.

¹⁵² *Ibid.*, at 8.

¹⁵³ *Ibid.*, at 8.3. A similar line of thought can be found in Oversight Board, CD 2020-002-FB-UA, *supra* note 75, at 8.3 (pointing to the task of developing frameworks to ascertain the distributive justice of the companies’ allocation of (scarce) content governance resources: ‘The UN Working Group on the issue of human rights and transnational corporations and other business enterprises noted that businesses’ diligence responsibilities should reflect the greater complexity and risk for harm in some scenarios (A/75/212, paras 41–49)’). Similarly, in Oversight Board, CD 2021-001-FB-FBR, *supra* note 100, the Oversight Board recommended that Meta ‘ensure adequate resourcing and expertise to assess risks of harm from influential accounts globally’, recognizing that Facebook should devote attention to regions with greater risks.

¹⁵⁴ Oversight Board, CD 2020-002-FB-UA, *supra* note 75, at 8.3.

¹⁵⁵ Oversight Board, CD 2021-011-FB-UA (South Africa slurs case), 28 September 2021, at 8.1, available at www.oversightboard.com/decision/FB-TYE2766G/.

¹⁵⁶ Oversight Board, CD 2021-012-FB-UA (Wampum belt case), 9 December 2021, at 8.3, available at www.oversightboard.com/decision/FB-L1LANIA7/.

Meta, the Oversight Board is gradually carving out space for shaping the way in which Meta is drafting its ‘reasoned explanation of the policy difference in advance, clarified in accordance with human rights standards’.¹⁵⁷ Thus, it is not merely engaging in law-making by interpreting human rights standards itself but is wielding influence on the way in which Meta engages in this practice.

Second, by turning to a rough idea of ‘input legitimacy’¹⁵⁸ and by providing arguments in the context of the user’s right to justification, the Oversight Board is asserting an additional reference point for the interpretation of human rights (in this case, hate speech restrictions), which are mediated through its corporate duty of care under the UNGPs. Importantly, compliance with the requirements set out by the UNGPs does not hinge on alleging the ‘legality’ of community standards, nor is the allegation of legality, without an effect, innocent or ‘neutral’ – rather, it is, as we will see, part of a strategic positioning of the Oversight Board *vis-à-vis* Meta and IHRI. This is particularly interesting when considered alongside the fact that Meta, in its submissions to a previous decision, asked the Oversight Board ‘to focus on the outcome of enforcement, and not the method’.¹⁵⁹ This is crucial as it highlights the idea that Meta’s decisions hinge not only on the correct or incorrect application of human rights but also on how community standards and algorithmic design choices interact.¹⁶⁰

D Diverging Modes of Engagement between IHRI, Meta and the Oversight Board

Analysing reports and statements by different kinds of IHRI exhibits different modes of responses and a differentiated picture of who is taking part in the conversation and who is not. In the following sections, we explain and contextualize the varying responses and first traces of emerging conversations.

1 First Careful Responses

Despite the decisive role that the Oversight Board has assigned to international human rights treaties and especially to the ICCPR, treaty bodies tasked with monitoring the implementation of these treaties have not reacted to the Oversight Board’s decisions or even mentioned the Oversight Board or Meta in any of their publications. However, the picture looks quite different when we turn our head and look at the HRC and its special procedure mandate holders as well as at the OHCHR. Since early 2021, we have seen first instances of responses of the UNSRs to the Oversight Board. In her April 2021 report on disinformation and freedom of opinion and expression, UNSR Irene Khan, who is special rapporteur on the promotion and protection of rights to

¹⁵⁷ Oversight Board, CD 2021-002-FB-UA, *supra* note 86.

¹⁵⁸ For context, see Haggart and Iglesias Keller, ‘Democratic Legitimacy in Global Platform Governance’, 45 *Telecommunications Policy* (2021) 1, at 6, 10.

¹⁵⁹ Oversight Board, CD 2020-004-IG-UA, *supra* note 116.

¹⁶⁰ Oversight Board, CD 2021-016-FB-FBR, *supra* note 86; Oversight Board, CD 2021-006-IG-UA, *supra* note 117. See generally Douek, *supra* note 48; Jørgensen, ‘What Platforms Mean When They Talk About Human Rights: Platforms and Human Rights’, 9 *Policy and Internet* (2017) 280.

freedom of opinion and expression, called for an evaluation of the Oversight Board in due course through a transparent, multi-stakeholder participatory process and pointed to potential industry-wide multi-stakeholder measures such as social media councils.¹⁶¹ In this request, she echoed the call of Kaye, her predecessor, who in his 2018 report picked up on this idea brought forward by the NGO 'ARTICLE 19'.¹⁶² In a second report from July 2021, Khan used the first decision of the Oversight Board as an example to point out the failure of automated content moderation to be considerate of nuance.¹⁶³ Interestingly, the Oversight Board has continued to refer to this report, however without leveraging the semantic authority of this critique against Meta.¹⁶⁴ Khan has also referred to one case decision of the Oversight Board to illustrate the role that social media plays in spreading state propaganda.¹⁶⁵

Further, UNSR Fernand de Vareennes, special rapporteur on minority issues, urged the Oversight Board in a public comment published online (but also submitted to the Oversight Board via its designated public comment procedure),¹⁶⁶ to take a comprehensive approach in deciding hate speech cases by considering human rights instruments relating to minority protection such as Article 27 of the ICCPR, instead of limiting its considerations to typical 'freedom of expression' balancing such as Article 19(3) and 20 of the ICCPR. UNSR Fionnuala Ní Aoláin, special rapporteur on human rights and counter-terrorism, equally submitted a public comment¹⁶⁷ to the Oversight Board on Meta's policies regarding dangerous groups that was picked up in the Oversight Board's decision.¹⁶⁸ However, the responses are not limited to the activities of the UNSRs. Then UN High Commissioner for Human Rights Michelle Bachelet in her 2021 annual report welcomed the Oversight Board's use of the Rabat threshold test as well as the Oversight Board's references to the ICCPR and its use of general comments, reports of UN special procedure mandate holders and the UNGP as sources

¹⁶¹ HRC, *supra* note 54, para. 73.

¹⁶² HRC, *supra* note 50, paras 58, 59, 63, 72, citing Article 19, *Self-regulation and 'Hate Speech' on Social Media Platforms* (2018), at 20–22.

¹⁶³ HRC, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/76/258, 30 July 2021, paras 26, 81.

¹⁶⁴ Oversight Board, CD 2022-013-FB-UA (Iran protest slogan), 9 January 2023, available at <https://oversightboard.com/decision/FB-ZT6AJS4X/>.

¹⁶⁵ Oversight Board, CD 2021-014-FB-UA, *supra* note 120, referenced in Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression – Disinformation and freedom of opinion and expression during armed conflicts, UN Doc. HRC/77/288, 12 August 2022, paras 74ff.

¹⁶⁶ Oversight Board, Rulebook, *supra* note 76, at 9, 14.

¹⁶⁷ Fionnuala Ní Aoláin, 'Input of the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism to the Facebook Oversight Board', May 2021, available at <https://osbcontent.s3.eu-west-1.amazonaws.com/PC-10055.pdf>.

¹⁶⁸ Oversight Board, CD 2021-006-IG-UA, *supra* note 116, at 8.3, citing the UN special rapporteur on human rights and counterterrorism in Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism – Impact of measures to address terrorism and violent extremism on civic space and the rights of civil society actors and human rights defenders – UN Doc. A/HRC/40/52, 1 March 2019.

for its decision-making.¹⁶⁹ In a following report concerning the implementation of the UNGPs in the technology sector of 2022, the HRC acknowledged the Oversight Board as an example for the development of an in-house grievance mechanism under the UNGPs, noting that technology companies' current performance regarding the accessibility of operational grievance mechanisms leaves ample room for improvement.¹⁷⁰ Within the HRC and, in particular, among UNSRs, there seems to be a trend to instrumentalize the Oversight Board as a specific, and perhaps exceptionally receptive, addressee and amplifier for their guidance. They have included specific parts in their reports in which they address (digital) corporations explicitly.¹⁷¹

At the same time, the UNSRs are remaining very generic in their demands.¹⁷² Despite occasional references to what is seen as the shortcomings of the Oversight Board, the UNSRs generally seem to be willing to include the Oversight Board in the conversation about IHRL. By engaging with the Oversight Board and including it as an addressee of their guidance, they not only convey the impression that the Oversight Board has the potential to do meaningful work in this field, but they also gradually help the Oversight Board to establish its semantic authority. By design, the UNSRs generally enjoy a higher level of flexibility compared to other IHRIs, especially treaty bodies, given that their activities are merely restricted by their mandate and informed by a code of conduct.¹⁷³ Thus they can choose, largely independently, whom to address and from whom to receive information.¹⁷⁴ Yet, in this arguably more informal relationship, the specific mode of engagement and style that the Oversight Board resorts to matters.¹⁷⁵ Without its re-enactment of the three-step test and the evaluation of community standards in light of the 'legality' requirements, these interactions with the Oversight Board would look quite different and so would our assessment of its semantic authority.

¹⁶⁹ Michelle Bachelet, UN High Commissioner for Human Rights, United Nations Human Rights Report 2021 (2022), at 58.

¹⁷⁰ 'Public Comment by UN Special Rapporteur on Minority Issues Relating to Cases on Hate Speech and Minorities', *OHCHR*, December 2020, available at www.ohchr.org/en/statements/2020/12/public-comment-un-special-rapporteur-minority-issues-relating-cases-hate-speech.

¹⁷¹ SR Report on Disinformation and freedom of opinion and expression during armed conflicts UN Doc. HRC/77/288, *supra* note 166, paras 74ff; HRC, *supra* note 49, paras 70ff.

¹⁷² 'Joint Statement by UNHRC Special Procedures Experts Referring and Partially Reiterating an Open Letter of UN High Commissioner for Human Rights, Volker Türk to Twitter CEO Elon Musk', *OHCHR*, 6 January 2023, available at www.ohchr.org/en/statements/2023/01/freedom-speech-not-freedom-spread-racial-hatred-social-media-un-experts. The same holds true for the 'Joint Declaration on Media Freedom and Democracy by UN and Regional Mandate Holders on Freedom of Expression of Opinion and Expression', *OHCHR* (2023), available at www.ohchr.org/sites/default/files/documents/issues/expression/activities/2023-JD-Media-Freedom-and-Democracy.pdf. See references in Oversight Board, CD 2023-007-FBUA, 2023-008-FB-UA, 2023-009-IG-UA, *supra* note 100.

¹⁷³ Code of Conduct for Special Procedure Mandate Holders of the Human Rights Council, UN Doc. HRC/A/RES/5/2 (2007), which was included in HRC, *Manual of Operations of the Special Procedures*, August 2008.

¹⁷⁴ Berger, *supra* note 101, at paras 21, 22.

¹⁷⁵ On the productiveness of analysing style, see Van Den Meerssche and Gordon, 'Is This the Rhizome? Thinking Together with Fleur Johns', 33 *Law and Critique* (2022) 237, at 240 ('style points act as a sort of lens to make new governance practices legible, both for institutional application and critical attention').

2 Who Is not Taking Part in the Conversation?

By mapping the existing interactions between Meta, the Oversight Board and IHRIs, we have brought to the fore different modes of engagement and contextualized these different modes under the analytical lens of semantic authority. Yet, thus far, we have mostly concentrated on those sitting around the table and looked at those who have been specifically addressed – those who have been speaking in loud voices who are shaping our ideas of what is going on in-between. It is, however, equally (if not more) important to ask who is not invited to the table and who refuses to respond. Considering the complexity of the international human rights protection system with regard to both normative instruments and institutions, the absence of specific institutions equally shapes the relationships.

With the strong emphasis that Meta and the Oversight Board place on the ICCPR and other international human rights treaties, it is not surprising that the focus rests firmly on these international frameworks and that attention is drawn away from other (regional) instruments and institutions. As we will show in the following, the overall picture of references to other sources remains generic at best and eclectic at worse, despite the guidance that these other institutions have to offer. First, actors involved in other areas of international law are rarely referenced,¹⁷⁶ and, if they are referred to, it is only for factual guidance. This holds true not only for publications of UN specialized agencies such as the World Health Organization or the UN Educational, Scientific and Cultural Organization¹⁷⁷ but also for international humanitarian law and important institutions such as the International Committee of the Red Cross.¹⁷⁸ Second, references to the documents or case law of regional human rights institutions remain a rare exception, with no apparent interest in the growing body of relevant regional case law.¹⁷⁹ Any such references are exclusively made to illustrate underlying facts of the case. In turn, it is not surprising that, thus far, regional human rights courts and institutions have not been addressing the Oversight Board or Meta either. The same applies for case law by national (constitutional) courts, which the Oversight Board has only referenced once.¹⁸⁰ Guidance from other national or regional institutions heavily

¹⁷⁶ The rare cases for such references to other areas of international law include references to two UN conventions on psychotropic substances in Oversight Board, CD 2021-013-IG-UA (Ayahuasca brew), 9 December 2021, at 6, available at www.oversightboard.com/decision/IG-OU6FLA5B/.

¹⁷⁷ Referencing the UN Educational, Scientific and Cultural Organization in Oversight Board, CD 2022-005-FB-UA (Mention of the Taliban in news reporting), 15 September 2022; referencing the World Health Organization's declaration of COVID-19 as an international public health emergency in Oversight Board, PAO-2022-01, *supra* note 125.

¹⁷⁸ Only in Oversight Board, CD 2023-004-FB-MR, *supra* note 123, is the latter especially interesting. The International Committee of the Red Cross, like the Oversight Board, does not fit in any pre-defined institutional frame but evolved into an important actor in international humanitarian law interpretation by establishing semantic authority. See Venzke, 'Legal Contestation about Enemy Combatants: On the Exercise of Power in Legal Interpretation', 155 *Journal of International Law and International Relations* (2009) 155.

¹⁷⁹ Such as, *inter alia*, references to the Inter-American Commission of Human Rights' annual report of 2022 in Oversight Board, CD 2023-014-IG-UA (Call for women's protest in Cuba), 3 October 2023, available at www.oversightboard.com/decision/IG-RH16OBG3/.

¹⁸⁰ Oversight Board, PAO-2021-01, *supra* note 46, at 18, para. 49.

involved in digital policy (for example, on the EU level) is not referenced at all. If Meta and the Oversight Board have aimed to refuse these institutions a seat at the table and prevent them from taking part in the debate about how human rights should be interpreted and protected on Meta's platforms, thus far they have succeeded.

E The Emergence of Inter-Institutional Dialogues?

By mapping the different stages of the evolving relationship between Meta, the Oversight Board and different IHRIs, we were able to trace how semantic authority is constructed and contested in between these institutions. Through the analytical lens of semantic authority, we were able to bring to the fore different strategies pursued by different institutions 'to establish reference points for legal discourse that other actors can hardly escape'¹⁸¹ and 'to elucidate whose voice is particularly influential in international legal discourse'.¹⁸² In this section, we will address and contextualize what appears to be their underlying strategies.

First, the Oversight Board has utilized international human rights vocabulary and the legality test as a foothold to push for its institutional self-authorization vis-à-vis Meta. It was able to do so because Meta had previously introduced international human rights vocabulary into the conversation. The strategy pursued by the Oversight Board is twofold: first, comprehensively and robustly integrating IHRL into its governing documents wherever possible, and second, modelling the design of its documents after modes of reasoning established by the treaty bodies. Using human rights as an anchor and echoing Kaye's demands, the Oversight Board has claimed to make the human rights compliance of Meta its 'principal task', as allegedly prescribed by IHRIs.¹⁸³ As a result, it has at least become more cumbersome for Meta to ignore or evade the arguments developed by the Oversight Board. We can already see how Meta has started drafting its statements to the Oversight Board prior to its decisions differently. Departing from its past practice, Meta increasingly has relied on treaty bodies as well as on national and regional human rights case law to substantiate its positions.¹⁸⁴ The Oversight Board has created a tool for institutional emancipation from Meta by establishing its own interpretations of IHRL as a reference point for content moderation. What we witness, as Venzke would have it, is how semantic authority does

¹⁸¹ Venzke, 'Semantic Authority', in J. d'Aspremont and S. Singh (eds), *Concepts for International Law* (2019) 815, at 815.

¹⁸² *Ibid.*

¹⁸³ Oversight Board, CD 2020-003-FB-UA, *supra* note 114, at 8.3.

¹⁸⁴ Oversight Board, CD 2021-013-IG-UA, *supra* note 175; Oversight Board, CD 2022-011-IG-UA (Video after Nigeria church attack case), 14 December 2022, at 6, available at www.oversightboard.com/decision/IG-0U6FLA5B/. In three recently published decisions, the Oversight Board only delivered summary decisions, as '[a]fter the Board brought the appeal to Meta's attention, the company reversed its earlier decision'. See Oversight Board, CD 2023-015-FB-UA (Dehumanizing speech against a woman), 27 June 2023 available at <https://www.oversightboard.com/decision/FB-VJ6FO5UY/>; Oversight Board, CD 2023-016-FB-UA (Metaphorical statement against the president of Peru), 27 June 2023, available at <https://www.oversightboard.com/decision/FB-2AHD01LX/>; Oversight Board, CD 2023-017-FB-UA (Anti-colonial leader Amílcar Cabral), 27 June 2023, available at <https://www.oversightboard.com/decision/FB-33NK66FG/>.

‘[n]ot only influence the meaning of given norm texts, but its communications structure the space of contestation’.¹⁸⁵

Second, the Oversight Board is carefully grooming itself as an interlocutor for dialogue about the interpretation of IHRL with mainly two kinds of IHRIs – namely, treaty bodies and UNSRs. It does so by pursuing a whole bundle of strategies: first, by resorting to the vocabulary of legality; second, by re-enacting the three-step test; third, by offering a third-party involvement tool through the public comment process;¹⁸⁶ fourth, through its case selection; and, lastly, by framing these strategies as imperatives under the UNGPs. In construing its role as an interpreter of IHRL, the Oversight Board has inevitably raised legitimacy questions – some of which were shelved by pointing to the relative improvement that the Oversight Board has brought compared to the previous status quo as it somewhat aligned with minimal theories of legitimacy.¹⁸⁷ However, legitimacy questions are resurfacing as the Oversight Board becomes more eager to define space for its own interpretations,¹⁸⁸ increasingly engaging in practices of self-referencing its previous decisions rather than pointing to IHRI guidance.

Third, we see a growing number of responses of UNSRs.¹⁸⁹ They appear to be gladly engaging with the Oversight Board as a specific, and perhaps exceptionally receptive, addressee and amplifier for its guidance. By drawing on the vocabulary and methods of reasoning of international human rights, and by positioning itself as an institution that reviews ‘law’, the Oversight Board has begun to create possible entry points for dialogue on a seemingly equal footing. Whether these first and cautious references and responses will mature into a constructive dialogue between these institutions depends on a creative, iterative and discursive engagement and on who responds and how in the future. Currently, the Oversight Board’s practices and its claims *vis-à-vis* Meta are bolstering the semantic authority of the treaty bodies and the UNSRs, while marginalizing the semantic authority of other instruments and institutions such as regional human rights institutions and, interestingly, courts and tribunals. Conflicts regarding the scope of protection of different sources of IHRL, thus far, have not been addressed. Yet those can be considerable, as a recent inquiry by Evelyn Aswad and David Kaye shows,¹⁹⁰ which points to open questions such as what framework should

¹⁸⁵ Venzke, *supra* note 26, at 63.

¹⁸⁶ The public comments procedure resembles *amicus curiae* in human rights bodies and less the stricter (and varying) rules that are established by different international courts and tribunals. See Piovesan and Cortez da Cunha Cruz, *supra* note 121; Sands and Mackenzie, *supra* note 121.

¹⁸⁷ According to such theories, any reasonably just legal regime should be supported, absent a fair prospect of its replacement by more just institutions. See Fallon, ‘Legitimacy and the Constitution’, 118(6) *HLR* (2005) 1787, at 1798ff; Haggart and Keller, *supra* note 159.

¹⁸⁸ See, *inter alia*, Oversight Board, CD 2020-002-FB-UA, *supra* note 75, at 8.3.

¹⁸⁹ See Open Letter of SR Khan to Oversight Board, 5 July 2023, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=28221>; response of the Oversight Board, 31 August 2023, available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=37688>; ‘Joint Declaration on Freedom of Expression and Gender Justice’, *OHCHR* (2022), available at www.ohchr.org/sites/default/files/2022-05/Gender-Joint-Declaration-Freedex.pdf.

¹⁹⁰ Aswad and Kaye, *supra* note 111.

be considered appropriate for the effective protection of human rights online and how much leeway Meta and the Oversight Board should enjoy when determining it.

4 Conclusion

By revisiting different stages of Meta's and the Oversight Board's engagement with a variety of IHRIs and vice versa, we were able to trace the strategies that they have pursued to construct their semantic authority. This also highlights what might be productive entry points for more specific guidance to enhance the protection of human rights online. The interrelations that we were able to trace, thus far, show a considerable level of contingency and uncertainty. The relationship between Meta, the Oversight Board and IHRIs remains 'complicated', and there is a certain degree of co-dependency in these relationships. We must not forget that the semantic authority of IHRIs themselves depends on how successful they are in establishing reference points in international human rights discourse. Thus, how they continue to use their authority – and also *vis-à-vis* Meta and the Oversight Board – remains important.

What began as a fling between IHRIs and the Oversight Board seems to have become more and more serious lately, and it may continue to do so if treaty bodies, especially the HRC, regional human rights institutions and courts, should happen to seize an opportunity to engage with the Oversight Board and join the conversation. Yet there are possible benefits and downsides involved from the perspective of IHRIs. On the one hand, with the Oversight Board and the growing number of strategically drafted documents it publishes, treaty bodies have the opportunity to steer the conversation into a specific direction, contest human rights interpretation by the Oversight Board and discursively narrow the interpretative discretion that the Oversight Board has established. Thereby, they can bolster their authority in becoming important reference points for the interpretation of UNGPs by (digital) corporations. Given the uncertainties in marrying the UNGPs with state obligations under IHRL to contour Meta's responsibility to respect human rights, there is still a lot of work to be done. IHRIs have the opportunity to provide guidance that goes beyond what is foreseen in the UNGP, including guidance on algorithmic design choices. So far, the UNGPs only mention treaty bodies once and in a rather unspecific manner.¹⁹¹ The same holds true for the already more actively engaging IHRIs, such as the OHCHR and the UNSRs. While they have established reference points that the Oversight Board and Meta can hardly escape, their guidance could have more impact if it was more specific.

Meta, on the other hand, does not seem to fully embrace the idea of seriously opening its relationship with the Oversight Board to IHRIs. From the perspective of IHRIs, it is important to stay wary of the possible downsides and be careful not to legitimize corporate human rights window dressing. There is a risk of being distracted by a superficial compliance of community standards with an eclectic selection of IHRL and therefore overlooking (rather than overseeing) the real human rights implications of

¹⁹¹ UNGPs, *supra* note 39, at 4, Commentary on Foundational Principle no. 2.

algorithmically enforced content moderation. To manage this risk, IHRIs could articulate legitimacy requirements aimed at further refining the Oversight Board's practice and institutional structure, steering the way in which this sophisticated self-regulatory mechanism develops. Demanding compliance to human rights thus might simply not be enough.¹⁹² If Meta should give in to its already palpable jealousy, mourning the two-way relationship that Meta and the Oversight Board started out with, their relationship may turn into a rather unstable love triangle, an arrangement that may become, in the long run, unsuitable for anyone involved and oftentimes coming with casualties. Therefore, IHRIs are well advised to divide their attention equally to both – Meta and the Oversight Board. However, if IHRIs decide to increase their responsiveness to Meta and the Oversight Board in the future in an effort to form a closer connection and to engage more seriously in an inter-institutional conversation with them, they should continue to pay careful attention to when, how and what they contest and how they draft their guidance.¹⁹³ With our intervention, we could only take the first steps in investigating what role the Oversight Board might play in the complex institutional arrangement of international human rights protection online. We have demonstrated how shifting the focus to the 'in-between' offers novel insights and may also continue to prove productive for future and empirically more comprehensive analyses.

¹⁹² S. Moyn, *Not Enough Human Rights in an Unequal World* (2018). Indeed, a focus on the 'correct' human rights may have peripheralized other problems, such as the business model of platform companies.

¹⁹³ UNSR Khan, in HRC, *supra* note 54, para. 86.

