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Beyond The Name And Nationality: Who Are The Claimants in Investment Arbitration?

Vera Korzun*

Current efforts to reform international investment law focus in large part on the impact of investor-State dispute settlement (ISDS) on the regulatory power of the sovereign State. At the core of the reform debate is the ability of foreign investors, as claimants in investment treaty arbitrations, to challenge the laws and regulations of the host State as part of dispute resolution. Modern investment treaties seek to safeguard the State's right to regulate, but also impose obligations on foreign investors and promote responsible business conduct.

Yet, beyond the name and nationality as alleged in arbitration filings, very little is known about the claimants themselves. Who are the primary beneficiaries and users of international investment law and dispute resolution? Are they predominantly large multinational corporations as it is commonly perceived? Are there any individuals able to bring claims in ISDS? Do they relate to one another? These and many other questions remain largely open. Answering these questions will inform and guide sovereign States and international organizations as the debate about the possible reform of ISDS continues.

This Article seeks to fill the existing void by providing empirical data on claimants—companies and individuals—that have brought investment treaty

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arbitration claims in International Centre for Settlement of Investment Disputes (ICSID) arbitrations from January 1, 2010, to December 31, 2019. It further analyzes the data on claimants and investment arbitrations to better understand how investor protection treaties affect the flows and structure of foreign investments and decisions by companies and individuals to bring claims in ISDS. In doing so, it seeks to contribute to our understanding of the functioning of the international investment regime and whether it achieves its goal of increasing the flow of foreign investments into the host State's economy. The Article concludes by reconciling the goals of investor protection with the collected empirical data on claimants in ISDS and offers normative prescriptions for investment treaty-making.

INTRODUCTION

Modern international investment law encompasses nearly 3,300 international investment agreements (IIAs) united largely by the same goal—to increase the flow of foreign investments into a host country by providing protections to foreign investors and/or investments.[1] In addition to serving their formal goal, such agreements perform a signaling function by indicating to the rest of the world that a country is safe for foreigners to invest in and will treat them fairly.[2] Although

1. As of January 2024, the database of IIAs of the United Nations Conference on Trade and Development (UNCTAD)—the IIA Navigator—contains 3,278 IIAs concluded worldwide to date, including 2,589 agreements currently in force. *See* UNCTAD, International Investment Agreements Navigator, https://investmentpolicy.unctad.org/international-investment-agreements. (According to the IIA Navigator, the majority of these agreements (2,828 IIAs) are bilateral investment treaties (BITs), with 2,219 BITs currently in force.)

2. *See, e.g.*, Zachary Elkins et al., *Competing for Capital: The Diffusion of Bilateral Investment Treaties, 1960–2000*, 2008 U. ILL. L. REV. 265, 283–84 (arguing that signing an investment treaty

the scope and protections offered in IIAs vary substantially, the conclusion of bilateral investment treaties (BITs) and other IIAs has long become a *de-facto* standard for investor-friendly nations.[3] Unsurprisingly, countries that sought foreign investments rushed to complete IIAs in bulk, often conceding to the demands of their treaty partners and not thinking through the economic implications of such treaties.[4]

A cursory look into BITs shows that they are treaties for the benefit of third parties. Concluded by sovereign States on a bilateral basis, they provide protections to nationals of State parties, both companies and individuals, who choose to invest in a foreign country that has signed a respective BIT.[5] The enforcement of BITs is left to their beneficiaries, foreign investors, who in case of a dispute can invoke an investor-State dispute settlement (ISDS) mechanism provided for in the treaty.[6] This right of foreign companies and individuals to

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"send[s] a proinvestment signal to international markets." (footnote omitted)). *See also* Lauge N. Skovgaard Poulsen, *The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence*, *in* YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2009–2010 539, 539–74 (Karl P. Sauvant ed., 2010); Andrew Guzman, *Explaining the Popularity of Bilateral Investment Treaties*, *in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES, AND INVESTMENT FLOWS 73, 73–98 (Karl P. Sauvant & Lisa E. Sachs eds., 2009).

3. *See* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work: An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 HARV. INT'L L.J. 67, 102 (2005) (noting that "signaling power [of BITs] may have eroded during the 1990s as investors increasingly saw them as a 'normal feature of the institutional structure'." (footnote omitted)). *See also* UNCTAD's International Investment Agreements Navigator, *supra* note 1 (showing that almost all economies have signed BITs or other IIAs, including 180 countries that have signed at least one BIT to date).

4. *See, e.g.*, Deborah L. Swenson, *Why Do Developing Countries Sign BITs?*, 12 U.C. DAVIS J. INT'L L. & POL'Y 131, 143 (2005) (arguing that developing countries that signed BITs in the 1990s "may have agreed to sign these treaties since foreign investors located in their borders were lobbying for the investor protections they could gain from BITs").

5. *See, e.g.*, Anthea Roberts, *Triangular Treaties: The Extent and Limits of Investment Treaty Rights*, 56 HARV. INT'L L. J. 353, 353–54 (2015) ("Investment treaties should be reconceptualized as triangular treaties, i.e., agreements between sovereign States that create enforceable rights for investors as non-sovereign, third-party beneficiaries."). *See also* Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 368 (2017) ("In this sense, IIAs operate like contracts for the benefit of third parties. Although they are concluded by sovereign States, IIAs provide third-party beneficiaries–the foreign investors–with the rights that are directly enforceable in international arbitration against State parties.")

6. The term "investor-State dispute settlement" (or "ISDS") refers to the mechanisms of resolving investment disputes between foreign investors and the host State, most commonly, investor-State arbitration. *See* Andrea Bjorklund, Lecture, *Will an International Investment Court Restore Legitimacy to Investor State Dispute Settlement?*, UN Audiovisual Library of International Law (2020). According to UNCTAD, most BITs contain ISDS provisions, notably, providing for binding arbitration that can be initiated by the foreign investor in case of a treaty breach by the host State. *See* UNCTAD, DISPUTE SETTLEMENT: INVESTOR-STATE. UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS 5 (2003). Depending on an investment treaty, foreign investors have several options to choose from, most commonly, the arbitration pursuant to the 1965 Convention for the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention), the ICSID Additional Facility Rules, or the UNCITRAL Arbitration Rules. *See* Mapping of IIA Content, UNITED NATIONS CONF. ON TRADE AND DEV.,

bring a claim in ISDS has attracted the attention of scholars and policymakers and has generated an ongoing debate about the costs and benefits of foreign investor protection.[7] Moreover, once foreign investors began to bring their first claims in ISDS, it became clear that international investment law had empowered "foreigners" to challenge the government measures of the host State.[8] In response, governments and public interest groups voiced their concern that the current system of ISDS enabled foreign investors—often, multinational corporations—to encroach on State sovereignty and the right to regulate, that is the right of the host State to adopt and implement laws and regulations for the benefit of the public at large.[9] Providing for the right to regulate in investment treaties is an effort to safeguard rights for the sovereign State and, therefore, minimize challenges of domestic regulations and potential liability of the host State where domestic law

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https://investmentpolicy.unctad.org/internationalinvestment-agreements/iia-mapping [hereinafter UNCTAD IIA Mapping Project] (last visited Jan. 1, 2024) (mapping the content of 2,583 IIAs, including 2,448 treaties that provide for the ISDS mechanisms, such as the ICSID arbitration (2,191 treaties), the UNCITRAL arbitration (1,643 treaties), or litigation in domestic courts (1,623 treaties).

7. *See generally* Jonathan Bonnitcha et al., *A Future Without (Treaty-Based) ISDS: Costs and Benefits*, *in* INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OF TRANSFORMATION? 191, 191–219 (Manfred Elsig et al. eds., 2021) (exploring whether the abandonment of treaty-based ISDS would negatively impact the main benefits it allegedly provides, such as the increase of foreign investment flows, depoliticization of investment disputes, and the institutionalization of the rule of law in host States); Columbia Center on Sustainable Investment, *Costs and Benefits of Investment Treaties: Practical Considerations for States.* Policy Paper (March 2018) (providing an overview of the costs and benefits of investment treaties and offering suggestions to the sovereign States on managing their existing treaty obligations and developing future treaties); Joachim Pohl, *Societal Benefits and Costs of International Investment Agreements* (OECD, Working Papers on International Investment 2018/01), https://doi.org/10.1787/e5f85c3d-en (last visited Jan. 1, 2024) (reviewing societal benefits and costs of ISDS from the academic, government, business, and civil society viewpoints).

8. A classic example is the challenge by multinational tobacco company Philip Morris International, Inc. a tobacco-packaging legislation in Australia in domestic and international courts and ISDS. *See Philip Morris Asia Ltd. v. Austl.*, *PCA Case No. 2012-12*, Award on Jurisdiction and Admissibility (UNCITRAL 2015). (Four years after the notice of arbitration was served, Australia won in the investment treaty arbitration but the reputation of ISDS has since suffered a heavy blow. In large part, because this dispute has shown how legitimate government measures can be challenged in ISDS through creative treaty- and forum-shopping.)

9. *See, e.g.*, OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law* 2 (OECD, Working Papers on International Investment 2004/04), http://dx.doi.org/10.1787/780155872321 (last visited Jan. 1, 2024) (noting that "there is increasing concern that concepts such as indirect expropriation may be applicable to regulatory measures aimed at protecting the environment, health and other welfare interests of society."). On the right to regulate in international investment law and arbitration, *see generally* AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014) (offering the in-depth analysis of the right to regulate in trade and investment agreements, including pre-modern agreements and modern IIAs); Korzun, *The Right to Regulate*, *supra* note 5 (examining the right to regulate in international investment law, with a focus on regulatory disputes in ISDS and the ways to protect the right to regulate in investment treaties through exceptions, exclusions, and other safeguard provisions); YULIA LEVASHOVA, THE RIGHT OF STATES TO REGULATE IN INTERNATIONAL INVESTMENT LAW: THE SEARCH FOR BALANCE BETWEEN PUBLIC INTEREST AND FAIR AND EQUITABLE TREATMENT (2019) (providing a comprehensive analysis of the right to regulate in the context of the fair and equitable treatment (FET) standard as embodied in investment treaties and tribunal decisions).

impacts foreign investors. By definition, the scope of the right to regulate, as protected by investment treaties, impacts the scope of the benefits provided to foreign investors as well as the key concepts of the investment regime, such as "investor" and "investment."[10]

Developments in the world economy in the last two decades have contributed to the debate about the benefits of IIAs and the alleged legitimacy crisis in investment treaty arbitration.[11] Noticeably, there has been a change in the direction of cross-border investments. In the past, cross-border investments were made by companies and individuals from developed countries who frequently invested in less developed regions.[12] Thus, the flow of foreign investments remained largely unidirectional—from developed to developing countries—and the roles of these countries as capital exporters and capital importers rarely

10. *See* UNCTAD, INTERNATIONAL INVESTMENT AGREEMENTS REFORM ACCELERATOR 5 (2020) (explaining that "[t]he extent to which a State's right to regulate in the public interest is restricted may be directly affected by treaty provisions relating to the scope of the IIA or definitions of concepts such as 'investment' and 'investor'").

11. The term "legitimacy crisis" with reference to ISDS was first used by Susan Franck in her 2005 law review article, where she argued that contradictory awards undermine "the legitimacy of investment arbitration, particularly where public international law rights are at stake and the legitimate expectations of investors and Sovereigns are mismanaged." Susan D. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions*, 73 FORDHAM L. REV. 1521, 1568 (2005). Since then, scholars have used the term "legitimacy crisis" to refer to a broad range of weaknesses of ISDS, including its inherent "pro-investor bias." *See, e.g.*, Malcolm Langford et al., *Special Issue: UNCITRAL and Investment Arbitration Reform: Matching Concerns and Solutions, An Introduction*, 21 J. WORLD INV. & TRADE 167, 168 (2020) (observing that "[f]or at least a decade, the ISDS regime has suffered a public legitimacy crisis.") (footnote omitted) The authors further explain that "[c]ritics charge that the system is afflicted by pro-investor bias, undue secrecy, conflicting jurisprudence and high levels of compensation, which is compounded by concerns that developing countries are burdened with excessive legal costs and frequently lose cases against foreign investors." *Id.* (footnote omitted).

12. *See, e.g.*, UNCTAD, WORLD INVESTMENT REPORT 1998. TRENDS AND DETERMINANTS 9, Table I.8. Regional Distribution of FDI Inflows and Outflows, 1994–1997 (United Nations, New York, and Geneva, 1998) (providing data on outflows and inflows of FDI for 1994–1997, where the developed countries accounted for 84.8–86.9 percent of total FDI outflows and 57.9–63.9 percent of total FDI inflows while developing countries accounted for 12.9–15 percent of total FDI outflows and 31.9–39.3 percent of total FDI inflows). The report further states that in 1997 developing countries:

> accounted for close to two-fifths or $149 billion of world FDI inflows, twice the level they received in 1993 and tenfold the level in 1985. (Both in 1996 and 1997, FDI flows into developing countries were larger than those into Western Europe, by about $30 billion.)

Id. at 16. The reference in this Article to the "developing" and "developed" countries follows the practice of UNCTAD that prior to December 2021 reported statistical data for the developing and developed economies. UNCTAD has since abolished this practice, although to assist the users that "expressed the need to maintain the distinction of developed and developing regions," UNCTAD has made available a file with "an updated classification of developed and developing regions as of May 2022." UNCTAD, Methodology: Standard Country or Area Code for Statistical Use (M49), accessible https://unstats.un.org/unsd/methodology/m49/. The file can be accessed at https://unstats.un.org/unsd/methodology/m49/historical-classification-of-developed-and-developing-regions.xlsx.

changed.[13] Such asymmetry of roles and interests made it easier for signatory States to negotiate a BIT, because a home State would largely seek protections for its nationals investing abroad, while a host State would be willing to grant investor protections in hopes of attracting foreign investments.[14]

Today, investment flows are increasingly bi-directional.[15] Noticeably, countries that previously played a capital-importing role, such as China,[16] are actively investing abroad in Africa and Latin America,[17] and in traditionally capital-exporting countries of the European Union, the United Kingdom, the United States, and Canada.[18] In cases of investing in developed countries in

13. *See, e.g.*, SUSAN D. FRANCK, ARBITRATION COSTS. MYTHS AND REALITIES IN INVESTMENT TREATY ARBITRATIOn 6–7 (2019) ("Historically, the developed world dominated capital exports. . . . [as] rates of capital outflows from developing [S]tates and transitioning economies was proportionately low when compared to their developed world counterparts, with annual investment outflows regularly around 10% and never more than a quarter of worldwide outbound investment until 2009" (footnote omitted)).

14. In international investment law, the term "home State" refers to the country of origin of foreign investments, while the term "host State" refers to the country where the investment is made.

15. *See, e.g.*, UNCTAD, WORLD INVESTMENT REPORT 2019: SPECIAL ECONOMIC ZONES 2 (United Nations, 2019) ("FDI flows to developed economies reached their lowest point since 2004, declining by 27 per cent.") Further, according to the 2019 Reports, FDI flows to developing economies remained stable, rising by 2 percent to $706 billion. As a result of the increase and the anomalous fall in developed countries, the share of developing economies in global FDI increased to 54 percent, a record. *Id*. *See also* Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 23–24 (2014) ("Capital flows are no longer uni-directional, leaving [S]tates that had previously considered themselves immune from such suits open to investment arbitration." (footnote omitted)); FRANCK, ARBITRATION COSTS, *supra* note 13, at 6–7 ("More recently, yearly investment flows have ebbed and flowed but are no longer unidirectional." (footnote omitted)).

16. *See, e.g.*, UNCTAD WORLD INVESTMENT REPORT 1998, *supra* note 12, at xx ("A new record level of $45 billion in FDI flows received by China contributed to the 9 per cent increase in total FDI flows to Asia and the pacific in 1997"). The 1998 Report also notes that in 1997 China and Indonesia experienced large increases in outflows, with big projects in natural resource-seeking investments, while firms from Singapore and Taiwan were actively involved in acquisitions of firms in crisis-afflicted countries. *Id*. at xxi.

17. On Chinese FDI in Africa, see, e.g., Won Kidane & Weidong Zhu, *China-Africa Investment Treaties: Old Rules, New Challenges*, 37 FORDHAM INT'L L.J. 1035, 1036 (2014) ("The extraordinary rise in the last decade of Chinese investment in Africa continues to be a subject of profound curiosity. . . . largely because it defies the centuries-old norm on who invests where."). On Chinese FDI in Latin America, *see, e.g.*, Ding Ding et al., *Chinese Investment in Latin America: Sectoral Complementarity and the Impact of China's Rebalancing*, IMF Working Paper WP/21/160 (2021).

18. *See, e.g.*, [UNCTAD], WORLD INVESTMENT REPORT 2021: INVESTING IN SUSTAINABLE RECOVERY 82 (United Nations, 2021) ("Despite the COVID-19 pandemic, aggregate FDI flows to the least developed countries (LDCs) remained practically unchanged in 2020, largely due to the developments in Angola. . . . Investors from developing countries, especially from China and, to a lesser degree, Mauritius, South Africa and Thailand, continued to play a growing role in investment in LDCs.") The 2021 Report further notes that "China is the largest and one of the fastest growing sources of FDI to LDCs." *Id*. at 83. *See also* Max J. Zenglein & Gregor Sebastian, *Chinese Foreign Direct Investment in Europe: The Downward Trend Continues*, UNIDO INDUS. ANALYTICS PLATFORM (IAP) (Dec. 2022) (observing the downwards trends in Chinese FDI in Europe following the COVID-19 pandemic but also reporting that

particular, once a dispute arises, the old generation of Chinese BITs, which provided limited protections to foreign investors and focused on protecting the host State, may prove to be less adept at satisfying the interests of Chinese companies making investments abroad.[19] Although China remains a net capital importer, there is a growing awareness in China and other countries whose roles in cross-border movement of capital are changing that investor protection treaties should both safeguard the rights of the host State and protect its investors abroad.[20] Similarly, as the pattern of investment flows is changing globally, developed countries are no longer immune from claims in ISDS by foreign investors coming from developing countries that were predominantly capital importers in the past.[21]

Another development that has affected international investment law is the evolution of the European Union (EU) and its foreign investment competence regime.[22] Today, Foreign Direct Investments (FDIs), as part of the common commercial policy, fall under the exclusive competence of the EU.[23] This gives the EU the exclusive power to legislate in the area of FDIs but not in the area of

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> Chinese investments in Europe (the European Union (EU) and the United Kingdom (UK)) . . . which had been steadily declining since 2017, bounced back in 2021, increasing by 33 percent year-on-year, and reaching EUR 10.6 billion. Despite this recovery, Chinese FDI in Europe has dropped by 77 percent compared to the peak in 2016 of EUR 46 billion, and remains on a downward trajectory due to increased scrutiny—including stronger investment screening in Europe as well as ongoing capital controls in China—and an economic slowdown at home.).

19. *See, e.g.*, Juan Du, *Restrictive ISDS Clauses under Chinese BITs: Interpretations and Implications for China*, 30 ASIA PACIFIC L. REV. 382, 382 (2022) (in view of the restrictive ISDS clauses in Chinese BITs, arguing that

> As China's dual role in two-way investment, China needs to consider the protection of both the host [S]tate and its investors. To deal with the challenges from the predominance of the restrictive ISDS clauses in Chinese BITs, China seems to be updating its restrictive BITs from a multilateral level.

See also Uche Ewelukwa Ofodile, *Africa-China Bilateral Investment Treaties: A Critique*, 35 MICH. J. INT'L L. 131, 155 (2013) (observing that "[e]arly Chinese BITs 'provided investors with little protection in practice' and accorded host governments considerable policy space") (footnote omitted).

20. *See, e.g.*, Uche Ewelukwa Ofodile, *supra* note 19, at 156–57 (exploring China's motivations for concluding BITs with countries in Africa). *See also* Cai Congyan, *Outward Foreign Direct Investment Protection and the Effectiveness of Chinese BIT Practice*, 7 J. WORLD INV. & TRADE 639 (2006); Stephan W. Schill, *Tearing Down the Great Wall—the New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73 (2007).

21. *See* Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1, 23–24 (2014).

22. *See generally* ANGELOS DIMOPOULOS, EU FOREIGN INVESTMENT LAW (2011) (providing a comprehensive analysis of the European Union's involvement in the regulation of foreign investments, including the scope of the EU competencies and the influence of the EU on international investment law globally).

23. *See* Issam Hallak, *EU International Investment Policy: Looking Ahead, Briefing*, E.P.R.S. Doc. PE 729.276 (Feb. 2022).

portfolio investments or ISDS, which are frequently covered by the IIAs.[24] As a result, in concluding EU investor protection treaties with third countries, the EU shares its competence with EU Member States whose approval of such treaties is required.[25] In addition to its role in investment treaty-making, the European Commission has long been adamant in its criticism of ISDS and has proposed to replace it with the two-tier permanent international investment court system.[26] The EU and its Member States now lead the discussions on possible reform of ISDS under the guidance of the United Nations Commission on International Trade Law (UNCITRAL).[27]

Current scholarly debate reflects these trends in the world economy, and treaty drafting has focused on the issues of rebalancing international investment

24. *Id*. at 1 ("Early on, concerns were raised as to the specific EU competence. Opinions requested from the Court of Justice of the EU (CJEU) established that the EU had neither exclusive competence in portfolio international investments (which, unlike direct investments, provide limited control over a firm) nor in the investor-State dispute settlement (ISDS) mechanism – two domains covered by EU protection IIAs. EU Member State approval on these provisions was therefore needed.")

25. Since 2009 when the Lisbon Treaty entered into force and provided the EU with exclusive competence over FDI, the EU and its Members States have concluded such protection IIAs as the 2016 Canada-EU Comprehensive Trade and Economic Agreement (CETA), the 2018 EU-Singapore Investment Protection Agreement, and the 2019 EU-Vietnam Investment Protection Agreement. *Id*.

26. *See, e.g.*, Cecilia Malmström, *A Multilateral Investment Court: A Contribution to the Conversation About Reform of Investment Dispute Settlement*, EUR. COMM'N DOC. 157512 (Nov. 22, 2018), https://trade.ec.europa.eu/doclib/docs/2018/november/tradoc_157512.pdf [https://perma.cc/LAJ2-535Q] (archived Dec. 2, 2022) (discussing the EU position expressing dissatisfaction with modern ISDS and suggesting to replace it with an investment court system). *See also* Issam Hallak, *Multilateral Investment Court: Overview of the Reform Proposals and Prospects*, E.P.R.S. Doc. PE 646.147 (Jan. 2020), https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/646147/EPRS_BRI(2020)646147_EN.pdf; European Commission Press Release IP/15/6059, The Commission, EU Finalises Proposal for Investment Protection and Court System for TTIP (Nov. 12, 2015), https://ec.europa.eu/commission/presscorner/detail/en/ip_15_6059; European Commission Press Release IP/15/5651, Commission Proposes New Investment Court System for TTIP and Other EU Trade and Investment Negotiations (Sept. 16, 2015), http://europa.eu/rapid/press-release_IP-15-5651_en.htm.

27. *See* U.N. COMM'N ON INT'L TRADE L. [UNCITRAL], Working Group III, *Possible Reform of Investor-State Dispute Settlement (ISDS): Submission from the European Union*, A/CN.9/WG.III/WP.145 (Dec. 12, 2017).

law[28] and reforming the existing system of ISDS.[29] Looking into the first of these issues (rebalancing international investment law), scholars and sovereign States have explored ways to protect the State's regulatory power while also ensuring that foreign investors can continue to rely on investor protection treaties.[30] They have also addressed the ability of multinational corporations to interfere with the State's right to regulate by challenging the government's measures in investment treaty arbitration.[31] Other scholars have focused on ISDS's structural weaknesses:

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28. *See generally* Anthea Roberts & Taylor St John, *Complex Designers and Emergent Design: Reforming the Investment Treaty System*, 116 AM. J. INT'L L. 96 (2022) (exploring the "balanced content" as one of the "emergent design principles" underlying the work of the participants of the ISDS reform efforts at the UNCITRAL); Luke Nottage, *Rebalancing Investment Treaties and Investor-State Arbitration: Two Approaches*, 17(6) J. WORLD INV. & TRADE 1015 (2016) (reviewing two then recent books exploring how international investment law can be changed to better balance the interests of foreign investors and host States); Andrea K. Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, 17(2) LEWIS & CLARK L. REV. 461 (2013) (exploring counterclaims in investment law and arguing that permitting closely related counterclaims against an investor in investment treaties would contribute to rebalancing international investment law). *See also* Marc Jacob & Stephan W. Schill, *Going Soft: Towards a New Age of Soft Law in International Law?*, 8(1) WORLD ARB. & MEDIATION REV. 1, 43–44 (2014) (studying the role of soft law instruments in international investment law and observing that "soft law instruments are . . . becoming increasingly wide-spread also as regards the balancing, or re-balancing, of rights of investors and competing rights of States and their populations").

29. On the proposed reform of ISDS, *see, e.g.*, José Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV.–FILJ 253 (2021); Sergio Puig & Gregory Shaffer, *Imperfect Alternatives: Institutional Choice and the Reform of Investment Law*, 112 AM. J. INT'L L. 361 (2018); Anthea Roberts, *Incremental, Systemic, and Paradigmatic Reform of Investor-State Arbitration*, 112 AM. J. INT'L L. 410 (2018); RESHAPING THE INVESTOR-STATE DISPUTE SETTLEMENT SYSTEM (Jean E. Kalicki & Anna Joubin-Bret eds., 2015). *See also* WOLFGANG ALSCHNER, INVESTMENT ARBITRATION AND STATE-DRIVEN REFORM: NEW TREATIES, OLD OUTCOMES (2022).

30. *See, e.g.*, Andrea K. Bjorklund, *Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims*, 45 VA. J. INT'L L. 809 (2005); AIKATERINI TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW (2014); PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA (2015); Korzun, *The Right to Regulate*, *supra* note 5; Klara Polackova Van der Ploeg, *Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design*, 51 INT'L LAW 109 (2018). *See also* UNCTAD, IIA ISSUES NOTE. INTERNATIONAL INVESTMENT AGREEMENTS, RECENT DEVELOPMENT IN THE IIA REGIME: ACCELERATING IIA REFORM 5 (Issue 3, August 2021) (observing that the right to regulate has been selected among topics for the modernization in the Energy Charter Treaty (ECT); noting that the "States' right to regulate in areas such as health, safety and the environment" is recognized in the United States-Mexico-Canada Agreement (USMCA, in force as from July 1, 2020)); further noting that provisions on the protection of the right to regulate are included in the Regionally Accepted Standards for Negotiating International Investment Agreements, which were endorsed on Nov. 10, 2020 and will serve as a "baseline" for the negotiation of future investment agreements involving Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, and Serbia).

31. *See, e.g.*, *TPP "Worst Trade Deal Ever," Says Nobel-Winning Economist Joseph Stiglitz*, CBC NEWS (Mar. 31, 2016), http://www.cbc.ca/news/business/joseph-stiglitztpp-1.3515452 ("Stiglitz takes issue with the TPP's investment-protection provisions, which he says could interfere with the ability of governments to regulate business or to move toward a low-carbon economy."). *See also* Gus Van Harten & Martin Loughlin, *Investment Treaty Arbitration as a Species of Global Administrative Law*, 17 EUR. J. INT'L L. 121, 124 (2006) ("This growth [of investment treaty arbitration] suggests that multinational enterprises are increasingly prepared to use investment arbitration to resolve disputes

it does not prevent multiple proceedings or double recovery and may allow investment tribunals to render inconsistent and conflicting awards, thereby increasing the social costs of litigation.[32] Scholars have acknowledged that the ISDS system is in crisis and looked into ways to reform ISDS or replace it with an international investment court.[33] Other studies have explored the scope of investor protection treaties and the impact of such treaties on incoming FDIs.[34] Several studies have sought to provide empirical insights into ISDS.[35] Yet very little is known about the *users* of ISDS—companies and individuals that bring

with [S]tates, indicating that investment arbitration has become an important method for foreign investors to resist [S]tate regulation and seek compensation for the costs that flow from the exercise of public authority.").

32. A classic example of multiplicity and inconsistency of arbitral awards are tribunal decisions in *CME v. Czech Republic* and *Lauder v. Czech Republic*, where different tribunals rendered different decisions based on the same facts. *See* CME Czech Republic B.V. (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award, ¶ 620 (Sept. 13, 2001) and Lauder v. Czech Republic, UNCITRAL, Final Award, ¶¶ 176–80 (Sept. 3, 2001). *See also* Julien Chaisse & Lisa Zhuoyue Li, *Shareholder Protection Reloaded: Redesigning the Matrix of Shareholder Claims for Reflective Loss*, 52 STAN. J. INT'L L. 51, 82 (2016) (discussing the rationale for avoiding double recovery in the context of shareholder claims for reflective loss). Together with the counterclaims, multiple proceedings are now on the agenda of the UNCITRAL Working Group III looking into the possible reform of ISDS. *See* UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Thirty-Ninth Session. *Possible Reform of Investor-State Dispute Settlement (ISDS). Multiple Proceedings and Counterclaims.* Note by the Secretariat. A/CN.9/WG.III/WP.193 (Jan. 22, 2020).

33. *See generally* José Alvarez, *ISDS Reform: The Long View*, 36 ICSID REV. – FOREIGN INV. L.J. 253 (2021) (reviewing IIAs and ISDS reform efforts at the UNCTAD, ICSID, and UNCITRAL levels and arguing that available and proposed alternative dispute resolution methods will not fully displace ISDS); Andrea Bjorklund, Lecture, *Will an International Investment Court Restore Legitimacy to Investor State Dispute Settlement?*, UN Audiovisual Library of International Law (2020) (exploring arguments for and against establishing the international investment court system and its potential to restore legitimacy of ISDS); Wolfgang Alschner, *The OECD Multilateral Tax Instrument: A Model for Reforming the International Investment Regime?*, 45 BROOK. J. INT'L L. 1 (2019) (studying the extent to which the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Tax Base Erosion and Profit Shifting, known as the Multilateral Instrument (MLI), can serve as a model for reforming bilateral IIAs).

34. *See, e.g.*, Jason Yackee, *Do BITs Really Work? Revisiting the Empirical Link Between Investment Treaties and Foreign Direct Investment, in* THE EFFECT OF TREATIES ON FOREIGN DIRECT INVESTMENT: BILATERAL INVESTMENT TREATIES, DOUBLE TAXATION TREATIES AND INVESTMENT FLOWS 379 (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Jason Yackee, *Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties*, 22 BROOK. J. INT'L L. 405 (2008); Eric Neumayer & Laura Spess, *Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?*, 33 WORLD DEV. 1567 (2005).

35. *See, e.g.*, FRANCK, ARBITRATION COSTS, *supra* note 13, at 67–68 (providing empirical data on the cost of investment treaty arbitration); David Chriki, *Is the Washington Consensus Really Dead? An Empirical Analysis of FET Claims in Investment Arbitration*, 41 SUFFOLK TRANSNAT'L. L. REV. 291 (2018); Rachel L. Wellhausen, *Recent Trends in Investor-State Settlement*, 7 J. INT'L DISP. SETTLEMENT 117 (2016); Kathleen S. McArthur & Pablo A. Ormachea, *International Investor-State Arbitration: An Empirical Analysis of ICSID Decisions on Jurisdiction*, 28 REV. LIT. 559 (2009); Gus Van Harten, *Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration*, 50 OSGOODE HALL L.J. 211 (2012); Daphna Kapeliuk, *The Repeat Appointment Factor: Exploring Decision Patterns of Elite Investment Arbitrators*, 96 CORNELL L. REV. 47 (2010).

claims in investment treaty arbitration—and the relationships among them.[36] This Article seeks to fill that void.

In the context of the ISDS debate, multinational corporations have long found themselves at the epicenter of criticism. They are believed to be the primary users—and, by some accounts, abusers—of ISDS.[37] In particular, they are suspected of treaty- and forum-shopping through corporate restructuring and incorporating in countries with more beneficial investor protection regimes.[38] They are blamed for contributing to excessive litigation by bringing frivolous and multiple claims.[39] They are accused of encroaching on State sovereignty by challenging government measures adopted for the benefit of the public at large.[40] Meanwhile, multinational corporations have proved capable of depleting natural resources without considering the economic, social, cultural, and environmental needs of the local communities.[41]

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36. *See, e.g.*, FRANCK, ARBITRATION COSTS, *supra* note 13, at 67–68 (noting that investors are "one of the most under-explored actors of [investment treaty arbitration]").

37. *See, e.g.*, *The International Center for Settlement of Investment Disputes (ICSID)*, BRETTON WOODS PROJECT (July 10, 2009), https://www.brettonwoodsproject.org/2009/07/art-564868 ("Twenty per cent of ICSID cases are brought by companies that rank within the top 500 globally, seven of these companies have revenues that exceed the GDP of the country they are bringing a case against."). *See also* GUS VAN HARTEN, THE TROUBLE WITH SOVEREIGN INVESTOR PROTECTION 99–132 (2020) (arguing that through "ISDS as a source of litigation risk" foreign investors are intimidating sovereign States, which leads to regulatory chill and makes governments otherwise change their minds).

38. Vera Korzun, *Shareholder Claims for Reflective Loss: How International Investment Law Changes Corporate Law and Governance*, 40 U. PA. J. INT'L L. 189, 234–38 (2018) (providing examples of investment disputes and related instances of treaty- and forum-shopping in the context of ISDS).

39. *See, e.g.*, Henrik Horn, *Investor-State v. State-State Dispute Settlement*, IFN Working Paper, No. 1248, Research Institute of Industrial Economics (IFN) (Stockholm, 2018) (observing that ISDS has been criticized for allegedly "caus[ing] 'excessive' litigation, relative to some (normally unspecified) benchmark."). The author further explains that "[e]xcessive litigation could be very costly to host countries in terms of legal costs, compensation payments, and reduced regulatory 'policy space'." (footnotes omitted). *Id.*

40. The topic of frivolous claims is currently on the agenda of the UNCITRAL Working Group III looking into the possible reform of ISDS. *See* UNCITRAL, Working Group III (Investor-State Dispute Settlement Reform), Thirty-Ninth Session. *Possible Reform of Investor-State Dispute Settlement (ISDS). Security for Cost and Frivolous Claims.* Note by the Secretariat. A/CN.9/WG.III/WP.192 (Jan. 16, 2020).

41. *See, e.g.*, George K. Foster, *Investor-Community Conflicts in Investor-State Dispute Settlement: Rethinking 'Reasonable Expectations' and Expecting More from Investors*, 69 AM. U. L. REV. 105, 108 (2019) (analyzing "Community Conflict Cases," that is

> investment cases in which the investor seeks damages from the host [S]tate for having canceled a development project following an outcry by local communities who feared that the project would contaminate their water supplies, destroy their sacred sites, threaten endangered plants or wildlife, or wreak other serious harm.)

Forster provides detailed summaries of several Community Conflict Cases in Section II.B of the article. *Id.* at 146–51.

Yet, corporations are themselves affected by the international investment regime.[42] It is increasingly evident that international investment law impacts the inner structure of the corporations that act as claimants in investment treaty arbitration.[43] Remarkably, international investment law allows shareholders to bring claims for damages in ISDS for so-called "reflective loss," that is, loss incurred by shareholders indirectly as a result of injury to "their" company.[44] Shareholders can bring these claims without consulting with the management of the company, regardless of any claims brought by the corporation.[45] Thus, inherent in investment arbitration is the ability of individual shareholders to alter the corporate law and governance choices adopted by the corporation. Furthermore, as empirical evidence suggests, investment treaties incentivize corporate claimants to restructure in order to benefit from a stronger investor protection regime in anticipation of investment treaty arbitration.[46]

Against this background, this Article seeks to provide empirical data on claimants—companies and individuals—that have brought investment claims in ISDS. It further seeks to examine the nature and structure of relations between claimants in known investment treaty arbitrations to better understand how investor protection treaties affect the structure of foreign investments and decisions by companies and individuals to bring ISDS claims. The Article starts with a hypothesis that corporations and their shareholders are the most common ISDS claimants. The empirical data collected in this study confirm this hypothesis, although a further study is needed to explore the prevalence in ISDS of reflective loss claims that may lead to double recovery and inconsistent awards. The Article also advances a hypothesis that corporations often bring multiple claims in ISDS, simultaneously or over time, acting directly or through related corporate entities or shareholders. The data do not support this hypothesis, although a further study on reflective loss may impact this conclusion if claims

42. *See* Korzun, *Shareholder Claims*, *supra* note 38, at 193 (arguing that international investment law distorts domestic corporate law and governance by "allow[ing] foreign shareholders to bring claims for 'reflective loss'—that is, loss incurred by shareholders as a result of injury to the company").

43. *See, e.g.*, Julian Arato, *The Elastic Corporate Form in International Law*, 62 VA. J. INT'L L. 383, 385 (2022) ("International law is warping the corporate form.").

44. On the shareholder claims for reflective loss, see David Gaukrodger, *Investment Treaties and Shareholder Claims: Insights from Advanced Systems of Corporate Law* (OECD, Working Papers on International Investment 2014/02), https://doi.org/10.1787/5jz0xvgngmr3-en (last visited Jan. 1, 2024); Korzun, *Shareholder Claims*, *supra* note 38; Julian Arato, Kathleen Claussen, Jaemin Lee, & Giovanni Zarra, *Reforming Shareholder Claims in ISDS* (Acad. F. on ISDS Concept Paper 2019/9); LUKAS VANHONNAEKER, SHAREHOLDERS' CLAIMS FOR REFLECTIVE LOSS IN INTERNATIONAL INVESTMENT LAW (2020).

45. *See* Korzun, *Shareholder Claims*, supra note 38, at 189.

46. *See, e.g.*, Ed Poulton et al., *Empirical Study: Corporate Restructuring and Investment Treaty Protection*, BIICL/BakerMcKenzie (London, 2020) (identifying "at least [sixty-one] publicly available decisions [that] concern a respondent [S]tate's objection to corporate restructuring" and concluding that in these cases "[a] majority of tribunals find they have jurisdiction despite the respondents' objections to restructuring").

by shareholders are counted as claims by the corporation itself. If ultimately confirmed, this hypothesis would suggest that host States might be allowed to tailor their investor protection regimes to their needs. For instance, instead of providing a blanket consent to arbitration in investment treaties, host States could resort to consenting to arbitration on a case-by-case basis in investment contracts, thereby limiting their exposure to liability for breach of investment treaties.

Following this Introduction, Part I provides background information on international investment law and dispute resolution by focusing on shareholding as investment and the role of companies and their shareholders as claimants in ISDS. Part II provides empirical data on companies and individuals that, from January 1, 2010, to December 31, 2019, initiated investment treaty arbitrations pursuant to the 1965 Convention for the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention)[47] and the ICSID Additional Facility Rules. Data on claimants in ICSID arbitrations were collected using the ICSID database and available submissions by the parties.[48] Further data on the legal form, place of incorporation, ownership structure, and corporate relationship for claimants were collected using company websites, Bloomberg, and online business information. Part III seeks to reconcile the goals of the investor protection regime with collected empirical data on claimants in investment arbitrations. In view of the empirical findings, this Article makes a normative argument that sovereign States should not seek to revisit their universal consent to arbitration provided in investment treaties. Empirical data show that the system operates as anticipated, providing a route for a variety of claimants to enforce their rights in ISDS. If the host States revoke their universal consent to arbitration granted in IIAs, it would only benefit the most powerful users of ISDS—multinational corporations. These corporations would still be able to bargain for arbitration on a case-by-case basis in investment contracts. Other users of ISDS—individuals, small-, and medium-sized companies which commonly bring FDIs as opposed to short-term portfolio investments—would be deprived of the ability to enforce their rights in ISDS and would therefore be less likely to invest.

I. INTERNATIONAL INVESTMENT LAW AND DISPUTE RESOLUTION

Before discussing the process of collecting, coding, and interpreting the empirical data on claimants in investment treaty arbitration, this Part briefly explains how the modern system of international investment law and dispute

47. *See* Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention), Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter ICSID Convention].

48. ICSID explains that its database "covers all cases registered at ICSID. . . [and allows searching] for cases and case-related materials by claimant, respondent, case number, applicable rules and other terms." *See* ICSID Cases Database (2024), INT'L CTR. FOR SETTLEMENT OF INV. DISPS., https://icsid.worldbank.org/cases.

resolution operates. In doing so, it is critical to acknowledge that there are multiple sources and instruments of international investment law and dispute resolution that can be relevant for a foreign investor in an investment dispute.[49] Furthermore, in bringing its claims and invoking an investment treaty in ISDS, a foreign investor generally has a choice between different treaties and arbitration rules and may bring a claim to arbitration through its subsidiary, parent company, and/or other affiliated entities. Finally, such subsidiaries and/or shareholders can bring their own claims in arbitration, together with the foreign investor or on their own, concurrently or separately, and may invoke the same or different investor protection treaties and/or arbitration rules. Such a dispute resolution system leads to the multiplicity of claims and claimants at different levels of the corporate ownership chain, including claims that relate to the same investment but invoke different investor protection treaties and/or arbitration rules. As a result, in the absence of a single method of dispute resolution and a centralized system of registration for investment arbitrations, coupled with the confidentiality and privacy of the process, any empirical study in the field of ISDS has its limitations, and choices regarding the scope of the study and coding of data need to be made.

A. Investor Protection: From Foreign Direct Investments to Reflective Loss

Dating back to the first known BIT of 1959 between Germany and Pakistan,[50] international investment law today encompasses nearly 3,300 IIAs concluded to date.[51] The majority of these treaties are BITs, which provide foreign investors with investor protections, such as national treatment (NT), most-favored-nation treatment (MFN), fair and equitable treatment (FET), and full protection and security (FPS).[52] In addition to providing foreign investors with substantive protections, investment treaties may also contain the State's consent

49. Depending on the nature of the dispute and investor protections granted by the host State, sources and instruments of international investment law and dispute resolution include investor protection treaties, domestic law of the host State and arbitration rules that can be invoked in a case, such as the ICSID Convention and ICSID Additional Facility Rules, the SCC Arbitration Rules, and the UNCITRAL Arbitration Rules.

50. For the text of the first known BIT, *see* Treaty for the Promotion and Protection of Investments, Ger.-Pak., Nov. 25, 1959, 457 U.N.T.S. 24. *See also* Tom Ginsburg, *International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance*, 25 INT'L REV. L. & ECON. 107 (2005) (referring to the 1959 BIT between Germany and Pakistan as "the first such agreement").

51. This number of IIAs is based on the information provided by UNCTAD. As of January 2024, UNCTAD reports 3,278 IIAs concluded worldwide to date. Of these, there are 2,828 BITs, including 2,219 BITs currently in force. *See* UNCTAD's International Investment Agreements Navigator, *supra* note 1.

52. UNCTAD provides comprehensive data on the content of IIAs as part of its IIA Mapping Project, which as of January 2024 includes 2,583 IIAs. *See* UNCTAD IIA Mapping Project, *supra* note 6. Of these 2,583 IIAs, 2,029 treaties provide for NT and 2,347 for MFN treatment in the post-establishment stage of the investment, 1,985 for unqualified FET, and 1,982 for FPS. *Id*.

to ISDS, which could include investment treaty arbitration or other methods of resolving investment disputes, such as conciliation or mediation.[53]

The first generation of BITs were largely focused on attracting foreign direct investments (FDIs),[54] which, in contrast with two other categories of investments, portfolio and indirect investments,[55] entail a lasting relationship with a certain degree of control or influence over investments.[56] More recent BITs have expanded the concept of investments by defining them broadly to include not only FDIs, but also portfolio investments (such as investments in the equity or debt securities) and indirect investments (such as agreements on technical assistance or intellectual property transfers).[57] As a result, modern BITs generally cover shares, stock, and other forms of equity participation in the company.[58]

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53. Out of 2,583 investment treaties included in the UNCTAD's IIA Mapping Project by January 2024, 1,840 treaties provide for a general consent to ISDS covering any dispute relating to investment. *See* UNCTAD IIA Mapping Project, *supra* note 6. Further, 2,448 treaties include ISDS, of which 2,191 treaties provide for ICSID arbitration, 1,643 for UNCITRAL arbitration, and 1,623 for litigation in domestic courts. *Id*. As an alternative to arbitration, 627 IIAs provide for voluntary alternative dispute resolution (ADR), such as conciliation or mediation. *Id*.

54. For a definition of foreign direct investment (FDI), *see, e.g.*, Padma Mallampally & Karl P. Sauvant, *Foreign Direct Investment in Developing Countries*, 36 FIN. & DEV. 34, 34 (1999) (defining FDI as "investment by transnational corporations or multinational enterprises in foreign countries in order to control assets and manage production activities in those countries."). *See also* IMF BALANCE OF PAYMENTS AND INTERNATIONAL INVESTMENT POSITION MANUAL 99 (6th ed. 2009) ("Direct investment is related to control or a significant degree of influence, and tends to be associated with a lasting relationship. As well as funds, direct investors may supply additional contributions such as know-how, technology, management, and marketing. Furthermore, enterprises in a direct investment relationship are more likely to trade with and finance each other.").

55. *See, e.g.*, CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 1-2 (2008) (defining three broad categories of cross-border investments in international investment law: (i) foreign direct investments (FDIs), (ii) portfolio investments, and (iii) indirect investments). *See also* Mallampally & Sauvant, *supra* note 54, at 34 (distinguishing FDI from "other major types of external private capital flows in that [FDI] is motivated largely by the investors' long-term prospects for making profits in production activities that they directly control"). The authors further explain that "[f]oreign bank lending and portfolio investment, in contrast, are not invested in activities controlled by banks or portfolio investors, which are often motivated by short-term profit considerations that can be influenced by a variety of factors (interest rates, for example) and are prone to herd behavior." *Id.*

56. *See* Korzun, *Shareholder Claims, supra* note 38, at 211.

57. *Id*. at 213.

58. *See, e.g.*, Agreement Between the State of Israel and Japan for the Liberalization, Promotion and Protection of Investment, Israel-Japan, art. 1, Feb. 1, 2017 (defining "investment" as "every kind of asset made in accordance with the applicable law and regulations, owned or controlled, directly or indirectly, by an investor, including (i) an enterprise and a branch of an enterprise; (ii) shares, stocks or other forms of equity participation in an enterprise"); Agreement Between the Government of the Republic of Korea and the Government of the Republic of Uzbekistan for the Reciprocal Promotion and Protection of Investments, Republic of Korea-Uzbekistan, art. 1, Apr. 19, 2019 (defining "investment" as "every kind of asset in the territory of one Contracting Party, owned or controlled directly or indirectly by an investor of the other Contracting Party, provided that the investment has been made in accordance with the laws and regulations of the former Contracting Party, and that has the characteristics of an investment, including, though not exclusively . . . (ii) shares, stock, and other forms of equity participation in an enterprise"). *See* UNCTAD IIA Mapping Project, *supra* note 6.

Naturally, with the expansion of the concept of covered "investments" under BITs came the expansion of the potential pool of claimants in ISDS, that is, foreign investors engaged in investment disputes with the host States that decide to commence an investment arbitration. Today, in addition to foreign individuals, claimants in ISDS include foreign corporations with branches and subsidiaries in a host State, as well as foreign shareholders in existing or newly created companies in a host State.[59] This latter group of claimants, who can be short-term equity investors with no interest in the control or management of the foreign enterprise, differs drastically from the FDI providers protected by the first generation of BITs in that their investments are relatively short and bring no lasting economic effect on the host State's economy.[60]

Foreign shareholders, both individuals and companies, are able to bring ISDS claims for direct and indirect (or reflective) loss.[61] The availability of reflective loss claims in international investment law allows shareholders to bring ISDS claims for damages for loss incurred indirectly because of injury to the company.[62] For instance, in view of the regulatory expropriation or breach of the FET standard by the host State, a company investing abroad may sustain an injury that affects its value or profitability. Such injury may reflect on the shareholders by decreasing the value of their shares.[63] Under many modern IIAs, shareholders are able to bring claims in ISDS for such reflective loss without consulting with the company's management and regardless of any claims by the company itself.[64]

Allowing shareholder claims for reflective loss has put international investment law and dispute resolution at odds with domestic corporate law, which generally prohibits reflective loss claims for policy reasons, such as to avoid double recovery and achieve greater consistency, predictability, and judicial economy in dispute resolution.[65] In recognizing reflective loss claims,

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(According to UNCTAD's Mapping Project, out of 2,583 IIAs included in the project by January 1, 2024, only thirty-one treaties specifically exclude portfolio investments from their coverage.)

59. *See, e.g.*, empirical data on claimants in ISDS, *infra*, Part II. B.

60. It is assumed that by contrast to FDIs, portfolio and indirect investments bring no lasting economic effect on the host State's economy as they are largely motivated by short-term profit considerations. *See supra* notes 54, 55 and accompanying text (discussing the difference between FDIs and other forms of investments).

61. *See* Korzun, *Shareholder Claims*, *supra* note 38.

62. It is not always easy in practice to distinguish between direct and reflective loss or to establish whether an exception to the "no reflective loss" principle recognized under domestic law can be applied. In the Netherlands and the United Kingdom, these issues have led to extensive case law and literature on the subject. *See* Bas J. de Jong, *Shareholders' Claims for Reflective Loss: A Comparative Analysis*, 14 EUR. J. BUS. ORG. 97, 99 (2013).

63. *See* Korzun, *Shareholder Claims*, *supra* note 38, at 199.

64. *Id*.

65. *See* David Gaukrodger, *Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency* 11 (OECD, Working Papers on International Investment 2013/03), http://dx.doi.org/10.1787/5k3w9t44mt0v-en (last visited Jan. 1, 2024). For court decisions, *see, e.g.*, Gaubert v. United States, 885 F.2d 1284, 1291 (5th Cir. 1989) ("One rationale behind this prohibition [of shareholder claims for reflective loss] rests on principles of judicial economy.")

international investment tribunals appear to ignore these public policy concerns. Therefore, in cases where investment treaties provide protections to foreign investments in equity securities, shareholders in international investment law have independent standing under IIAs to bring individual claims for losses suffered by the company.[66]

B. Companies and Individuals as Claimants in Investment Arbitration

For a company or an individual seeking to bring a claim in investment treaty arbitration, two broad questions become determinative. First, what constitutes an *investment* under a treaty? Specifically for reflective loss claims, does protected investment include stocks or other equity interest in the company? Second, *who* can bring a claim under an investor protection treaty? Determining whether a treaty covers a particular economic activity or a claimant is crucial for establishing jurisdiction of the investment tribunal.

Answering these questions requires investment tribunals to engage in treaty interpretation. The Vienna Convention on the Law of Treaties (VCLT) calls on arbitral tribunals to interpret BITs and other IIAs by giving the terms of the treaty their ordinary meaning in view of the object and purpose of the treaty.[67] Yet most investment treaties are inherently vague and provide little or no clarification as to what constitutes an investment under the treaty.[68] As a result, interpretations by arbitral tribunals vary substantially across treaties and investment disputes. Furthermore, without *stare decisis* or binding precedents in international investment law, tribunals may also interpret identical treaty provisions differently in subsequent arbitrations.[69]

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66. *See, e.g.*, Enron v. Argentina, ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 39 (Jan. 14, 2014) (noting that "there is nothing contrary to international law or the ICSID Convention in upholding the concept that shareholders may claim independently from the corporation concerned, even if those shareholders are not in the majority or in control of the company.").

67. *See* Vienna Convention on the Law of Treaties Art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

68. For instance, arbitral tribunals have allowed claims by both direct and indirect shareholders because BITs generally do not distinguish between direct and indirect investments. *See* Martin J. Valasek & Patrick Dumberry, *Developments in the Legal Standing of Shareholders and Holding Corporations in Investor-State Dispute*s, 26 ICSID REV.–FILJ 34, 51 (2011) (providing an example of *Siemens v. Argentina*, where the investment tribunal in allowing claims by the indirect shareholder, Siemens A.G., concluded that "[the Argentina-Germany BIT] does not require that there be no interposed companies between the investment and the ultimate owner of the company.").

69. *See* Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 369 (2007) (observing that in investment arbitration, "[w]hile tribunals seem to agree that there is no doctrine of precedent per se, they also concur on the need to take earlier cases into account."). *See also* Richard C. Chen, *Precedent and Dialogue in Investment Treaty Arbitration*, 60 HARV. INT'L L.J. 47, 47 (2019) (arguing that "[t]he use of precedent in investment treaty arbitration ("ITA") presents a puzzle" as "[t]he treaties themselves do not provide for a doctrine of stare decisis.") (footnote omitted). Chen further questioned "whether precedent can play a useful role in the process," considering that "the substantive law that the tribunals are shaping through precedent is fragmented,

Claims in ISDS can generally be brought by the foreign investors and/or, depending on the language of the treaty, by the investments. Most treaties focus on the nationality of claimants in ISDS and require a claimant to be a national of the State party to the treaty (the "home State") but not a national of the "host State" where the investments are made.[70] However, companies that are incorporated in the host State (and, therefore, have the nationality of the host State based on the place of incorporation) will often count as foreign investors and will be able to bring their claims in ISDS, provided they are under foreign control.[71]

More recent treaties, such as the United States-Mexico-Canada Agreement (USMCA),[72] distinguish between investors and investments in their ability to bring a claim in ISDS.[73] Pursuant to Annex 14-D of the USMCA,[74] a foreign

coming not from a single multilateral treaty but instead from thousands of investment treaties that are similar in content but nonetheless formally distinct." *Id.* at 47–48 (footnote omitted).

70. *See* Christoph Schreuer, *Shareholder Protection in International Investment Law*, 2(3) TRANSNAT'L DISP. MGMT. 1, 2 (2005) ("The claimants in investment arbitration must meet certain requirements with respect to their nationality. Most importantly, they must not be nationals of the host State.") (footnote omitted).

71. *See, e.g.*, Article 25(21)(b) of the ICSID Convention, which permits the host State and the foreign investor to agree that a locally incorporated company should be treated as a foreign company because of its foreign control. *See* ICSID Convention, *supra* note 47, at 18 (providing in relevant part that "'[n]ational of another Contracting State means: . . . any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention."). *See also* Energy Charter Treaty, art. 26(7), *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95, http://www.energycharter.org/fileadmin/DocumentsMedia/Legal/ECTC-en.pdf (last visited Jan. 1, 2024). Thus, if the parties agree on this issue, the foreign control requirement allows departure from the principles of incorporation or seat of the company, which are commonly applied under international investment law to determine the nationality of the corporation. *Cf.* Schreuer, *supra* note 70, at 17 ("Under the ICSID Convention, departure from the principle of incorporation or siège social in favor of foreign control to determine corporate nationality is permissible only under the narrowly circumscribed conditions of Article 25(2)(b)."). Some tribunals may also apply the equitable doctrine of "veil piercing" to identify the true nationality of the party. *See, e.g.*, Stanimir A. Alexandrov, *The "Baby Boom" of Treaty-Based Arbitrations and the Jurisdiction of ICSID Tribunals: Shareholders as "Investors" Under Investment Treaties*, 6 J. WORLD INV. & TRADE 387, 402 (2005) (citing Tokios Tokelės v. Ukraine, ICSID Case No. Arb/02/18, Decision on Jurisdiction, ¶56 (Apr. 29, 2004), where the tribunal opined that the doctrine could only be used by a tribunal where the company's conduct "constitutes an abuse of legal personality" and there is evidence that the company "used its formal legal nationality for [an] improper purpose.")

72. United States-Mexico-Canada Agreement, Can.-Mex.-U.S., Nov. 30, 2018, Pub. L. No. 116–113 [hereinafter USMCA].

73. For the definitions of "investor" and "investment," *see* Article 14.1 of the USMCA. USMCA, art. 14.1. Generally, the article defines the investor as "a national or an enterprise of the [S]tate party." *Id.* It further defines the investment as "every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk". *Id. See also* USMCA, art. 1.5 (defining an enterprise as "an entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association or similar organization."). *Id.*

74. Annex 14-D of the USMCA applies only to investment disputes relevant to two State parties—Mexico and the United States—and investors from these two countries. *See* USMCA, *supra*

investor can submit a claim to arbitration on its own behalf or on behalf of an enterprise of the responding State, which is a juridical person established in the host State that the claimant owns or controls.[75] Similar provisions were available in the former North American Free Trade Agreement (NAFTA),[76] which also called for the consolidation of arbitrations if claims were made both on behalf of an *investor* and an *enterprise* and arose from the same events.[77]

Other IIAs are less consistent with regard to claimants and allow an *investment* to initiate an arbitration directly.[78] In these instances, an "investment" is not a share or stock but a company that was incorporated in the host State to carry out investment activity because the law or the business considerations so required.[79] Allowing an "investment" (i.e., an enterprise) to be a claimant in ISDS is a call back to the prior generation of BITs, which sought to protect investments in the form of FDIs, such as opening a subsidiary or creating a new company in the host State.[80] As legal persons of their own, such "investments" in the host State received protection under IIAs and could bring their own claims in ISDS.

Looking at shareholders as claimants in ISDS, one should note that IIAs usually do not talk about shareholders or their rights beyond listing shares as a

note 72, Annex 14-D (titled Mexico-United States Investment Disputes). Chapter 14 of the USMCA does not provide for ISDS of the Canada-United States investment disputes or Canada-Mexico investment disputes. *See* USMCA, *supra* note 72, Ch. 14.

75. USMCA, *supra* note 72, art. 14.D.3.1(a)–(b).

76. North American Free Trade Agreement, arts. 1116–17, Dec. 17, 1992, 32 I.L.M. 289 (1992) [hereinafter NAFTA].

77. NAFTA, *supra* note 76, art. 1117(3). Consolidation seeks to achieve greater consistency of arbitral awards, reduce the risk of double recovery, and increase judicial economy in ISDS. Under USMCA, a disputing party can seek consolidation pursuant to Article 14.D.12. *See* USMCA, *supra* note 72, art. 14.D.12.

78. UNCTAD, *Investor-State Disputes Arising from Investment Treaties: A Review*, 15, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (2005) (defining "investor" and "investment"). *But see* NAFTA, *supra* note 76, art. 1117(4) ("An investment may not make a claim under this Section [B. Settlement of Disputes between a Party and an Investor of Another Party].").

79. *See* Schreuer, *supra* note 70, at 20 ("[Where] the company has the nationality of the host State and does not qualify as a foreign investor. . . . the company in question is not treated as the investor but as the investment."). *Id.* at 4 (observing that "many States require the establishment of a local company as a precondition for foreign investment."). For an arbitral decision touching on this issue, *see, e.g.*, Compañía de Aguas del Aconquija, S.A. & Compagnie Générale des Eaux v. Arg. (the Vivendi case), ICSID Case No. ARB/97/3, Decision on Annulment, ¶ 50 (July 3, 2002) ("In common with other BITs, Article 1 [of the France-Argentina BIT] clearly distinguishes between foreign shareholders in local companies and those companies themselves. While the foreign shareholding is by definition an "investment" and its holder an "investor," the local company only falls within the scope of Article 1 if it is "effectively controlled, directly or indirectly, by nationals of one Contracting Party" or by corporations established under its laws."). Sometimes, establishment of the local company is motivated purely by business considerations. *See, e.g.*, Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 49 (Mar. 20, 2017) (where there was no requirement under the Italian law to establish a local company, but a foreign investor chose to do so for business reasons).

80. Contrast this understanding with the modern, more expansive definition of investment, which includes portfolio investments and would require permitting a share, a stock, or other equity participation in the company to bring a claim in ISDS.

type of investment or providing a broad definition of investments that can be interpreted to include shares.[81] Moreover, IIAs generally do not restrict shareholders—be they controlling, majority, or minority shareholders—in their ability to bring a claim in ISDS.[82] It should come as no surprise then that investment tribunals supported by legal scholars have consistently interpreted IIAs to allow reflective loss claims by shareholders—many of whom are companies themselves.[83] In 2013, the Organisation for Economic Co-Operation and Development (OECD) had already estimated that "[c]laims by company shareholders seeking damages from government for so-called 'reflective loss' now make up a substantial part of the ISDS caseload" and would continue to grow.[84]

Furthermore, investment tribunals have allowed both *direct* and *indirect* shareholders to bring claims for reflective loss in ISDS.[85] In doing so, tribunals rely on investment treaty provisions, which are usually broad and do not distinguish between direct and indirect investments.[86] Without an express exclusion of indirect shareholders, arbitral tribunals have demonstrated a certain reluctance to deny jurisdiction to indirect investments.[87]

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81. Korzun, *Shareholder Claims*, *supra* note 38, at 215. *See also* Gaukrodger, *Investment Treaties as Corporate Law*, *supra* note 65, at 8 ("Typically, the only reference to shares in BITs is a clause that clarifies that shares are assets that qualify as an investment under the treaty definition of investment."); Julian Arato, *The Elastic Corporate Form in International Law*, 62 VA. J. INT'L L. 383, 398 (2022) ("[Investment treaties] generally extend substantive and procedural rights to corporations and shareholders, by including natural and legal persons in the definition of 'investor'; and by including enterprises, stocks, shares, and various interests in corporations within the definition of 'investment'.").

82. Gaukrodger, *Investment Treaties as Corporate Law*, *supra* note 65, at 8 (noting that most treaties do not "expressly address the issue of the scope of shareholder claims.").

83. For an example of legal scholarship supporting investment tribunals in their treatment of shareholder claims for reflective loss, see, for instance, CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES §§ 6.77, 6.79 (2007) ("Given the wide definition of investment contained in most bilateral investment treaties, if an 'investment' can include shares in a company there is no conceptual reason to prevent an investor recovering for damage caused to those shares which has resulted in a diminution in their value. . . The simplest approach to justify claims [for reflective loss] is. . . based upon the wording of the treaty.").

84. Gaukrodger, *Investment Treaties as Corporate Law*, *supra* note 65, at 7. Gaukrodger estimated at the time that "there are easily more than [forty] decisions involving shareholder claims and numerous pending cases, many of which involve claims for reflective loss." *Id.*

85. *See* Valasek & Dumberry, *supra* note 68 (analyzing claims in ISDS by shareholders, including majority, minority, and indirect shareholders).

86. *See* Korzun, *Shareholder Claims*, *supra* note 38, at 195 (providing example of Venezuela Holdings (Exxon) v. Venezuela, ICSID Case No. ARB/07/27, where the tribunal allowed an indirect shareholder to assert claims under the Netherlands-Venezuela BIT relying on the literal reading of the treaty, which granted protection to investments without distinguishing between direct and indirect investments).

87. *See, e.g.*, Siemens A.G. v. Arg., ICSID Case No. ARB/02/8, Decision on Jurisdiction, ¶ 137 (Aug. 3, 2004) (where Argentina objected to tribunal's jurisdiction because Siemens A.G., the claimant, was an indirect shareholder in the Argentine investment, but the tribunal found jurisdiction noting that "there is no explicit reference to direct or indirect investment as such in the Treaty. The

The openness of ISDS to claims by indirect shareholders increases the multiplicity of claims in ISDS because the pool of potential claimants expands beyond a local company (an "investment") and its direct shareholders.[88] There are multiple ways of structuring foreign (direct and portfolio) investments and then choosing the best claimant(s) among related companies and individuals. They can involve shareholders of one or more intermediaries in the investor's home State, the host State or third countries, at several levels of corporate ownership structure.[89] Arbitral tribunals have acknowledged this multiplicity of claims problem, which leads to excessive litigation and potential double recovery, but continue to grant jurisdiction as long as a treaty allows shareholder protection without reservations.[90]

Whether a company can submit a claim of its own is largely irrelevant for shareholder standing.[91] The tribunals view the claims by shareholders as separate

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definition of "investment" is very broad. . . . Therefore, a literal reading of the Treaty does not support the allegation that the definition of investment excludes indirect investments.").

88. Schreuer, *supra* note 70, at 11 (observing that "[i]f there are two or more layers of minority shareholding the economic consequence of the adverse action by the host State may still be traceable. But the pursuit of legal remedies becomes increasingly complex especially if competing sets of shareholders at different levels pursue parallel or conflicting remedies.").

89. Schreuer points to a complex structure of investment in *Enron v. Arg*., where the claimants indirectly owned 35.263 percent of the investments in Argentina. *Id.* at 12. The shareholding was described as follows:

> Claimants' participation concerns the privatization of Transportadora de Gas del Sur ("TGS"), one of the major networks for the transportation and distribution of gas produced in the provinces of the South of Argentina. The Claimants own 50 percent of the shares of CIESA, an Argentine incorporated company that controls TGS by owning 55.30 percent of its shares; the Claimants' participation in CIESA is held by two wholly-owned companies, EPCA and EACH. The Claimants, through EPCA, EACH and ECIL, another corporation controlled by the Claimants, also own 75.93 percent of EDIDESCA, another Argentine corporation that owns 10 percent of the shares of TGS; and they also have acquired an additional 0.02 percent of TGS through EPCA. The investment as a whole, it is explained, amounts to 35.263 percent of TGS.

Enron v. Arg., ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 21 (Jan. 14, 2014).

90. *See, e.g.*, Enron v. Arg., ICSID Case No. ARB/01/3, Decision on Jurisdiction, ¶ 50 (Jan. 14, 2014) ("The Argentine Republic has rightly raised a concern about the fact that if minority shareholders can claim independently from the affected corporation, this could trigger an endless chain of claims, as any shareholder making an investment in a company that makes an investment in another company, and so on, could invoke a direct right of action for measures affecting a corporation at the end of the chain."). *Id.* at ¶ 52 ("The Tribunal notes that while investors can claim in their own right under the provisions of the treaty, there is indeed a need to establish a cut-off point beyond which claims would not be permissible as they would have only a remote connection to the affected company. As this is in essence a question of admissibility of claims, the answer lies in establishing the extent of the consent to arbitration of the host State."). *But see* Schreuer, *supra* note 70, at 14 (criticizing the tribunal's suggestion to find a cut-off, stating that "[t]he Tribunal's demand for a cut-off point for indirect shareholding lacks a legal foundation. Any difficulties arising from a multiplicity of claimants can be taken care of by a number of devices but do not require that the investor be deprived of its standing.")

91. *See* ZACHARY DOUGLAS, THE INTERNATIONAL LAW OF INVESTMENT CLAIMS 456 (2009) (citing arbitrations where companies had recourse to claims in ISDS, yet their shareholders were also allowed to proceed in arbitration, including *Lauder v. Czech* (Final Award) (2001); *CME Czech*

from the claims by the company and generally allow both types of claims to proceed.[92] Unless the interests of a shareholder and a company are identical, tribunals do not find it abusive to allow both arbitrations to continue.[93]

Overall, domestic courts and investment tribunals approach shareholder claims differently. Domestic courts focus on the type of loss suffered by shareholders, such as drops in the share price or dividend payout, and prohibit claims by shareholders if their loss is merely the reflection of the injury to the company.[94] In contrast, investment tribunals in ISDS focus on the availability of a cause of action for shareholders.[95] Once they are satisfied that a shareholder is protected under a treaty, tribunals allow a case to proceed without regard to the type of loss suffered by a shareholder.[96] Having established liability, tribunals award damages to shareholders directly, usually on a pro rata basis to the company's loss.[97]

Arbitral tribunals have acknowledged that reflective loss claims in ISDS raise concerns of the increased cost of litigation, conflicting decisions, and double recovery that motivated domestic courts to adopt the "no reflective loss" principle.[98] Tribunals have also expressed sympathy to the host States' circumstances that allow multiple claims arising from the same dispute and that make it harder for the State to predict who will initiate an investment arbitration

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Republic BV (The Netherlands) v. Czech, Partial Award (2001) & Final Award (2003); *Sempra Energy Int'l v. Arg*., Preliminary Objections (2005), § 42).

92. *See*, *e.g.*, Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 166 (Mar. 20, 2017) (where the tribunal allowed the company's claim to proceed after an arbitration lost by the company's shareholder, holding that "[a] shareholder's claims for its reflective loss through an entity in which it holds shares cannot be equated automatically to that entity's claims for its direct loss").

93. *Id.* at ¶ 167 (noting that the interests of the shareholders and the company can be identical so that it would be abusive to "permit arbitration of a given dispute by one after the other already has concluded an arbitration over the same dispute.") For instance, the interest of a shareholder and a company could be viewed as identical where a foreign shareholder owns 100 percent of equity in a local company. *Id.*

94. Korzun, *Shareholder Claims*, *supra* note 38, at 199, 215.

95. Chaisse and Li argued in this respect that "policy considerations underlining the non-reflective loss principle that are developed by the domestic courts should not be blindly adopted by international arbitration tribunals adjudicating investment treaty disputes." Chaisse & Li, *supra* note 32, at 84. They further suggested that "the tribunals should first analyze the policy considerations in the context of international investment and economic development." *Id.*

96. Korzun, *Shareholder Claims*, *supra* note 38, at 210.

97. Gaukrodger, *supra* note 65, at 8 (explaining that, in contrast to domestic law, in international investment law shareholders are not only able to claim for reflective loss, but also to collect recovery directly, irrespective of the company claims that may co-exist).

98. Korzun, *Shareholder Claims*, *supra* note 38, at 219. *See also* Gaukrodger, *supra* note 65, at 9 (observing that "[s]hareholder claims are likely to be less predictable for governments than claims by the injured company because company nationality is both known and hard to change; in contrast, the identity of shareholders is both more likely to change and frequently hard to monitor").

and when.[99] Yet investment tribunals continue to enforce IIAs by permitting reflective loss claims by shareholders independently of the claims by local companies.[100]

Investment tribunals have been less sensitive to corporate needs in ISDS, although they are aware of the distortions reflective loss claims create on corporate governance.[101] If the language of the treaty permits, arbitral tribunals continue to accept shareholder claims for reflective loss, even where it harms the corporation by destroying the management's efforts to settle.[102] Only a few tribunals have acknowledged the tension between the interests of shareholders and the company in the context of the reflective loss claims in international investment law, but suggested that disputes between them can be addressed under domestic law.[103] Investment tribunals have largely not acknowledged or dismissed any

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99. *See, e.g.*, Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 170 (Mar. 20, 2017) ("The Tribunal is not unsympathetic to Italy's circumstances, having to face claims now that are closely related to those it already successfully vanquished in a prior proceeding. . . . Absent such a system [for joinder of all stakeholders] . . . it would not be appropriate for tribunals to preclude arbitration by qualified investors, simply because *other* qualified investors may have proceeded before them without their participation." (footnote omitted)).

100. *See, e.g.*, CHRISTOPHER F. DUGAN ET AL., INVESTOR-STATE ARBITRATION 249 (2008) (citing American Mfg. & Trading v. Zaire, ICSID Case No. ARB/93/1, Award (Feb 21, 1997) ("investment" was shares (94% ownership) in a Zairian company); Genin v. Est., ICSID Case No. ARB/99/2, Award, ¶ 324 (June 25, 2001) (U.S. citizen's equity in Estonian company qualified as "investment"); CME Czech Republic B.V. (The Netherlands) v. Czech, UNCITRAL, Partial Award (Sept. 13, 2001) (CME's claim was based on a 99% equity interest in the Czech company). *See also* Antoineé Goetz et consorts v. Burundi, ICSID Case No. ARB/95/3, Decision (Sept. 2, 1998); Maffezzini v. Spain, ICSID Case No. ARB/97/7, Decision on Jurisdiction (Jan. 25, 2000); Compañía de Aguas del Aconquija, S.A. v. Arg. (the Vivendi case), ICSID Case No. ARB/97/3, Decision on Annulment (July 3, 2002); Azurix v. Arg., ICSID Case No. ARB/01/12, Decision on Jurisdiction (Dec. 8, 2003); LG&E Energy v. Arg., ICSID Case No. ARB/02/1, Decision of the Arbitral Tribunal on Objections to Jurisdiction (Apr. 30, 2004); Plama Consortium v. Bulg., ICSID Case No. ARB/03/24, Decision on Jurisdiction (Feb. 8, 2005).

101. Korzun, *Shareholder Claims*, *supra* note 38, at 220. For evidence that tribunals are aware of the impact of reflective loss claims, *see, e.g.*, *Total S.A. v. Arg.*, ICSID Case No. ARB/04/01, Decision on Objections to Jurisdiction, ¶ 80 (Aug. 25, 2006), where the tribunal stated:

> Having found, however, that the assets and rights that Total claims have been injured in breach of the BIT fall under the definition of investments under the BIT, it is immaterial that they belong to Argentine companies in accordance with the law of Argentina. Total asserts its own treaty rights for their protection, regardless of any right, contractual or non-contractual that the various companies [in which it owns shares] might assert in respect of such assets and rights under local law before the courts of other authorities of Argentina, in order to seek redress or indemnification for damages suffered as a consequence of actions taken by those authorities.

102. *See* DOUGLAS, *supra* note 91, at 456 (describing instances where tribunals "hearing claims by shareholders have proclaimed as irrelevant the fact that the company is actively negotiating with the host state to achieve a settlement").

103. Korzun, *Shareholder Claims*, *supra* note 38, at 220. *See also* Eskosol S.p.A. in Liquidazione v. It., ICSID Case No. ARB/15/50, Decision on Respondent's Application under Rule 41(5), ¶ 170 (Mar. 20, 2017) (where the tribunal held it was not "sufficient basis for precluding qualified investors from exercising their fundamental right to access the ICSID system," even where domestic law affords

concerns over competing interests between the company and its treaty-protected shareholders, presumably leaving the resolution of such disputes to the parties.[104]

In summary, international investment law allows individuals and companies and/or shareholders of such companies to bring claims in ISDS. In turn, shareholders can be individuals and/or companies that are owned by individuals and/or companies entitled to bring their own claims in ISDS, as long as there is an investment treaty granting protection to a shareholder. In other words, international investment law allows direct and indirect shareholders to bring claims for direct loss, as well as reflective loss sustained due to the loss to the company.[105] Because of the shareholder standing and the ability of shareholders and companies to bring multiple claims deriving from the same investment and breach, claimants in ISDS can be connected at different levels of the corporate ownership structure. Ultimately, it may be that all claims in ISDS are brought by the limited number of multinational corporations who act as repeat users of ISDS directly or through their subsidiaries or other affiliated entities.

II. EMPIRICAL DATA ON CLAIMANTS IN ISDS

Empirical data and scholarship on ISDS remain relatively scarce, even though empirical studies on investment arbitration have noticeably expanded.[106] One can identify several distinct groups of empirical studies in this field, none of which focus specifically on claimants in ISDS. First, multiple empirical studies have sought to analyze BITs and, in particular, to establish a relationship between

"potential remedies—for example, claims by minority shareholders or bankruptcy receivers against majority shareholders who take unauthorized actions in contravention of domestic law.")

104. Korzun, *Shareholder Claims*, *supra* note 38, at 220.

105. In contrast to reflective loss, shareholders incur direct loss when they are deprived of or restricted in their rights as shareholders (e.g., the right to vote, the right to share proceeds upon dissolution of the company) or when their shares are canceled or expropriated. *See* Korzun, *Shareholder Claims*, *supra* note 38, at 198.

106. *See* Susan D. Franck, *The Promise and Peril of Empiricism and International Investment Law Disputes*, *in* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 61, 61 (Andrea Bjorklund et al. eds., 2023) ("A little more than a decade ago, virtually no empirical scholarship explored investment treaty dispute settlement."). For an overview of the existing empirical studies and publications on international commercial and international investment arbitration, see Christopher R. Drahozal, *Empirical Findings on International Arbitration: An Overview*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ARBITRATION 643 (Thomas Schultz & Federico Ortino eds., 2020). *See also* Daniel Behn et al., *Evidence-Guided Reform: Surveying the Empirical Research on Arbitrator Bias and Diversity in Investor-State Arbitration*, *in* INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OR TRANSFORMATION? 264 (Manfred Elsig et al. eds., 2021); Daniel F. Behn, *Bibliography*: *Empirical Studies on Legitimacy in International Investment Law* (PluriCourts Investment, Internal Working Paper 1/2014) (containing a bibliography of empirical studies on international investment law, including studies on investment arbitration, investment treaties & FDI, procedural issues and outcomes relating to investment arbitration); Daniel Behn et al., *Empirical Perspectives on Investment Arbitration: What Do We Know? Does It Matter?*, 21 J. WORLD INV. & TRADE 188 (2020) ("provid[ing] a state-of-the-art summary and assessment of empirical studies on the six identified concerns of [S]tates: legal cost, duration of proceedings, consistency, correctness, diversity and independence").

the conclusion of BITs and the growth of inward FDIs, although the causal link between the two remains unclear.[107] Second, with a focus on investment dispute resolution, separate studies have touched on claimants and respondents in ISDS, looked at the nationality of claimants,[108] and provided data on responding States; the data include the frequency of being sued in ISDS and the breakdown data on the region and development status.[109] Third, a number of studies have looked into arbitrators who served on international investment tribunals.[110] Here, empirical studies have made data available on arbitrators' background, nationality, diversity, behavior, independence, impartiality, personal and professional relations, frequency of serving together, ownership of financial stakes in the outcome of a dispute, appointment by an investor and/or a host State, and decision for a foreign claimant and/or responding State.[111] Fourth, prior studies have provided empirical data on outcomes in investment treaty arbitration, including arbitration cases by sector,[112] winners and losers in ISDS,[113] and the effect on the outcome of the investment arbitration on the development status of the respondent State and the presiding arbitrator.[114] In addition, scholars have presented

107. *See, e.g.*, Arjan Lejour & Maria Salfi, *The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment* (CPB Netherlands Bureau for Economic Policy Analysis, CPB Discussion Paper 298, Jan. 16, 2015), https://ideas.repec.org/p/cpb/discus/298.html#download (concluding that "[u]pper middle income countries seem to benefit the most from BITs. . . . [but] BITs do not support significantly foreign investment in high income countries."); Yackee, *Do BITs Really Work?*, *supra* note 34; Yackee, *Conceptual Difficulties*, *supra* note 34; Neumayer & Spess, *supra* note 34. *See also* Behn, *Bibliography: Empirical Studies*, *supra* note 106 (containing an extensive list of empirical studies on investment treaties and FDI).

108. *See, e.g.*, Susan D. Franck, *Empirically Evaluating Claims about Investment Treaty Arbitration*, 86 N.C. L. REV. 1, 26–31 (2007) (presenting information on investor nationality for 82 separate cases that resulted in 102 arbitral awards publicly available before June 1, 2006).

109. *See, e.g.*, Daniel Behn et al., *Poor States or Poor Governance? Explaining Outcomes in Investment Treaty Arbitration*, 38 NW J. INT'L L. & BUS. 333 (2018); Franck, *supra* note 108, at 31–33.

110. *See, e.g.*, Drahozal, *Evidence-Guided Reform*, *supra* note 106; Van Harten, *supra* note 35; Franck, *Empirically Evaluating Claims*, *supra* note 108, at 75–83 (presenting empirical data on arbitrators' nationality and gender).

111. *See, e.g.*, Behn et al., *Evidence-Guided Reform*, *supra* note 106; PIA EBERHARDT ET AL., PROFITING FROM INJUSTICE: HOW LAW FIRMS, ARBITRATORS AND FINANCIERS ARE FUELLING AN INVESTMENT ARBITRATION BOOM (Helen Burley ed., 2012); Daphna Kapeliuk, *Collegial Games: Analyzing the Effect of Panel Composition on Outcome in Investment Arbitration*, 31 REV. LITIG. 267 (2012).

112. *See, e.g.*, Behn et al., *Evidence-Guided Reform*, *supra* note 106, at 269–70.

113. *See, e.g.*, Behn et al., *Evidence-Guided Reform*, *supra* note 106, at 267–69; Tim R. Samples, *Winning and Losing in Investor-State Dispute Settlement*, 56 AM. BUS. L.J. 115, 115–75 (2019); Franck, *Empirically Evaluating Claims*, *supra* note 108, at 49–55 (empirically exploring the winners and losers in investment treaty arbitration).

114. Susan D. Franck, *Development and Outcomes of Investment Treaty Arbitration*, 50 HARV. INT'L L.J. 435, 435–89 (2009).

empirical data on provisional measures,[115] as well as the costs, damages, and duration in investor-State arbitrations.[116]

With respect to claimants, the aforementioned empirical studies do not present data beyond the named nationality of a claimant.[117] A notable exception is the empirical work by Susan Franck, who most recently published a comprehensive empirical study on arbitration costs and provided data on claimants based on investment treaty arbitration awards made public by January 1, 2012.[118] Prior to that, the OECD provided empirical data on claimants based on a survey of fifty ICSID cases and forty-five UNCITRAL arbitrations concluded between April 2006 and April 2010.[119]

The comprehensive arbitration cost study by Susan Franck on the arbitration costs provides unique empirical insights into claimants in investment treaty arbitration. Professor Franck analyzed 202 different investment arbitration cases that generated 272 arbitration awards made public by 2012.[120] Based on the first award in the case, the author provided empirical data on claimants: (i) the total number of claimants (irrespective of whether they were foreign or locally incorporated), (ii) investors' nationality and the development status of their claimed home State (i.e., claimed origin of the investment), and (iii) background information on whether investors included individuals, corporations, or a combination thereof; privately held or publicly listed entities; or involved at least one commercial entity classified as a leading multinational enterprise according to the *Financial Times 500*.[121]

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115. DAVID GOLDBERG ET AL., PROVISIONAL MEASURES IN INVESTOR-STATE ARBITRATION, BIICL/White & Case (London, 2023).

116. Tim Hart & Rebecca Vélez, *Study of Damages Awards in Investor-State Cases*, 18 TRANSNAT'L DISP. MGMT. (2021); GOLDBERG ET AL., *supra* note 115; MATTHEW HODGSON ET AL., 2021 EMPIRICAL STUDY: COSTS, DAMAGES AND DURATION IN INVESTOR-STATE ARBITRATION, BIICL/Allen & Overy (2021); Franck, *Empirically Evaluating Claims*, *supra* note 108, at 55–66.

117. Today, the nationality of claimants can be extracted from the databases of investment arbitrations run by ICSID and UNCTAD. On its website, ICSID allows the user to do a search of cases by "Claimant(s) Nationality(ies)" for all cases registered at ICSID. *See* ICSID Cases Database, *supra* note 48. Otherwise, as Susan Franck points out, "[u]nfortunately, ICSID does not provide information on investor nationality or distinguishing characteristics, such as firm size or type." (footnote omitted). FRANCK, ARBITRATION COSTS, *supra* note 13, at 72–73 (2019). Similarly, the UNCTAD Investment Dispute Settlement Navigator—the ISDS Navigator—allows the users to search arbitration cases by "Claimant's Nationality." According to UNCTAD, the ISDS Navigator includes publicly known international arbitration cases commenced by foreign investors against the host State pursuant to IIAs. *See* UNCTAD, Investment Dispute Settlement Navigator, https://investmentpolicy.unctad.org/investment-dispute-settlement.

118. FRANCK, ARBITRATION COSTS, *supra* note 13, at 68.

119. David Gaukrodger & Kathryn Gordon, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (OECD, Working Papers on International Investment 2012/03) https://doi.org/10.1787/5k46b1r85j6f-en (last visited Jan. 1, 2024).

120. FRANCK, ARBITRATION COSTS, *supra* note 13, at 68.

121. *Id.* at 73.

For 202 cases included in the survey, Professor Franck identified 180,893 named claimants, including claimants in the mass claims arbitration *Abaclat v. Argentina*.[122] These investors came from twenty-three different countries, with the United States leading in the number of cases initiated by its investors.[123] The survey also identified that "[t]he vast majority of investors bringing ITA claims were corporate entities," with only twenty three cases (11.4 percent) commenced solely by individuals.[124] For thirty cases (14.9 percent), the survey identified no data on investor identity in terms of whether the companies were privately owned or publicly traded.[125] Out of the remaining 172 cases, only fifty-one cases (29.7 percent) were initiated by claimants where at least one investor was "publicly traded or otherwise listed on any worldwide stock exchange."[126] Professor Franck used the public listing of the company as a proxy, albeit "imperfect," for the size of the investor and its economic strength.[127]

The OECD survey showed that 48 percent of claimants in the sample were medium and large multinational enterprises, varying in size from several hundred employees to tens of thousands of employees.[128] Only 8 percent of claimants in the OECD sample were extremely large multinationals, companies appearing in the UNCTAD's list of top one hundred multinational enterprises.[129] Twenty-two percent of the claimants in the OECD sample were either individuals or very small corporations with limited foreign operations (one or two foreign projects).[130] This goes against the common view that ISDS is only available and used by global multinational corporations. Finally, in 30 percent of arbitrations in the OECD sample, information on claimants was not publicly available or was very limited.[131] The authors of the OECD survey explained the lack of publicly available information as a possible result of the small size of some companies, which were not publicly listed and/or not subject to disclosure requirements, and of the fact that in some instances, claimants were "holding companies formed for the specific asset or activity that [was] the subject of the arbitral dispute."[132] I observed similar difficulties in obtaining information on the nationality of a

122. *Id.* For the *Abaclat* arbitration, see Abaclat v. Arg., ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 10 (Aug 4, 2011).

123. FRANCK, *supra* note 13, at 74.

124. *Id.* at 76.

125. *Id.* at 77.

126. *Id.*

127. *Id*. at 79. As Professor Franck explains, "[g]iven the administrative complexity and scrutiny of public listing, smaller businesses may prefer to remain privately held, whereas larger businesses may be willing to incur the costs associated with public listing." *Id*. at 77.

128. Gaukrodger & Gordon, *supra* note 119, at 18.

129. *Id*.

130. *Id*. at 17.

131. *Id*.

132. *Id*. at 78.

claimant, its governance structure, and financial and operating data in collecting the data for this Article.

A. Methodology for the Survey

Empirical data for the present survey were collected using publicly available information about companies and individuals who have filed and/or acted as claimants in investment treaty arbitration (ITA) cases pursuant to the ICSID Convention and the ICSID Additional Facility Rules.[133] Data on claimants were collected without regard to whether the case was discontinued, settled, decided by the tribunal, and/or decided by the ad hoc committee as a result of annulment proceedings. As long as the case was initiated, assigned a number, and included in the ICSID database,[134] it was counted as an ICSID case, analyzed, and coded as to its claimants.

I have limited my study to ICSID arbitrations (both ICSID Convention and ICSID Additional Facility arbitrations) because information on these cases is publicly available through the ICSID website and regularly updated. It can also be checked against known investment arbitrations included in the UNCTAD's Investment Dispute Settlement Navigator.[135] In the future, I might be able to expand my study to other investor-State arbitrations, such as those conducted under the UNCITRAL arbitration rules and investment arbitrations invoking investment law and/or contracts.

Data for the survey were collected by reading and coding requests for arbitration, arbitral awards, and other filings made in ICSID arbitrations initiated from January 1, 2010, to December 31, 2019. I limited my survey to this time period of ten years as it covers the most recent investment arbitration cases, which have not yet been studied empirically. As such, this survey provides the most recent data on claimants in known investment treaty arbitrations. This includes arbitrations invoking IIAs, irrespective of whether such arbitration also invoked domestic investment law of the host State and/or a contract. This survey did not include cases where the claimants invoked a contract and/or investment law without also invoking a BIT or other treaty with investment protections.

To collect arbitration cases, I first used the ICSID website to conduct a search for all cases invoking the "ICSID Convention – Arbitration Rules" and the "ICSID Additional Facility – Arbitration Rules," as well as "Bilateral Investment Treaties" and "Other Treaties" as instruments invoked by the claimant. I did not use any other limitations except for the "proceeding registration date," where I limited my search to the time period of January 1, 2010, to December 31, 2019. I then conducted a similar search on the UNCTAD's website for the Investment

133. INT'L CTR. FOR SETTLEMENT OF INV. DISPS., ADDITIONAL FACILITY RULES (effective April 10, 2006).

134. ICSID Cases Database, *supra* note 48.

135. UNCTAD's Investment Dispute Settlement Navigator, *supra* note 117.

Dispute Settlement Navigator. Finally, I compared the two pools of investment treaty arbitration cases and identified the reasons for discrepancies and missing cases. For instance, there was a case "missing" on the UNCTAD's list because UNCTAD listed two consolidated cases, ARB/12/40 and ARB/12/14, as a single arbitration, while the ICSID listed them separately as two cases, albeit with a note that they were consolidated. Ultimately, this process has generated a list of 375 investment treaty arbitrations for reading and coding (see Table 1).

Table 1. Number of ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	ICSID Convention	ICSID AF	Total
2010	18	1	19
2011	29	4	33
2012	31	7	38
2013	30	2	32
2014	30	3	33
2015	46	2	48
2016	39	5	44
2017	42	4	46
2018	41	6	47
2019	32	3	35
Total	***338***	***37***	***375***

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

The goal of the survey was to go beyond the name of the claimant and its alleged nationality as presented at the time of filing. Having collected information on claimants from the ICSID database, UNCTAD's Investment Dispute Settlement Navigator and accompanying filings, I proceeded to collect data from other resources, such as *Investment Arbitration Reporter*, a subscription-based news and analysis service on international arbitrations.[136]

For cases with more than one claimant, I collected data on each claimant named on the case separately. This avoided the weakness of the OECD survey, which counted the largest investor as being the claimant on the case, thereby increasing the proportion of large investors in the finding.[137] I categorized claimants as individuals or companies. For individuals, I sought to collect data on their names, nationality, number, relations between themselves and other claimants, and any other background information publicly reported as part of the case. For companies, I sought to collect data on their name, legal form, named nationality, number, relations with other claimants, and publicly available information on their subsidiaries/parent companies, affiliates, prior experience in

136. Investment Arbitration Reporter, otherwise known as IAReporter, is accessible at https://www.iareporter.com/.

137. Gaukrodger & Gordon, *supra* note 119, at 78.

investment arbitrations, and status as a multinational corporation. Where possible, I noted whether the company was publicly or privately held. Finally, I noted the size of the companies and the size of their alleged investments and claims.

To collect these data, I used several sources of information: UNCTAD's Investment Dispute Settlement Navigator; Investment Arbitration Reporter; a company's profile on Bloomberg; the website of the claimant, if available; and business information appearing on the internet.

B. Claimants in ICSID Arbitrations

Using the above methodology, the following data were collected on claimants and ITA cases as they relate to claimants for publicly known ICSID arbitrations initiated from January 1, 2010, to December 31, 2019, pursuant to BITs and other investment treaties.

Except for the year 2016,[138] there were ITA cases initiated solely by individuals each year, in addition to arbitration cases commenced solely by companies or jointly by individuals and companies (*see* Table 2). For the years with ITA cases initiated solely by individuals, such cases constituted from the total cases initiated that year from 6.06 percent (number (n)=2) in 2014 to 25.71 percent (n=9) in 2019. Companies as sole claimants commenced the majority of ITA cases for each year. The share of ITA cases initiated by companies as sole claimants on a case ranged from 56.25 percent (n=18) in 2013 to 89.13 percent (n=41) in 2015 (if we exclude from consideration the two outlier cases for 2015),[139] or to 88.64% (n=39) in 2016 (if we add for consideration the two outlier cases for 2015). ITA cases initiated by both individuals and companies acting as claimants on a case ranged from 4.35 percent (n=2) in 2015 (without the outlier cases for 2015) or 7.89 percent (n=3) in 2012 (with the outlier cases for 2015) to 21.88 percent (n=7) in 2013.

Table 2. Number of ITA Cases, Per Category of Claimants, Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	**Cases with individuals as sole claimants on the case (% of total cases)**	**Cases with companies as sole claimants on the case (% of total cases)**	**Cases with both individuals and companies as claimants on the case (% of total cases)**	**Total number of cases**
2010	4 (21.05%)	13 (68.42%)	2 (10.53%)	19
2011	4 (12.12%)	26 (78.79%)	3 (9.09%)	33
2012	3 (7.89%)	32 (84.21%)	3 (7.89%)	38

138. In 2016, there were no ITA cases initiated by individuals on their own, although they brought five cases (out of forty-four for the year) jointly with companies as claimants.

139. The two outlier cases for 2015 were Adamakopoulos and Others v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23. For further discussion of these two cases as outliers, see the text of the Article immediately following Table 2.

2013	7 (21.88%)	18 (56.25%)	7 (21.88%)	32
2014	2 (6.06%)	27 (81.82%)	4 (12.12%)	33
2015[i]	3 (6.52%) 3 (6.25%)	41 (89.13%) 41 (85.42%)	2 (4.35%) 2(+2) (8.33%)	46 46(+2)
2016	0 (0%)	39 (88.64%)	5 (11.36%)	44
2017	5 (10.87%)	37 (80.43%)	4 (8.70%)	46
2018	7 (14.89%)	34 (72.34%)	6 (12.77%)	47
2019	9 (25.71%)	23 (65.72%)	3 (8.57%)	35
Total[ii]	44 (11.80%) 44 (11.73%)	290 (77.75%) 290 (77.33%)	39 (10.45%) 39(+2) (10.94%)	373 373(+2)

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

The year 2015 covered two outlier cases, including a mass claims arbitration of *Adamakopoulos and Others v. Cyprus*, an ICSID Convention case that, by the date of the hearing on the jurisdiction included as claimants 951 (ultimately 949) natural persons and seven companies.[140] As the decision on jurisdiction further explains, the number and identity of claimants in this ITA case have changed since the date of filing a request for arbitration: Twelve claimants passed away and were succeeded by their estates, four claimants were added after being omitted by error, duplicates were corrected for three claimants listed twice and one claimant listed twice under two separate names, and one more claimant (originally listed but latter excluded by mistake) was added to the list of claimants.[141] At the hearing, the claimants stated their number as 969, although their rejoinder on jurisdiction (Annex A) listed the number of claimants as 958.[142] Two claimants later withdrew, bringing their number down to 956, including 949 natural persons and seven companies, covered by the tribunal's decision on jurisdiction.[143]

i. For the year 2015, the top line represents the data for the year without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

ii. For the Total for the period of 2010-2019, the top line represents the data without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

140. *See* Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2 (Feb. 7, 2020). For further reading on this arbitration, see, for instance, Ridhi Kabra, *Theodoros Adamakopoulos and others v Cyprus: Multiparty Arbitration Takes One Step Forward, Two Steps Back*, 36 ICSID REV.–FILJ 286 (2021).

141. Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2, n. 3 (Feb. 7, 2020).

142. *Id.*

143. *Id.* The full list of claimants is included in the Decision on Jurisdiction, Annex I.

The second outlier case for 2015 was *Kruck and Other v. Spain*, an ICSID Convention case which involved 116 German claimants, including largely limited liability partnerships, private companies, and eight German nationals.[144]

For the ten years under review, there were 957 named claimants who initiated ICSID arbitrations (including outliers—2,029 named claimants), ranging for the year from forty-eight (in 2011) to 205 (in 2016) (including outliers—to 1,160 named claimants (in 2015))[145] (*see* Table 3). If we exclude the two outlier cases for 2015, for each year (except 2013), more companies than individuals initiated ICSID arbitrations. The share of companies as claimants in ITA cases under review ranged from 60.69 percent in 2018 to 90.41 percent in 2012. By exception, in 2013, there were more individuals than companies who initiated ICSID arbitrations: Fifty-seven individuals (57.58 percent of total claimants) brought claims in ICSID that year as compared to only forty-two companies (42.42 percent). If we add the number of claimants for the outlier cases of 2015 and consider the year 2013, the data are different: Now, for two years (2013 and 2015) out of the ten-year period under review individuals constituted larger shares of claimants in ICSID arbitrations, representing 57.58 percent of all claimants in 2013 and 83.36 percent in 2015.

Table 3. Number of Claimants in ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	Individuals as claimants (% of total claimants)	Companies as claimants (% of total claimants)	Total number of claimants
2010	18 (36.73%)	31 (63.27%)	49
2011	7 (14.58%)	41 (85.42%)	48
2012	7 (9.59%)	66 (90.41%)	73
2013	57 (57.58%)	42 (42.42%)	99
2014	8 (11.94%)	59 (88.06%)	67
2015[iii]	10 (11.36%) 10 (+949+8) (83.36%)	78 (88.64%) 78 (+7+108) (16.64%)	88 88 (+956+116)
2016	33 (16.10%)	172 (83.90%)	205
2017	32 (29.63%)	76 (70.37%)	108
2018	57 (39.31%)	88 (60.69%)	145
2019	29 (38.67%)	46 (61.33%)	75

144. *See* Kruck v. Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, ¶ 2 (April 19, 2021).

145. *See* Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2 (Feb. 7, 2020), and Kruck v. Spain, ICSID Case No. ARB/15/23, Decision on Jurisdiction and Admissibility, ¶ 2 (April 19, 2021), respectively.

iii. For the year 2015, the top line represents the data for the year without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

Total[iv]	258 (26.96%) / 258 (+957) (59.88%)	699 (73.04%) / 699 (+115) (40.12%)	957 957 (+1,072)

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

For 2010–2019, the number of ITA cases where individuals acted as claimants on the case, on their own or jointly with companies, ranged from five (in 2015 (without the outlier cases) and in 2016) to fourteen (in 2013) (see Table 4). The weight of these ITA cases in the total number of cases for the year ranged from 10.87 percent for 2015 (if we exclude from consideration the two outlier cases for 2015),[146] or from 11.36 percent for 2016 (if we add for consideration the two outlier cases for 2015) to 43.75 percent for 2013, with an average for the period of ten years of 22.25 percent (83 ITA cases out of 373 total), or 22.67 percent (85 ITA cases out of 375 total, if including the two outlier cases). In some ITA cases, individuals acted as the only claimants on the case. The largest number of cases in this category were initiated in 2019 (n=9), which constituted 25.71 percent of all ITA cases for that year (n=35). The largest number of individuals as claimants in a case was 949 in the outlier case of *Adamakopoulos and Others v. Cyprus*, initiated in 2015.[147] Without this mass claims arbitration, the largest number of individuals as claimants in a case was thirty-four in 2018.[148]

Table 4. Individuals as Claimants in ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019

Year	**Number of cases with individuals as claimants on the case (% of total cases)**	**Number of cases with individuals as the only claimants on the case (% of total cases)**	**The largest number of individuals as claimants on the case**
2010	6 (31.58%)	4 (21.05%)	9
2011	7 (21.21%)	4 (12.12%)	1
2012	6 (15.79%)	3 (7.89%)	2
2013	14 (43.75%)	7 (21.88%)	13
2014	6 (18.18%)	2 (6.06%)	2
2015[v]	5 (10.87%)	3 (6.52%)	4

iv. For the *Total* for the period of 2010-2019, the top line represents the data without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

146. The two outlier cases for 2015 were Adamakopoulos and Others v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23. For further discussion of these two cases as outliers, see the text of the Article immediately following Table 2.

147. Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, Decision on Jurisdiction, ¶ 2 (Feb. 7, 2020).

148. The case at hand is GBM Global v. Spain, ICSID Case No. ARB/18/33.

v. For the year 2015, the top line represents the data for the year without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases. Without

	7 (14.58%)	3 (6.25%)	949
2016	5 (11.36%)	0 (0%)	19
2017	9 (19.57%)	5 (10.87%)	17
2018	13 (27.66%)	7 (14.89%)	35
2019	12 (34.29%)	9 (25.71%)	7
Total[vi]	83 (22.25%) 85 (22.67%)	44 (11.80%) 44 (11.73%)	***N/A***

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

The collected empirical data on claimants also revealed information on ITA cases where the host State companies acted as claimants in arbitration (Table 5). The weight of such cases in the overall number of arbitrations ranged from 9.38 percent (n=3) in 2013 to 26.09 percent (n=12) in 2017. Further study of the data is needed to explore whether these host companies as named claimants are true investors in the case or whether they are companies incorporated in the host State to satisfy the conditions of doing business in the country.

Table 5. ITA Cases Pursuant to the ICSID Convention and ICSID Additional Facility Rules initiated from January 1, 2010, to December 31, 2019, with the Host State Companies as Claimants on the Case

Year	**Cases with Host State Companies as Claimants (% total)**	**Total Number of Cases**
2010	4 (21.05%)	19
2011	5 (15.15%)	33
2012	7 (18.42%)	38
2013	3 (9.38%)	32
2014	8 (24.24%)	33
2015	5 (10.42%)	48
2016	11 (25.00%)	44
2017	12 (26.09%)	46
2018	5 (10.64%)	47
2019	6 (17.14%)	35
Total	***66 (17.60%)***	***375***

Source: Composed by the author based on the data collected and coded by the author using the methodology as described in Part II.A of the Article.

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the two outlier cases for 2015, the total number of ITA cases with individuals as claimants on the case was five (out of forty-six cases total for 2015), including three cases where individuals acted as sole claimants on the case. With the outlier cases, the total number of cases with individuals as claimants on the case was seven (out of forty-eight cases total for 2015), including three cases where individuals acted as sole claimants on the case (*see* Table 2 above).

vi. For the *Total* for the period of 2010-2019, the top line represents the data without including the two outlier cases (Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49, and Kruck v. Spain, ICSID Case No. ARB/15/23), and the bottom line represents the data including the two outlier cases.

III. DATA ANALYSIS AND NORMATIVE PRESCRIPTIONS FOR INVESTMENT TREATY-MAKING

According to UNCTAD, as of January 2024, US claimants (on their own or jointly with claimants from other countries) have commenced 132 arbitrations under the ICSID Convention and ICSID Additional Facility Rules invoking BITs and other treaties with investment provisions.[149] This constitutes 17.7 percent of all ICSID cases invoking BITs and other treaties with investment provisions (n=746). Of these arbitrations, twenty-nine arbitrations are still pending. Therefore, on its face, US claimants are by far the most active users of the ISDS system, followed by Dutch claimants (ninety-five arbitrations to date, twenty-eight currently pending), UK claimants (fifty-eight arbitrations, eighteen pending), German claimants (fifty-two arbitrations, twenty pending), French claimants (forty arbitrations, eleven pending), and Canadian claimants (thirty-three arbitrations, fifteen pending).

For the period of January 1, 2010, to December 31, 2019, under review in this survey, US claimants initiated thirty-nine ICSID arbitrations invoking BITs and other IIAs. This constitutes 10.4 percent of all cases for the period (n=375) covered by the survey. During this period, Dutch claimants were more active than US ones, having initiated fifty-three arbitrations (14.1 percent of all arbitrations initiated for the period). These two groups of claimants were followed by the United Kingdom (thirty-two arbitrations initiated; 8.5 percent), Germany (twenty-nine; 7.7 percent), France (twenty-one; 5.6 percent), and Canada (seventeen; 4.5 percent). This includes both individuals and companies with their nationality counted as identified in the arbitration filings, irrespective of whether the arbitral tribunal later accepted such claimants as foreign investors and recognized their nationality for the purposes of the investment dispute.

What does the survey data tell us about claimants in ISDS? First, a relatively small number of investment treaty arbitrations involve individuals acting as claimants on their own or together with companies (Table 2, Table 4). Most claims in investment treaty arbitrations are brought by companies, frequently acting together with their subsidiaries, such as those incorporated in the host State as part of the investment projects (Table 3, Table 5).

Second, corporations, as distinct from other legal forms of companies, frequently bring claims in investment arbitrations, but generally do so only once over their lifetimes (Table 3). Judging by the number of cases corporations submit to ISDS, they are certainly the users but hardly the abusers of the ISDS system. Large multinational corporations are indeed the frequent users of ISDS, bringing claims to ICSID arbitration directly or indirectly through their subsidiaries (Table 2, Table 4). Yet, they are not the only users of the ISDS system. Individuals and small and medium-size companies also bring claims in investment treaty arbitrations (Tables 2–4). This finding is consistent with the OECD survey, which

149. *See* UNCTAD's Investment Dispute Settlement Navigator, *supra* note 117.

found that global multinational corporations brought only 8 percent of investment arbitration cases.[150]

Third, based on the collected data, it appears that when individuals invest abroad professionally, they tend to shield themselves from liability by investing indirectly through companies incorporated in third jurisdictions, which may also reduce their tax liability.[151] This then impacts the nature of claimants in ISDS, which may be companies created for the sole purpose of making investments overseas and/or incorporated in the "tax haven" jurisdictions. The indirect structure of such investments makes it harder to identify the national origin of the investments as they may come through several entities and countries before entering the host State. For instance, the *Lao Holdings v. Laos (I)* arbitration, on its face, involved a Dutch investor invoking the 2003 BIT between the Netherlands and Laos (in addition to the ICSID Additional Facility Rules).[152] Yet, as the arbitration materials demonstrate, the case involved an investment by two US individuals made through two companies incorporated in Aruba, the Netherlands Antilles, and a subsidiary in Macau.[153] The arbitration was ultimately decided in favor of the host State, dismissing all claims at the merits stage.[154]

Still, other investment cases involve individuals who directly invested in the host State, without seeking protection of the limited liability. For instance, the *Gavrilovic v. Croatia* arbitration focused on the ownership and operation of the meat processing plant and the alleged statutory expropriation of the land and commercial properties of the company.[155] The claimant in this case invested in Croatia directly. The case was decided in favor of the foreign investor.[156]

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150. Gaukrodger & Gordon, *supra* note 119, at 18.

151. An example comes from *Lao Holdings v. Laos (I)*, where two US entrepreneurs with business experience in gambling facilities sought to make investments in casinos and slot machines in Laos. To this effect, they began investing in Laos in 2007 through their company incorporated in Macau in 2005. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, ¶ 2, ¶ 15 (Feb. 12, 2014). In 2012, to take advantage of the Laos-Netherlands BIT, the US investors incorporated a company (Lao Holdings N.V.) in Aruba, the Netherlands Antilles, and then transferred to it the ownership of their company in Macau. *Id.*, ¶¶ 49–52. Through these Dutch and Macau entities, US nationals partnered with a conglomerate in Laos in two casino projects and three slot machine clubs. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 1 (Aug. 6, 2019). One of the casinos was built and operated successfully, while the second one was never built. *Id*. When a dispute arose, it led to two separate arbitration cases, with Dutch and Macau entities (but not their US owners) serving as claimants in a case: (i) *Lao Holdings v. Laos (I)*, an arbitration case invoking the Laos-Netherlands BIT pursuant to the ICSID Additional Facility Arbitration Rules, and (ii) *Sanum Investments v. Laos (I)*, an UNCITRAL arbitration case invoking the China-Laos BIT.

152. *See Lao Holdings N.V. v. Laos*, ICSID Case No. ARB(AF)/12/6, Decision on Jurisdiction, ¶ 2 (Feb. 12, 2014) ("The Claimant, Lao Holdings N.V., is a company incorporated under the laws of Aruba, The Netherlands Antilles, and is hereinafter referred to as 'Lao Holdings' or the 'Claimant'.")

153. *See supra* note vi and accompanying text.

154. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 293 (Aug. 6, 2019).

155. Gavrilovic v. Croat., ICSID Case No. ARB/12/39, Award (July 26, 2018).

156. *Id.*, ¶ 1324.

If individuals are named as claimants together with companies in investment arbitrations, they are frequently the owners/shareholders of the legal entities listed as named claimants.[157] For instance, in *Blusun v. Italy*, the two shareholders of the public limited company (S.A.) acting as claimants in the case, Jean-Pierre Lecorcier (a French national) and Michael Stein (a German national), owned and exclusively controlled Blusun company (with 66 percent and 34 percent shares of equity, respectively), which was also listed as claimant in the case.[158] Although the case involved shareholder claims for reflective loss, the issue was avoided as the arbitral tribunal dismissed all the claims at the merits stage.[159]

Blusun, in turn, owned 80 percent of the Italian company, Eskosol S.p.A., which commenced a separate investment arbitration against Italy after being declared insolvent and placed in liquidation proceedings.[160] That case was also decided in favor of Italy on the merits,[161] so there were no damages awarded to the company in the *Eskosol* arbitration or its shareholders in the separate *Blusun* arbitration. Thus, the potential double recovery and inconsistent awards were avoided. But the *Blusun/Eskosol* case drew attention to the issue of shareholder claims for reflective loss as it involved an insolvent Italian subsidiary of the Belgian company desperately seeking but ultimately unable to join the *Blusun* arbitration (initiated by its parent company) in hopes to collect part of the arbitration award.[162] Considering its dire financial situation, Eskosol's inability to join the *Blusun* arbitration (ultimately lost by Blusun), followed by the need to fight back Italy's *res judicata* objection in the subsequent *Eskosol* arbitration, only highlighted the difficulty of reconciling the conflicting interests of the company and its shareholders in the context of reflective loss claims.

Fourth, the named nationality of claimants in investment arbitration may be misleading, with the "true" nationality of claimants not apparent from the arbitration materials. A good example is the *Rusoro Mining v. Venezuela* arbitration, where the named claimant was a Canadian corporation controlled by Russian businessmen, which becomes apparent after searching additional

157. *See, e.g.*, RSM Prod. Corp. v. Gren., ICSID Case No. ARB/10/6, Award (Dec. 10, 2010) (where three US individuals acting as claimants—Rachel S. Grynberg, Stephen M. Grynberg and Miriam Z. Grynberg—collectively, in equal shares, owned 100 precent of RSM Production Corporation, the fourth claimant on the case); Awdi v. Rom., ICSID Case No. ARB/10/13, Award (Mar. 2, 2015) (where Hassan Awdi, the individual acting as claimant on the case, wholly owned two U.S. companies—Enterprise Business Consultants, Inc. and Alfa El Corporation—as the sole shareholder of both companies).

158. Blusun v. It., ICSID Case No. ARB/14/3, Award, ¶¶ 2–4 (Dec. 27, 2016).

159. *Id.* ¶ 423. The tribunal's award was upheld in the ICSID annulment proceedings. *See* Blusun v. It., ICSID Case No. ARB/14/3, Decision on Annulment, ¶ 339 (Apr. 13, 2020).

160. Eskosol S.p.A. v. It., ICSID Case No. ARB/15/50, Award (Sept. 4, 2020).

161. *Id.* ¶ 499.

162. Blusun v. It., ICSID Case No. ARB/14/3, Award, ¶¶ 2–4 (Dec. 27, 2016). In the Blusun arbitration, Eskosol argued that "this Tribunal lacks jurisdiction and/or the Blusun claim is inadmissible because the Claimants are seeking damages to which only Eskosol is entitled, which will cause prejudice to Eskosol, its creditors and the Non-Party Shareholders." *Id.* ¶42.

information on the internet and the company's website.[163] Yet, the arbitration was decided on the premise that the claimant was a Canadian company and therefore could benefit from the Canada-Venezuela BIT.[164] Similarly, in the *NextEra v. Spain* arbitration, the dispute on its face involved two Dutch private limited liability companies—NextEra Energy Global Holdings B.V. and NextEra Energy Spain Holdings B.V.[165] However, both companies are the Dutch subsidiaries of the US-based energy company NextEra Energy, Inc.[166] So, the case could instead be counted as initiated by the US claimant.

A similar example of the "hidden" nationality is provided by *Cortec Mining v. Kenya*, where the three claimants were a Kenyan company (Cortec Mining Kenya Limited ("CMK")) and two companies incorporated in England and Wales (Cortec (Pty) Ltd ("Cortec UK") and Stirling Capital Limited ("Stirling")).[167] CMK was majority (70 percent) owned by Cortec UK and Stirling, who were "eventually wholly owned by Pacific Wildcat ("PAW"), a Canadian company listed on the Venture Exchange Market of the Toronto Stock Exchange."[168] From a formal perspective, the case involved UK investments in Kenya and, indeed, the claimants invoked the Kenya-United Kingdom BIT (1999).[169] However, one could also describe it as a dispute involving Canadian investments in Kenya and seek to invoke an investment treaty with Canada (except that Kenya did not have a BIT with Canada, which might explain why the claim was ultimately brought by UK claimants).[170] In fact, the absence of a BIT can explain the named claimants and the invoked alternative BIT in many investment arbitrations where, on its face, the claimant has made its investments indirectly.[171]

Overall, these observations show how random the nationality of a claimant is in investment arbitration. One should therefore be wary of studies of the

163. Rusoro Mining v. Venez., ICSID Case No. ARB(AF)/12/5, Award (Aug. 22, 2016).

164. According to Reuters, Rusoro Mining Ltd. is a Canada-based company, which is engaged in the operation, acquisition, exploration, and development of gold mining and mineral properties. *See* the company's profile at https://www.reuters.com/markets/companies/RML.V (last visited Jan. 1, 2024).

165. NextEra Energy Global Holdings B.V. v. Spain, ICSID Case No. ARB/14/11.

166. Caroline Simson, *Spain Can't Get €291M Award to NextEra Units Nixed*, LAW360 (Mar. 29, 2022).

167. Cortec Mining Kenya v. Kenya, ICSID Case No. ARB/15/29, Award, ¶ 14 (Oct. 22, 2018).

168. *Id*.

169. *Id.* (Identifying claimants as two companies incorporated in England and Wales that together owned 70 percent of the third claimant, a Kenyan company).

170. This conclusion is drawn from the arbitration materials of the case, which identify a Canadian public company as the ultimate owner of the investments in Kenya. *Id.* One could therefore explore whether there is an alternative BIT to invoke, which could have been a treaty between Kenya and Canada, but such a treaty has never been concluded.

171. Another example comes from the *Smurfit Holding B.V. v. Venez.* arbitration, where the Ireland-based multinational corporation commenced an investment arbitration through its Dutch subsidiary, invoking the Netherlands-Venezuela BIT, in part because there were no investment treaties concluded between Ireland and Venezuela. See Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending).

nationality of claimants in investment arbitrations based merely on the named nationality in arbitration filings and/or invoked BITs. Still, the nationality of the investment always impacts the tribunal's decision as to the jurisdiction and admissibility of a claim. For instance, in *Capital Financial v. Cameroon*,[172] the tribunal "dismissed jurisdiction over the claim, finding that Capital Financial was not a Luxembourg national for purposes of the BIT or the ICSID convention."[173] Furthermore, the "tribunal found that Capital Financial had committed an abuse of rights in bringing the claim, as the ultimate owner who had funded the investment was a Cameroonian national."[174]

Fifth, further studies are needed to explore the relationship among claimants in arbitrations where more than one claimant is listed on the case. There, the multiplicity of claimants may be explained by several factors, including jurisdictional concerns and requirements of local incorporation. Jurisdictional concerns could indeed contribute to (socially wasteful) treaty-shopping, while incorporating in the host State is often required as a condition of doing business in that country.

Sixth, due to the decentralized system of ISDS, data on related arbitrations are inherently incomplete, especially if such arbitrations are conducted under different arbitration rules by related parties. For instance, the *Lao Holdings* arbitration (referred above) was commenced by the Dutch company, on behalf of two US investors, pursuant to the Laos-Netherlands BIT and the ICSID Additional Facility Rules. This arbitration was subsequently followed by the UNCITRAL arbitration, pursuant to the China-Laos BIT, which was commenced by the wholly-owned subsidiary of *Lao Holdings*—Sanum Investments Limited, a company established under the laws of the Macau Special Administrative Region of the People's Republic of China.[175] Presently, there are no tools on the ICSID website or the UNCTAD Investment Dispute Settlement Navigator that would allow the user to identify related arbitration cases. Therefore, one has to know the facts of the dispute and learn about multiple arbitrations and/or court proceedings elsewhere to connect cases related to the same investment dispute. As a result, empirical studies in this respect are inherently limited in their ability to provide systematic data on investment arbitrations.

Seventh, the level of activism by US claimants in ISDS is not necessarily reflective of the foreign investments made by US companies and individuals abroad. Instead, a high number of US claimants could be an indicator of the attractiveness of the US treaty regime, especially in the areas of corporate law and

172. Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon, ICSID Case No. ARB/15/18, Award (June 22, 2017).

173. Zoe Williams, *Investor Seeks to Annul Jurisdictional Decision That Has Thwarted Its Claims Against Cameroon*, IA REPORTER (Nov. 2, 2017).

174. *Id*.

175. *See* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 1 (Aug. 6, 2019), and Sanum Investments v. Laos, UNCITRAL, PCA Case No. 2013–13, respectively.

foreign investor protection. A comparable level of activism is seen with respect to the Dutch claimants, which are the second most common users of ICSID judging by the number of arbitrations commenced by them. Here, scholars have observed the so-called "going Dutch" phenomenon,[176] where companies engage in treaty-shopping by incorporating in the Netherlands to benefit from Dutch investor protection treaties (by January 1, 2024, the Netherlands has concluded 108 BITs and eighty-one other treaties with investment provisions).[177] Similarly, the US regime currently includes forty-seven BITs and seventy other treaties with investor protection provisions,[178] which at least partially explains why US claimants have commenced so many ICSID arbitrations.

Some claimants openly admit the use of treaty-shopping to bring a claim in investment arbitration (e.g., through a subsidiary in a third country where a direct claim by the parent company is not available because of the lack of BITs). For instance, in *Smurfit Holdings B.V. v. Venezuela*,[179] the "Irish cardboard packaging giant" Smurfit Kappa Group, Plc. first "publicly threatened to initiate arbitration proceedings against Venezuela over a temporary takeover of its local subsidiary Smurfit Kappa Carton de Venezuela (SKCV) by the Venezuelan government."[180] It then chose to submit its request for arbitration through a Dutch affiliate pursuant to the 1991 Netherlands-Venezuela BIT.[181] As some reports suggest, the choice of the investment treaty and a named claimant (a Dutch holding company) in this arbitration have been influenced by the absence of a BIT between Ireland and Venezuela.[182] Of course, for a multinational corporation, such as Smurfit Kappa, operating in several jurisdictions and able to use its subsidiaries, other related entities, or its owners, treaty-shopping becomes a rational choice. Ultimately, the structure of the claim will largely depend on the counsel representing the company in the investment arbitration.

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176. *See* Timothy G. Nelson, *Going Dutch—The Many Virtues of the Netherlands Model BIT*, 6 IBA DISP. RESOL. INT'L 161, 161–62 (2012) (arguing that Dutch investor protection and double taxation treaties made it extremely attractive for investors to "channel their investments through the Netherlands by incorporating there," in other words, "going Dutch"). *See also* Roeline Knottnerus & Roos Van Os, *The Netherlands: A Gateway to 'Treaty Shopping' for Investment Protection*, INVESTMENT TREATY NEWS (Jan. 12, 2012), https://www.iisd.org/itn/en/2012/01/12/the-netherlands-treaty-shopping/.

177. On the number of investment treaties concluded by the Netherlands, see UNCTAD's International Investment Agreements Navigator, *supra* note 1.

178. *See* UNCTAD's International Investment Agreements Navigator, *supra* note 1 (last visited Jan. 1, 2024).

179. Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending).

180. Lisa Bohmer, *Cardboard Packaging Manufacturer Smurfit Holdings Makes on Earlier Threats to Initiate ICSID Arbitration Against Venezuela*, IA REPORTER (Dec. 28, 2018).

181. Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending).

182. Lisa Bohmer, *Cardboard Packaging Manufacturer Smurfit Holdings Makes on Earlier Threats to Initiate ICSID Arbitration Against Venezuela*, IA REPORTER (Dec. 28, 2018) ("Ireland does not maintain a bilateral investment treaty with Venezuela. To make good on its earlier threats to initiate ICSID arbitration against Venezuela, Smurfit has opted to pursue the arbitration through its Dutch affiliate Smurfit Holdings B.V.".)

However, from a data accuracy perspective, such practice changes the named nationality of claimants and impacts information on the true origin of foreign investments. It also creates a distorted impression as to the litigious nature of some foreign investors. Take, for instance, the Dutch investors who are the second most common claimants in known investment arbitrations under the ICSID Convention and ICSID Additional Facility Arbitration Rules.[183] As *Smurfit Holdings* and other cases demonstrate,[184] Dutch investors may simply be named claimants in many cases because of the structure of investments,[185] the number of IIAs concluded by the Netherlands,[186] and the attractiveness of the Dutch investor protection regime under the Dutch BITs and other IIAs.[187]

For an outside observer not familiar with the intricacies of international investment law and dispute settlement, it may appear that Dutch companies are prone to disputes and would eagerly engage in investment arbitrations should a dispute arise. However, a professional in the area of international investment arbitration would understand that the process is at least partially driven by the

183. According to the ICSID database of cases, by January 2024 Dutch claimants have brought one hundred investment arbitrations (10.48 percent of 954 cases worldwide) pursuant to both the ICSID Convention and the ICSID Additional Facility Arbitration Rules. *See* ICSID Cases Database, *supra* note 48. Dutch claimants follow the lead of US claimants, who have brought 176 (18.45 percent of cases worldwide) investment arbitration cases. *Id*. These numbers include disputes invoking BITs but also other treaties with investment protections, domestic investment law, and contracts. *Id.*

184. Smurfit Holding B.V. v. Venez., ICSID Case No. ARB/18/49 (pending). *See also* Lao Holdings N.V. v. Laos, ICSID Case No. ARB(AF)/12/6, Award, ¶ 1 (Aug. 6, 2019) (where US entrepreneurs, who made investments in Laos through a company in Macau, underwent corporate restructuring and incorporated in Aruba, the Netherlands Antilles, to receive the benefits of the Netherlands-Laos BIT).

185. *See, e.g.*, UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14–15 (2014) (partially explaining the significant number of cases brought by Dutch claimants in ISDS by "the frequent use of Dutch-incorporated entities as intermediaries in making transnational investments by non-Dutch companies.") The authors report that "in around three quarters of Dutch cases [brought by the end of 2013] the ultimate owners of the claimants are not Dutch themselves" and explain that "[i]ncorporation of a company in the Netherlands is sufficient to benefit from Dutch BITs; no substantive business operations in the country are required." *Id*. at 15.

186. According to UNCTAD, as of January 2024, the Netherlands has concluded 108 BITs, of which seventy-five are currently in force (five signed but not yet in force, and twenty-eight terminated). *See* UNCTAD's International Investment Agreements Navigator, *supra* note 1. In addition, the Netherlands has concluded seventy-seven (sixty-one currently in force) other treaties with investment protections, such as free trade agreements (FTAs) with investment chapters. *Id*. *See also* UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14 (2014) (concluding that the high activity of the Dutch investors as claimants in ISDS can be "explained by the significant number of BITs signed by the Netherlands," but further acknowledging that this explanation is only partial as a "few other EU Member States, including Germany, the United Kingdom and France have more extensive BIT networks" but have not experienced such a high number of claim in ISDS).

187. *See* Nelson, *supra* note 176, at 161–62 ("The extent of investment protections contained within the Netherlands Model BIT, and their 'broad geographic inclusivity and application', has made it extremely attractive to investors.") (footnote omitted).

volume and benefits of the Dutch investment treaties.[188] Yet, it is often impossible to separate "true" Dutch investors or investments from the named Dutch investments only. In view of the reputation that Dutch claimants receive in ISDS,[189] one should ask herself whether the Netherlands (and investment tribunals called upon to decide on their jurisdiction and the admissibility of a claim) are doing justice to the "true" Dutch investors. After all, some host States may be worried about engaging in investment projects with Dutch investors due to their reputation in the area of ISDS. Finally, such extensive reliance on Dutch investment treaties underlines the importance of the Dutch BITs as the trailblazers in investor protection and, more recently, responsible investment debate. Together with the United States and United Kingdom, whose investment treaties are most frequently invoked in investment arbitrations,[190] the Netherlands has a special role to play in setting the standards of investment protection worldwide.

This observation contributes to the long-running debate on the role of investment treaties in attracting and promoting foreign investments. It appears that regardless of the role of such treaties in the initiation of foreign investments (that is to say, irrespective of the weight a foreign investor gives to investment treaties when making its decision to invest), such treaties play a crucial role when actual disputes arise. It is at this stage that a foreign investor and their counsel would carefully consider their options and seek to frame their dispute to fit an investment treaty.

Whether they are able to frame their dispute successfully would depend on many factors, including the nature of the investment, the existence of related parties, and the availability of investment treaties that can be used for bringing a case in ISDS. Moreover, not all (creative) filings would persuade the arbitral tribunal. The case has to pass the objections to jurisdiction and admissibility, and the tribunal needs to establish that an investment treaty was breached, and, ultimately, award damages to the foreign investor. Nonetheless, once an

188. *See* UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14 (2014). *See also* Nelson, *supra* note 176, at 178 (arguing that "[t]he relatively liberal entry criteria for the Netherlands Model BIT, which extend protection to companies incorporated in the Netherlands regardless of the nationality of their shareholders, reflect a deliberate policy of encouraging incorporation in that jurisdiction—a policy that ICSID and UNCITRAL tribunals have been reluctant to second-guess").

189. *See, e.g.*, UNCTAD/DIAE, *Treaty-Based ISDS Cases Brought under Dutch IIAs: An Overview* 14 (2014) ("Dutch investors (mostly companies and only rarely individuals) rank highest in the European Union, and second highest in the world (after the United States), as frequent claimants in ISDS proceedings.").

190. *See* UNCTAD, IIA ISSUES NOTE, INTERNATIONAL INVESTMENT AGREEMENTS, INVESTOR-STATE DISPUTE SETTLEMENT CASES: FACTS AND FIGURES 2020 2-3 and Annex 2 (Issue 4, September 2021) (reporting that the United States (with 194 cases), the Netherlands (118 cases) and the United Kingdom (ninety cases) "have been the three most frequent home States of claimants in known ISDS cases filed from 1987 to 2020.") UNCTAD explains that its "statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration." *Id*. at 1.

arbitration is commenced, the nationality of an investor as alleged in arbitration filings tends to stick and reflect on ISDS and foreign investors globally, even if the tribunal concludes that a claimant is *not* an investor for the purposes of the treaty, or the case is dismissed or settled along the way.

Generally, one should note that investment treaties play a two-fold role. At the investment stage, they may create a favorable environment and signal to foreign investors that a host State is welcoming of foreign capital. At the dispute stage, they may be invoked by a foreign investor in ISDS to fit a particular investment project after the fact, once a dispute has arisen or is about to be submitted for ISDS. In their investment treaty-making, sovereign States and international organizations should keep both of these stages in mind. Moreover, States should tailor their investment treaties to the two different audiences among foreign investors, as the pool of claimants who trigger the ISDS mechanism may not be the same as the pool of investors who bring the foreign capital to the host State. The treaty language should reflect which group(s) it aims to attract.

The current system of ISDS, based on the host State's open-ended consent to arbitration, does not account for this two-fold role of investment treaties or tailor the ISDS mechanism to different groups of investors. Instead, reform proposals include abolishing ISDS entirely,[191] which would have a tremendous effect on the nature of investment claims that could be submitted to arbitration. Large multinational corporations and other foreign investors, who because of the nature of their business deals might have direct contracts with the host State (e.g., concession contracts), would still be able to negotiate for investment arbitration individually, even in the absence of a blanket protection of an investment treaty. Other foreign investors who, as this empirical study suggests, currently benefit from the investment treaty protections without direct contracts with the host State, would be left out. This includes family members investing abroad in smaller/family businesses and individuals with deposits and bonds in foreign banks (see, e.g., *Adamakopoulos v. Cyprus*, a mass claims arbitration pending at ICSID).[192]

Ultimately, there is a policy choice to be made by sovereign States and other treaty-makers as to the desirability of one category of investments (investments brought by multinational corporations) over the other (investments brought by everyone but multinational corporations), if we accept that investment treaties have a role to play in the foreign investor's decision to invest. Yet, simply abolishing ISDS in investment treaties would not eliminate the existing concerns of the multinational corporations' interference with the State's right to regulate and alleged abuses of the current system of foreign investor protection. As the existing data on investment arbitrations invoking contracts demonstrate,[193] many

191. *See supra* note 26 and accompanying text (discussing proposals of the multilateral investment court system to replace ISDS).

192. Adamakopoulos v. Cyprus, ICSID Case No. ARB/15/49 (currently pending).

193. For a list of contract-based ISDS cases, see, ICSID Cases Database, *supra* note 48.

of these cases involve multinational corporations that would continue to benefit from their bargaining power if the investment treaty protections were to be eliminated.

To conclude, what do these data and observations mean for ISDS? First, ISDS provides a forum for dispute resolution for all types of investors—from individuals and small and medium-sized companies to multinational corporations. Judging by the number and nature of claimants in surveyed ICSID arbitrations, the ISDS regime appears to be functioning better than commonly perceived. Second, in view of these findings, revoking BITs and/or universal consent to arbitration in investment treaties would likely harm first and foremost individuals and other investors without investment contracts with the host State. Large multinational corporations—the alleged primary users and abusers of ISDS—would preserve their bargaining power and ability to negotiate for ISDS directly in investment contracts. Finally, the nationality of investors as named in arbitration filings is impacted by several factors, including the type and structure of investments, the existence of related parties and the global corporate ownership network, and the availability of investment treaties that can be used to bring a case in ISDS. Further research is needed to explore the relationships between claimants in known ISDS cases and instances of corporate restructuring undertaken to facilitate treaty- and forum-shopping.

CONCLUSION

Sovereign States grant investor protections to foreign companies and individuals to attract foreign investments and, most importantly, FDIs. To enforce their rights under international investment law, foreign investors can bring ISDS claims. It is commonly believed that large multinational corporations are the only users of ISDS, and that by submitting ISDS claims, multinational corporations have been able to interfere with State sovereignty by challenging government measures adopted for the benefit of the public at large. Empirical data on companies and individuals that have brought claims in investment arbitrations under the ICSID Convention and the ICSID Additional Facility Rules show that large multinational corporations are not the only users of ISDS. Small- and medium-sized corporations, as well as other companies and individuals, frequently rely on ISDS to enforce their investor protection rights. This proves that the ISDS system functions as it should—by providing the route (often the only viable one) for diverse foreign investors to enforce their investor protection rights under IIAs.

The Role of the Court of Justice in the Course of European Integration

Emergence, development, and perspective of the judiciary of the European Union

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Since the beginning of European Integration, the case law of the Court of Justice of the European Union (Court of Justice) has undoubtedly had a lasting impact on the economic, societal and political development of Europe.[1] As a result, the Court of Justice has become one of the prominent voices in the choir of the supreme and constitutional courts. Seventy years after the Court of Justice took up its judicial activity, this year's *Irving Tragen Lecture* at the University of California, Berkeley, provides a welcome opportunity to take a look back to the Court of Justice's mission as it was laid down in the founding Treaties and the main topics that have continuously shaped its case law since 1952.

This seems all the more appropriate as the public reactions to the Court of Justice's seventieth anniversary rarely focus on these topics. Instead of examining the Court of Justice's contribution to the consolidation of the European peace order and to the protection of rights and freedoms of the Union's citizens, some

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1. Robert Lecourt, *Quel eut été le droit des Communautés sans les arrêts de 1963 et 1964?, in* L'EUROPE ET LE DROIT, MÉLANGES EN HOMMAGE À JEAN BOULOUIS, 349 (1991) (Fr.); Monica Claes, *The impact of Van Gend en Loos beyond the scope of EU law, in* 50TH ANNIVERSARY OF THE JUDGEMENT IN VAN GEND EN LOOS, 1963–2013, ACTES DU COLLOQUE, 103 (Antonio Tizzano, Juliane Kokott, & Sacha Prechal eds., 2013).

reactions simply bear witness to the "old" political conflict, which has persisted since the founding of the European Community of Coal and Steel. That is, the conflict between the proponents of the integrated Europe of the Treaties and their opponents, the latter waging a continuous struggle to maintain the judicial sovereignty of the nation-State.[2] Against this backdrop, I examine the original intent of the Founders of the Treaties to clarify the mission of the Court of Justice and to trace, in the light of this mission, the foundations of its jurisprudence.

I. A COMMUNITY OF LAW INSTEAD OF A PRIMACY OF POLITICS

The task of the Court of Justice as it is described in the founding Treaties was preceded by the special importance that was attributed, at the founding of the European Community for Coal and Steel, to the compliance with the law. In this vein, Massimo Pilotti, the first president of the Court of Justice declared on the occasion of the first sitting of the Court of Justice on December 10, 1952, that "the creation of a judicial authority that issues binding decisions seems today as an ideal to cope with situations in which states are contesting each other's rights."[3]

In his speech on the same occasion, Jean Monnet, the first president of the High Authority, highlighted in a visionary fashion: "The establishment of the Court [of Justice] also puts in place the sovereign existence of the law within the community. It safeguards the guarantees of the law for all involved in the community. […] The extent of its judicial powers makes it in every respect the guardian of the law of the treaty."[4]

With utmost clarity, Joseph Bech, the foreign minister of the Grand Duchy of Luxembourg, emphasized that same day "that the creation of the European Community for Coal and Steel constitutes a new development, and I am inclined to speak of a revolutionary development in the field of international law. This institution, whose protection is entrusted to the Court [of Justice], is from a legal perspective surely one of the most original and progressive institutions."[5]

This revolutionary development was described as the establishment of a community of law by Walter Hallstein, the first president of the European Commission in March 1962 during his famous speech at the University of Padua,

2. *Cf.*, among others, Ferdiand Weber, *Die Identität des Unionsrechts im Vorrang*, 77 JURISTENZEITUNG 292, 299 (2022) (Ger.); Christian Hillgruber, *Vom souveränen Nationalstaat zur souveränen Europäischen Union?–Zur Souveränitätsverlagerung durch supranationale Rechtsprechung*, 77 JURISTENZEITUNG 584, 587 *et seq*. (2022) (Ger.).

3. *Ansprache von H. Massimo Pilotti, Präsident des Gerichtshofs in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 169, 170 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.) (translation provided by the author).

4. *Ansprache des Präsidenten der Hohen Behörde, M. Jean Monnet in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 168, 169 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.) (translation provided by the author).

5. *Ansprache des luxemburgischen Außenministers Joseph Bech in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 171, 172 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.) (translation provided by the author).

in which he elaborated: "[t]his Community was not created by military power or political pressure, but owes its existence to a constitutive legal act. It also lives in accordance with fixed rules of law and its institutions are subject to judicial review. In place of power and its manipulation, the balance of powers, the striving for hegemony and the play of alliances we have for the first time the rule of law. The European Economic Community is a community of law . . . because it serves to realize the idea of law."[6]

II. FOUNDING MISSION OF THE COURT OF JUSTICE

These general commitments to the importance of the law and the necessity of its judicial guarantee find their sustained confirmation in the documents that are available from the debates that led to the establishment of the Court of Justice.

The famous Schuman Declaration confined itself to "suitable arrangements" that should be designed to guarantee the possibility of appeal against decisions of the High Authority. The first preliminary drafts remained silent on the institutional arrangement for a possible review procedure,[7] while later drafts considered the International Court of Justice (ICJ) or a system for mediation and arbitration for this role.[8] However, the Dutch,[9] Belgian, and German delegations in the negotiations soon fought for the establishment of an autonomous and independent Court. Hallstein, then head of the German negotiation team, proposed the creation of a permanent court that could guarantee a healthy development of the law and act as a disciplinarian for the High Authority. He supported this proposal by a reference to the fact that the United States would be particularly satisfied with it, as they would see it as the "beginning of a separation of powers in the nascent European political system."[10] Consequently, the concept of a permanent court for the community quickly prevailed in the negotiations. The obligatory nature of the Court of Justice's jurisdiction for both Member States

6. Walter Hallstein, *Die EWG – Eine Rechtsgemeinschaft. Rede anlässlich der Ehrenpromotion (Universität Padua, 12. März 1962), in* EUROPÄISCHE REDEN 341, 343 (Walter Hallstein & Thomas Oppermann eds., 1979) (Ger.); *Cf.* Robert Lecourt, *Rôle de la Cour de justice dans le développement de l'Europe*, REVUE DU MARCHÉ COMMUN 273 (1963): "Peut-on concevoir une Europe sans pouvoir et un pouvoir sans juridiction?".

7. *See Schéma de traité de Pierre Uri* (06/07/1950) *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 8 (Reiner Schulze & Thomas Hoeren eds., 2000) (Fr.).

8. *See Schéma de traité: recours contre les décisions de la Haute Autorité par Pierre Uri* (6/12/1950) *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 19 (Reiner Schulze & Thomas Hoeren eds., 2000) (Fr.).

9. *See Gecombineerde vergadering van de Commisses voor Buitenlandse Zaken en voor de Handelspolitiek* (07/07/1950) *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 31 (Reiner Schulze & Thomas Hoeren eds., 2000) (Nl.).

10. *Cf. Protokoll über die Zusammenkunft der deutschen Delegation mit Monnet in Houjarray* (07/02/1950), *in* DOKUMENTE ZUM EUROPÄISCHEN RECHT, VOL. 2, 29 (Reiner Schulze & Thomas Hoeren eds., 2000) (Ger.).

and companies was seen as its special feature,[11] while the extent of its powers remained the subject of discussions.

Despite the lamenting of the Court of Justice's limited powers during the ratification debates,[12] a great future was foreseen upon its first sitting. It was again Monnet who stressed: "[f]or the first time there has been created a sovereign European court. I foresee in it also the prospect of a supreme federal European court."[13] Similarly, Luxembourg's foreign minister Joseph Bech elaborated: "The Court [of Justice] will, where necessary, apply the objective legal norms in the face of conflicting interests. […] Beyond its purely adjudicatory functions, the Court [of Justice] will, under specific circumstances, perform political tasks in the proper meaning of the word, specifically when it is necessary to adapt the provisions of the treaty to changed circumstances."[14] From today's perspective, it also seems quite remarkable that—in the very first annulment proceedings before the Court of Justice—the parties emphasized their respect for and trust in the Court of Justice as the final instance for the decision of their dispute. The representative for the plaintiff, the French Republic, emphasized that the decision of the Court of Justice, whatever its outcome, would be regarded by the French government as definitive. Similarly, the representative of the High Authority stated that it was in no better position before the Court of Justice than "an ordinary litigant."[15]

The commencing reception of this new European legal development has been followed in academic literature with lasting interest, especially by American legal scholars. This scholarly contribution is inseparably associated, in particular, with the names of Eric Stein, Peter Hay, Richard Buxbaum, and Stuart Scheingold. Early on, the Court of Justice was perceived as the "most remarkable of all the Community's institutions"[16] and found itself at the center of academic interest. Early scholarly contributions discussed the "judicial process" that unfolded within the project of European integration,[17] the "federal jurisdiction of the Common Market Court,"[18] or broader topic of the "Rule of Law in European

11. *See* Bech, *supra* note 5, at 174 *et seq*.

12. *See* DONALD GRAHAM VALENTINE, THE COURT OF JUSTICE OF THE EUROPEAN COAL AND STEEL COMMUNITY 10 *et seq*. (1955) (referring to the ratification debates in the Netherlands, Belgium, and Italy. In particular, many members of the Dutch Parliament "believed that the Court of the Coal and Steel Community to be nearly the same in competence as the Supreme Court of the United States").

13. Monnet, *supra* note 4, at 168.

14. Bech, *supra* note 5, at 172 *et seq*.

15. Quoted from Eric Stein, *The European Coal and Steel Community: The Beginning of its Judicial Process*, 55 COLUMBIA L. REV. 985, 990 (1955) (referring to the minutes of the oral arguments that the Court held on the 28th, 29th, and 30th of October 1954, pts. 8 and 80).

16. Raymond Vernon, *The Schuman Plan—Sovereign Powers of the European Coal and Steel Community*, 47 AM. J. INT'L L. 183, 199 (1953).

17. *Cf.* The title of Stein, *supra* note 15.

18. Peter Hay, *Federal Jurisdiction of the Common Market Court*, 12 AM. J. COMP. L. 21 (1963).

Integration."[19]A review of these early writings reveals a remarkable grasp of the law of the founding Treaties and, in particular, a striking focus on the essential features of the federalization of the old continent, which are inherent in the project of European integration. The conferral of powers which, in continental legal systems, are attributed to ordinary and administrative courts, had earned the Court of Justice, from a French perspective the designation of a "veritable European Council of State."[20] But the Court of Justice was given even more important powers which would domestically correspond to those of a constitutional court. Those wide-ranging powers of the Court of Justice were precisely understood[21] as the basis for the constitutionalizing of the European legal system. In this context, legal scholars also recognized that the legal protection offered under the Treaties "must achieve more than in any normal state governed by the rule of law,"[22] in order to achieve acceptance in the supra-national community of Member States and to compensate at least partially for the democratic imperfections of the community.

This brief overview of the history of the Court of Justice's origins shows with utmost clarity that the rule of law has been given a very specific weight under the founding Treaties reflecting the Union's historical origins in post-war Europe and designed to preserve peace on the old continent. The founding Treaties thus granted the rule of law a particular value going beyond the respect for the legality and constitutionality guaranteed within the domestic legal systems. The guarantee of the rule of law is part of the DNA of the European Union and requires the Court of Justice to act with judicial prudence and wisdom, while being committed to the objective nature of the law.

Above all, the undoubtedly most important practical instrument that the Court of Justice has at its disposal to fulfill its judicial mandate is the innovative jurisdiction in the preliminary ruling procedure granted by the Treaty of Rome, establishing for the first time a direct cooperation between the courts of the Member States and the supranationally constituted Court of Justice. Under the Treaties, the courts of the Member States are entitled, and courts of last instance

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19. STUART SCHEINGOLD, THE RULE OF LAW IN EUROPEAN INTEGRATION: THE PATH OF THE SCHUMAN PLAN (1965).

20. Lecourt, *supra* note 6, at 274.

21. *Id.*; Bastian van der Esch, DER GERICHTSHOF ALS VERFASSUNGSGERICHT 564 (1965) (Ger.); Eric Stein, *Judges and the Making of their Constitution*, in FESTSCHRIFT FÜR KONRAD ZWEIGERT, 771 *et seq.*, (Herbert Bernstein et al. eds., 1981) (Ger.); Hans Peter Ipsen, *Die Verfassungsrolle des europäischen Gerichtshofes für die Integration*, in DER EUROPÄISCHE GERICHTSHOF ALS VERFASSUNGSGERICHT UND RECHTSSCHUTZINSTANZ 20 *et seq.* (Schwarze ed., 1983) (Ger.).

22. ERNST STEINDORFF, RECHTSSCHUTZ UND VERFAHREN IM RECHT DER EUROPÄISCHEN GEMEINSCHAFTEN: AUSGEWÄHLTE PROBLEME 39 (1964) (Ger.); Walter Hallstein, *Zu den Grundlagen und Verfassungsprinzipien der Europäischen Gemeinschaften*, in ZUR INTEGRATION EUROPAS: FESTSCHRIFT FÜR CARL FRIEDRICH OPHÜLS 1, 12 *et seq.*, (Walter Hallstein & Hans-Jürgen Schlochauer eds., 1965) (Ger.); Otto Riese, *Über den Rechtsschutz innerhalb der Europäischen Gemeinschaften*, ZEITSCHRIFT EUROPARECHT 24 *et seq.* (1966) (Ger.).

are required, to refer questions on the interpretation or the validity of EU law to the Court of Justice whenever the answer to those questions is necessary to resolve a dispute pending before national courts. The judicial collaboration brought about by this procedure was perfectly resumed by Robert Lecourt, later President of the Court of Justice, in the early 1960s as a *focal point* for the entire integration project of the founding Treaties: "[i]n this way, the uniform interpretation of the [founding] Treaties throughout Europe can be ensured and conflicting decisions between the various courts of the six countries can be avoided. Through this role as a coordinator and unifier of the various national jurisdictions, the Court of Justice of the European Communities, which can already be described as both a court of administrative and ordinary law and a constitutional court, is also entrusted with the mission of establishing, at the request of national courts—in binding judgments—the official interpretation of the Treaty and of the acts of the Community institutions."[23]

Today, the legal and practical importance of this instrument for the uniform interpretation and thus binding nature of EU law for and in the Member States can hardly be overemphasized, as the Court of Justice is tasked to deal with more than five-hundred references for preliminary rulings from Member States' courts every year[24] Already in 1969, Richard Buxbaum described the fundamental insight into the special importance of the preliminary ruling procedure for the progress of integration in an inimitably precise way, when he coined the term "federalizing device" for this procedure.[25]

As far-sighted and prophetic as this early insight may seem today, the question of the allocation the judicial competence-competence was already being addressed when the preliminary ruling procedure was first introduced, even though the debates on the nature of integration and the federal question of the ultimate allocation of powers in the European Union still culminate today in this crucial question[26] The exclusive jurisdiction of the Court of Justice to make the final decision on the interpretation of European Union law is, in legal practice, the cornerstone of the uniform application of EU law in Europe. Without this, the

23. *See* Lecourt, *supra* note 21, at 274 (Translation provided by the author).

24. *See* COURT OF JUSTICE, ANNUAL REPORT 2022, *Statistics concerning the judicial activity of the Court of Justice* 2, https://curia.europa.eu/jcms/jcms/p1_3889613/en/.

25. Richard Buxbaum, *Article 177 of the Rome Treaty as a Federalizing Device*, 21 STAN. L. REV. 1041 (1969).

26. *See* without using the terms "competence-competence," Lecourt, *supra* note 6, at 274 , and Buxbaum, *supra* note 25. On the German term of "Kompetenz-Kompetenz", *see* already CARL SCHMITT, VERFASSUNGSLEHRE 386 *et seq*. (1928) (Ger.) and—using instead the term "Kompetenzhoheit" (illimitable competence)—Hans Kelsen, Allgemeine Staatslehre (1925), 208 (Ger.). As for more contemporary contributions, *see* J.H.H. Weiler and Ulrich R.Haltern, *The Autonomy of the Community Legal Order—Through the Looking Glass*, JEAN MONNET WORKING PAPER 10/96, sub. III., https://jeanmonnetprogram.org/archive/papers/96/9610-The-2.html; David Preßlein, *Der absolute Anwendungsvorrang des Unionsrechts als Garantie der Gleichheit der Mitgliedstaaten in der Europäischen Union?* EUR 688 (698 *et seq*.) (2022) (Ger.).

equality of the Member States before the Treaties would not be ensured.[27] Once again, it is fascinating from today's perspective to notice the clarity with which the early literature allocated this judicial competence-competence to the Court of Justice[28], while taking into account the practical obstacles to enforcement and the potential for circumvention that exist in practice for the Member States' courts within the framework of the preliminary ruling procedure. However, with the spirit of genuine and loyal cooperation characterizing this procedure, these practical obstacles have not been unsurmountable.[29] Furthermore, in the medium and long term, circumvention strategies have not proved worthwhile, since preliminary references designed as "rail shots" to bypass their national highest court[30] or, in extreme cases, infringement proceedings against the member state concerned can lead to the clarification of the EU law question at issue.[31]

In light of these observations, it is hardly surprising that some of the main features of European Union law was developed by the Court of Justice in this procedure. The result was a conflict-laden case law that started with the dispute with the Italian *Corte Costituzionale* in *Costa/ENEL* over the primacy of European Union law[32], a dispute that continued in *Simmenthal II* over the

27. *Cf.* in particular joined cases C-357, C-379, C-547& C-840/19, Euro Box Promotion u.a., ECLI:EU:C:2021:1034, ¶¶ 249, 254 (Dec. 21, 2021); Cf.C-430/21, RS, ECLI:EU:C:2022:99, ¶¶ 52, 55, and 72 (Feb. 22, 2022).

28. *See* without using the terms "competence-competence", Lecourt, *supra* note 6, at 274, and Buxbaum, *supra* note 25.

29. *See* Hans-Wolfram Daig, *Die Gerichtsbarkeit in der Europäischen Wirtschaftsgemeinschaft und der Europäischen Atomgemeinschaft*, 83 ARCHIV DES ÖFFENTLICHEN RECHTS 134, 159 (1958) (Ger.); GERHARD BEBR, DEVELOPMENT OF JUDICIAL CONTROL OF THE EUROPEAN COMMUNITIES 214 (1981); PIETRO CASSANO, *Sulla nuova disciplina delle intese che limitano la concorrenza*, RIVISTA DI DIRITTO INTERNAZIONALE 1963, 255 (256 e*t seq*.); Hay, *supra* note 18, at 31–38; CHRISTIAN TOMUSCHAT, DIE GERICHTLICHE VORABENTSCHEIDUNG NACH DEN VERTRÄGEN ÜBER DIE EUROPÄISCHEN GEMEINSCHAFTEN, 196 *et seq*. (1964) (Ger.)

30. The German Federal Constitutional Court had in its so-called "Chief Physician"-decision (BVerfGE 137, 273) not made use of the possibility to refer the case to the Court of Justice to seek clarifications on the application of EU anti-discrimination law in establishments run by the church. After the case was remanded back to the Federal Labor Court, this court asked those questions instead by an order in the case 2 AZR 746/14 (A) (July 28, 2016) as well as in the so-called "Egenberger"-case [8 AZR 501/14 (A) (March 17, 2016)] These preliminary questions led to judgments by the Court in cases C-414/16, Egenberger, ECLI:EU:C:2018:257 (April 17, 2018) and case C-68/17, IR, ECLI:EU:C:2018:696 (Sept. 11, 2018).

31. In this vein, the French *Conseil d'État's* failure to submit a reference for a preliminary ruling on tax issues that came before it resulted in infringement proceedings against France in which a violation of the Treaties was found, see case C-416/17, Commission v. France, ECLI:EU:C:2018:811 (Oct. 4, 2018). However, the Commission enjoys a wide margin of discretion to initiate or end infringement proceedings, *cf.* its press release on ending the infringement proceedings against Germany because of the decision of the Federal Constitutional Court on the ECB's PSP-Program (BverfGE 154, 17—PSP Programm der EZB): https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201?fbclid=IwAR1w6wbHhdcA5vxlqXTohUjxcgF7mJbpSBxTXjxaNWXpMJ0Mizb9Zyuwv7I (Jan. 2, 2023).

32. *See* Case 6/64, Costa v. E.N.E.L, ECLI:EU:C:1964:66, 1269 and 1270 (Jul. 15, 1964), as well as the decisions by the Italian *Corte Costituzionale* n. 183/1973 Frontini, ¶ 9 (Dec. 18, 1973);

question whether an ordinary court had the authority to disapply provisions of national law that conflicted with EU law.[33] The Court of Justice reached the necessary clarification on the broadest possible discretion of national courts to refer cases to the Court of Justice in the case of *Melki and Abdeli*[34] and finally led to the most recent conflicts with the constitutional courts of Poland[35] and Romania[36] concerning the domestic applicability of EU law. This jurisprudence displays a consistent and necessary development designed to give effect to the integration project that was agreed upon in the founding Treaties.

III. LINES OF DEVELOPMENT IN THE CASE LAW IN VIEW OF DEEPER INTEGRATION

Today we find ourselves seventy years after the first sitting of the Court and almost sixty years after its groundbreaking judgments on the direct effect of EU law in the case *Van Gend & Loos*[37] and on the primacy of EU law over the law of the Member States in the case *Costa/ENEL*.[38] Eric Stein has so influentially described these features of EU law as core elements of the constitutionalization of the European Union.[39] The good intentions and noble declarations of intent of

n.232/1989, Fragd, ¶ 3 (Jun. 5, 1984); and n.170/1984, Granital, para. 7 (Apr. 13, 1989) on the so-called *controlimiti*-Doctrine.

33. Case 106/77, Simmenthal II, ECLI:EU:C:1978:49, 644, 645 (Mar. 9, 1978).

34. Joined cases C-188 & C-189/10, Melki und Abdeli, ECLI:EU:C:2010:363 (Jun. 22, 2010).

35. With its order C-204/21 R, Commission v. Poland, ECLI:EU:C:2021:593 (Jul. 14, 2021), the Court ordered Poland by way of an interim injunction to disapply certain provisions relating to the newly introduced Disciplinary Chamber for Judges while the Court considered their compatibility with EU law. In a judgment of the same day, the Polish Constitutional Tribunal in case P 7/20, responded by ruling that such an interim injunction violated the Polish Constitution. In case C-791/19, Commission v. Poland, ECLI:EU:C:2021:596 (Jul. 15, 2021), which also concerned the Disciplinary Chamber, the Court found in an infringement procedure that certain rules of the Polish disciplinary law for judges violated article 19(1)(2) TEU. As a reaction to this ruling and the ruling in case C-824/18, A.B. and Others (Appointment of judges to the Supreme Court—Actions), C-824/18, ECLI:EU:C:2021:153 (Mar. 2, 2021), the Constitutional Tribunal decided in case K 3/21, (Oct. 7, 2021) that, among other things, it would violate the Polish Constitution if Polish courts were to review the appointment procedure for judges in application of art. 19(1)(2) TEU.

36. By judgment in the case Euro Box Promotion et al., *supra* note 27, the Court affirmed in a Romanian case, among other things, the primacy of EU law also over the constitutional law of member states and over binding decisions of national constitutional courts and ruled that EU law precludes national rules that bar national courts under the threat of disciplinary sanctions, from disapplying decisions of a national constitutional court that themselves violate EU law. In a press release dated Dec. 23, 2021, the Romanian Constitutional Court subsequently expressed its criticism of this part of the Court's judgment and felt compelled to "clarify" that this case law of the Court would amount to a constitutional amendment, which could only be carried out by domestic courts after the national constitution had been formally revised, https://www.ccr.ro/wp-content/uploads/2021/12/Comunicat-presa-23.12.2021.pdf.

37. Case 26/62, van Gend & Loos, ECLI:EU:C:1963:1, 24-27 (Feb. 5, 1963).

38. Case 6/64, Costa v. E.N.E.L, ECLI:EU:C:1964:66, 1269 *et seq*. (Jul. 15, 1964).

39. Eric Stein, *International Integration and Democracy. No Love at First Sight*, 95 AM. J. INT. L. 489 *et seq*. (2001).

those times have in the meantime given way to a different—at times much harsher—tone in which representatives of the Member States seek to assert their interests before and even against the Court of Justice and its jurisprudence. Involuntarily, they remind the observer, time and time again, of *Goethe*'s sorcerer's apprentice, whose dictum, "[s]pirits I have conjured no longer pay me heed," exemplifies the classic dilemma in which national governments find themselves in proceedings before the Court of Justice.[40]

For generations, the Member States have pushed ahead with a rather far-reaching communitarization of central areas of State action within the European Union in order to counter the marginalization of their national statehood in the context of globalization and digitalization in the twenty-first century. As a result, they now are in danger of failing to assure that EU law is not a mere law on the books but remains a law in action that is effectively applied in daily practice—and even against national political and economic interests, traditions, sensitivities, and domestic political disputes.

In this context, it may be true that, to put it in the words of Hermann Hesse, the magic charm inherent in any beginning[41] has somewhere been lost since the early days of European integration, when the creation of a European Federation seemed to be within reach. However, it is worth remembering that it was the Member States whose joint decisions triggered the major developments that significantly deepened and broadened European integration over the past thirty years and at the same time changed the nature of integration itself. Thus, the integration project has further developed from the Coal and Steel community to a single market which has now existed for over thirty years, followed by the establishment of an economic and monetary union with the Euro as its currency, and the creation of an area of freedom, security, and justice[42] without internal frontiers in which the free movement of persons is guaranteed in conjunction with the necessary measures on external border control, asylum, immigration, and the prevention of and fight against crime. These developments have nowadays the effect of extending the European Union's claim to integration to almost all major areas of government action, albeit with varying degrees of intensity.[43] The expansion of the European Union's tasks by the successive treaty reforms since the 1960s has not only extended European integration into new fields of action. Furthermore, many provisions of the Treaty on the Functioning of the European Union and, in particular, the provisions of secondary law adopted on the basis of

40. *See* JOHANN WOLFGANG VON GOETHE, DER ZAUBERLEHRLING (1797) (Ger.) (Translation provided by the author).

41. *See* HERRMANN HESSE, STUFEN (1941) (Ger.) (Translation provided by the author).

42. The creation of an "Area of Freedom, Security and Justice" derives from the eponymous Title V of the Treaty on the Functioning of the European Union (Articles 67–89).

43. *Cf.* Ulrich Everling, *Die Europäische Union als föderaler Zusammenschluss von Staaten und Bürgern in* EUROPÄISCHES VERFASSUNGSRECHT, 75 *et seq.* (Armin von Bogdandy & Jürgen Bast eds., 2009) (Ger.).

it, have achieved a level of detail[44] that regularly surprises even knowledgeable observers. These provisions bear witness of the fact that EU law's claim to integration is capable of encompassing entire legal areas in their full complexity.[45] The reason for this development lies in the simple logic of a single

44. As an example, *cf*. the European regulation of the financial markets, that encompass legal provisions on **deposit protection** [Directive 2014/49/EU of the European parliament and the Council of 16 April 2014 on deposit guarantee schemes (recast), OJ L 173/149] and on **capital adequacy** [among others: Regulation (EU) No 575/2013 of the European Parliament and the Council of 26 June 2013 on prudential requirements for credit institutions and investment firms and amending Regulation (EU) No 648/2012, OJ L 176/1 and Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338)], **rules on investment services and trading centers** [*cf*., among others, Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L 173/349) and Regulation (EU) No 600/2014 of the European Parliament and of the Council of 15 may 2014 on markets in financial instruments and amending Regulation (EU) No 648/2012, OJ L 173/84; as well as Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, OJ L 201/1], on **banking oversight and their resolution** [among others, Directive 2013/36/EU of the European Parliament and the Council of 26. June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/877EC and repealing Directives 2006/48/EC and 2006/49/EC, OJ L 176/338; Council Regulation (EU) No 1024/2013, of 15 October 2013 conferring specific tasks on the European Central Bank relating to the prudential supervision of credit institutions OJ L 287/63, and Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund and amending Regulation (EU) No 1093/2010, OJ L 225/1] as well as provisions on sustainable finance [*see*, for example, Regulation (EU) No 2019/2089 of the European parliament and the Council of 27 November 2019 amending Regulation (EU) 2016/1011 as regards EU Climate Transition Benchmarks, EU Paris-aligned Benchmarks and sustainability-related disclosures for benchmarks, OJ L 317/17].

45. According to the case law of the Court of Justice, the legislator was able to adopt legal acts based on the internal market competence enshrined in art. 114 TFEU that were as varied as they were detailed, like Regulation (EU) No 236/2012 of the European Parliament and of the Council of 14 March 2012 on short selling and certain aspects of credit default swaps, OJ L 86/1 [*cf*. Case C-270/12, United Kingdom v. Parliament and Council, ECLI:EU:C:2014:18, ¶ 97 *et seq*. (Jan. 22, 2014)], Commission Regulation (EU) No 737/2010 of 10 August 2010 laying down detailed rules for the implementation of Regulation (EC) No 1007/2009 of the European Parliament and of the Council on trade in seal products, OJ L 216/1 [*cf*. Case C-398/13 P, Inuit Tapiriit Kanatami et al. v. Commission, ECLI:EU:C:2015:535, paras. 26-32 (Sep. 3, 2015)], or Directive (EU) 2017/853 of the European Parliament and the Council of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons, OJ L 137/22) [*cf*. Case C-482/17, Czech Republic v. Parliament and Council, ECLI:EU:C:2019:1035, paras. 33 *et seq*. (Dec. 3, 2019)] Beyond these examples, *see* the European data protection law that was adopted on the basis of art. 16 TFEU, among others Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data protection Regulation), OJ L 119/1 and the Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119/89.

market without internal frontiers, which aims precisely at creating a level playing field for companies, including those from third countries, throughout the entire European Union. The creation of this level playing field, however, is only to a very limited extent compatible with national reservations or residual national competences, since these might lead, for example, to location based advantages, which would inevitably cause a fragmentation of the internal market.[46] In the same way, the rights guaranteed by EU consumer law should lead to comparable protection of the individuals in all Member States as regards their scope and extent.[47] The logic of a single market without internal frontiers might eventually apply to all areas of law that appear particularly prone to conflict, such as areas of law characterized by very different legal traditions and in particular by very different levels of legal protection offered in the Member States.[48] A similar development can be observed, in the context of progressing globalization, for differences in legal standards between the European Union and non-member countries,[49] a development which has prominently been described as the "Brussels effect."[50]

The measures inherent in the creation of an area of freedom, security, and justice[51] without internal borders have an even more direct impact on the nature of integration, since their realization requires a substantial communitarization of the laws of the Member States in matters of the free movement of persons, asylum law, and the fight against crime. These areas, which are traditionally perceived to

46. *Cf*. recital 9 of the General Data Protection Regulation and European Commission, Impact Assessment, SEC(2012) 72 final, 11–20 (Jan. 25, 2012); *see also* Jan Philipp Albrecht, *Einleitung,* in DATENSCHUTZRECHT, ¶ 186 (Spiros Simitis et al. eds., 2019) (Ger.) and Martin Selmayr & Eugen Ehmann, *Einführung,* in DATENSCHUTZ-GRUNDVERORDNUNG, ¶ 43 with further references (Eugen Ehmann & Martin Selmayr eds., 2018).

47. *See, e.g.*, Case C-452/13, Germanwings, ECLI:EU:C:2014:2141, paras. 26 *et seq*. (Sep. 4, 2014); Case C-826/19, Austrian Airlines, ECLI:EU:C:2021:318, ¶¶ 20, 28 (Apr. 22, 2021) on Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation of flights, and repealing Regulation (EEC) No 295/91 OJ L46/1, but also specifically joined cases C-15415, C-307/15 and C-308/15, Gutiérrez Naranjo et al., ECLI:EU:C:2016:980, ¶¶ 65 *et seq*., 70 *et seq*. (Dec. 21, 2016) on Directive 93/13/EEC of the Council of 5 April 1993 on unfair terms in consumer contracts, OJ L 95/29.

48. As in European data protection law, see recitals 7–9 of Directive 95/46/EC of the European Parliament and the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OF L 281/31 and recitals 9–13 of the General Data protection Regulation.

49. On the application of the level of protection as guaranteed by Articles 7 and 8 of the Charter to the transfer of personal data in third countries, *see* Case C-362/14, Schrems v. Data Protection Comm'r, ECLI:EU:C:2015:650 (Oct. 6, 2015) and Case C-311/18, Data Protection Comm'r v. Facebook Ireland und Schrems, ECLI:EU:C:2020:559 (Jul. 16, 2020), as well as Opinion 1/15, PNR EU-Canada, ECLI:EU:C:2017:592 (Jul. 26, 2017).

50. *See generally* ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (2020); *see also* Elisabeth Christen et al., *The Brussels Effect 2.0: How the EU Sets Global Standards with its Trade Policy*, FIW-RESEARCH REPORTS NO. 07 (2022).

51. *See*, for the creation of this area, *supra* note 42.

be "sovereignty-sensitive" are particularly determined by traditional legal concepts, some with deep roots in national constitutions. Therefore, the influence of EU law in these areas is at times perceived as an intrusion into reserved areas of national law.[52]

Since the entry into force of the Lisbon Treaty, the dynamics of integration have experienced a profound boost, emanating from the binding force of the Charter of Fundamental Rights of the European Union (Charter). As a genuine bill of rights of EU law, the Charter applies to the institutions, bodies, offices and agencies of the European Union as well as to the Member States exclusively when implementing EU law. Specifically, as regards the Member States' commitment to the respect of the fundamental rights guarantees in the Charter, some difficulties have arisen in the case law with respect to the various legal traditions of the Member States and to sometimes remarkable differences in the level of fundamental rights protection that is guaranteed by their respective national Constitutions. In accordance with the guarantees enshrined in the Charter and in the provisions of EU statutory law, the Court of Justice has so far aimed at ensuring a high level of protection.[53]

With a view to the current evolution of integration, it is important to point to a remarkable but not yet fully recognized change in the way in which the institutions of the European Union exercise their powers. This change consists, on the one hand, in the sustained reduction of infringement proceedings brought by the European Commission as guardian of the treaties against Member States before the Court of Justice.[54] It corresponds, on the other hand, to the *continuing increase* in preliminary ruling proceedings before the Court of Justice. Taken

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52. For example, in Case C-742/19, B.K. v. Ministrstvo za obrambo, ECLI:EU:C:2021:597 (Jul. 15, 2021), Member States argued that Art. 4 (2) TEU would exclude on-call duty within the armed forces from the scope of Directive 2003/88 of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of working time, OJ L 299/9.

53. *See* for the interpretation of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (e-privacy-Directive) in the light of Articles 7 and 8 of the Charter joined cases C-203/15 and C-698/15, Tele2 Sverige und Watson et al., ECLI:EU:C:2016:970 (Dec. 21, 2016); joined cases C-511/18, C-512/18 and C-520/18, La Quadrature du Net et al., ECLI:EU:C:2020:791 (Oct. 6, 2020), Case C-140/20, Commissioner of the Garda Síochána et al., ECLI:EU:C:2022:258 (Apr. 5, 2022) and joined cases C-793/19 and C-794/19, SpaceNet und Telekom Deutschland, ECLI:EU:C:2022:702 (Sep. 20, 2022); for an interpretation of Directive (EU) 2016/681, of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offenses and serious crime in the light of articles 7 and 8 of the Charter, *see* case C-817/19, Ligue des droits humains, ECLI:EU:C:2022:491 (Jun. 21, 2022).

54. In the period from 1999 to 2003, the Commission introduced between 214 and 157 infringement procedures per year. This number dropped to 57 to 18 procedures introduced in the period from 2018 to 2022. *See* Court of Justice, Annual reports respectively for 2003 and 2022, both available on www.curia.europa.eu/jcms/jcms/Jo2_7000/en/. In individual cases, these developments have even led to a revival of inter-state cases under art. 259 TFEU which Member states argue over their compliance with EU law, see case C-591/17, Austria v. Germany, ECLI:EU:C:2019:504 (Jun. 18, 2019) and case C-457/18, Slovenia v. Croatia, ECLI:EU:C:2020:65 (Jan. 31, 2020).

together, these developments show that the task of upholding the law of the European Union in the interpretation and application of the Treaties increasingly shifts from centralized to decentralized enforcement and is largely placed in the hands of the judiciary. As a consequence, these developments are not only strengthening the role of the citizens of the European Union and the Member States' courts in ensuring compliance with EU law in practice, but they also lead to a judicial review of the legal issues at stake that is, in comparison to infringement proceedings, more comprehensive and less politically framed. Depending on the legal question and the self-perception of national courts, requests for preliminary rulings can sometimes even come close to veritable pleadings that argue for a specific interpretation of EU law and the compliance of a given national law with EU law.[55]

Against this background, the importance of preserving the rule of law to guarantee the functioning of the preliminary reference procedure and the uniform application of EU law in the Member States becomes apparent. Recent tendencies observed in some Member States to reduce the protection of judicial independence of their national judiciary in favor of new ways for political influence do have repercussions on EU law, which are not merely marginal. The weakening of judicial safeguards entails the particular risk of undermining a fundamental component of European Integration since upholding EU law can only work in practice as a cooperative enterprise of the Court of Justice and the courts of the Member States in order to safeguard the uniform application of EU law. In view of the dysfunctionality of the mechanism under Article 7 TEU, which was designed to prevent serious threats to the values of the European Union,[56] the Court of Justice has used the direct effect of the obligation under Article 19(1)(2) TEU[57] conveying standing to individual litigants to clarify that the effective legal protection in areas covered by EU law, required by this provision, can only be ensured under generally recognized requirements of the rule of law. In so far as those requirements are binding on Member States as a matter of EU law, they

55. The Member States' courts submitted between 255 and 210 references for a preliminary ruling per year within the period from 1999 to 2003. The number of these references increased to 641 to 546 in the period from 2018 to 2022. *See* Court of Justice, Annual reports respectively for 2003 and 2022, *supra* note 54. Like the reference for a preliminary ruling that led to the judgment in case C-42/17, M.A.S. and M.B., ECLI:EU:C:2017:936 (Dec. 5, 2017) in the aftermath of the judgment in case C-105/14, Taricco et al., ECLI:EU:C:2015:555 (Sep. 8, 2015). Likewise the reference of the French *Conseil d'État* that led to the judgment in La Quadrature du Net et al., *supra* note 53, as well as the two references emanating from the German Federal Constitutional Court in after which the Court issued judgments in cases C-62/14, Gauweiler et al., ECLI:EU:C:2015:400 (Jun. 16, 2015) and in case C-493/17, Weiss et al., ECLI:EU:C:2018:1000 (Dec. 11, 2018).

56. Article 7 TEU establishes a specific procedure, granting the EU institutions the power to examine, determine the existence of, and, where appropriate, impose penalties for breaches of the principles of the rule of law in a Member State.

57. Article 19(1)(2) TEU reads as follows: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

foster the European Union's capacity to guarantee the rule of law[58] in the best tradition of the long-standing jurisprudence since *Les Verts*.[59] From a distance, a certain parallel to the United States Supreme Court's case law on the state's obligations under the Due Process clause of the 14th Amendment might be discerned.[60]

IV. THE ROLE OF THE COURT IN FACING THE PHENOMENA OF DISINTEGRATION

In some contrast to this increasingly judicially enforced integration, the factors and features of a possible disintegration of Europe have been overly present in recent academic discussions. In that respect, it should first, in today's perspective, be borne in mind that the European Union "imported" considerable stability risks in economic, financial, political, and constitutional terms going along with the successive enlargements of 2004, 2007, and 2013. These enlargements were mainly carried out on the basis of a historical and geopolitical perspective, although the European Union's treaty foundations—specifically by retaining the unanimity requirement in important areas of decision-making procedures—were not sufficiently adapted to an enlargement of this magnitude. No less significant is the fact that the smooth functioning of the European institutions, especially in their attempt to speak with one voice at the global level, has not been idly accepted by large and smaller powers in other parts of the world, but has been actively fought against. This has become painfully apparent by the latest in the first year of the Russian war against Ukraine. On top of that, it might be that some globally operating companies in the European Union have not constructively accompanied the regulation of their business activities by EU law with a readiness for the best possible compliance.

In recent years, the newly awakened and strengthened nationalism, which has manifested itself in quite a number of European countries and worldwide, appears also to be a direct challenge to the values the European Union is based on, enshrined in Article 2 TEU. In legal terms, it appears to be decisive that Article 2's commitment to respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights—including the rights of persons belonging to minorities—has been ratified by all Member States in accordance with their constitutional requirements and has thus become binding law of the European Union. This applies equally to the broader statement in this provision that these values are common to all Member States in a society characterized by

58. The foundational judgment was issued in case C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117 (Feb. 27, 2018); since then, *see, e.g.*, Euro Box Promotion et al., *supra* note 27, ¶¶ 217 *et seq*. and RS, *supra* note 27, ¶¶ 37 *et seq*.

59. Case 294/83, Les Verts v. Parliament, ECLI:EU:C:1986:166 (Apr. 23, 1986).

60. *Cf*. most notably cases like *Hurtado v. California*, 110 U.S. 516 (1884); *McDonald v. City of Chicago*, 561 U.S. 742, 759 *et seq*. (2010); *cf*. Ronald D. Rotunda, John E. Nowak, J. Nelson Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE (VOL. 2) §14.2 (1986).

pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men.

The Court of Justice is not immune against the complexities of these times, which are characterized by difficult realities, external shocks, insufficient possibilities for action on the part of the European Union, diverging interests among the Member States, and a considerable degree of uncertainty among the population about the future of Europe. In such a situation, the stability of the case law is just as fundamental as the requirement of judicial wisdom and pragmatism to find solutions that can count on the broadest possible acceptance in the Member States' legal systems. In such a situation, the constant repetition of accusations since 1966 that, through its case law the Court of Justice is developing a "*gouvernement des juges dans les Communautés européennes*"[61] unquestionably deserves attention. In particular when they are—in substance—taken up by supreme and constitutional courts of the Member States[62] in order to use Article 4(2) TEU as a new basis for the protection of what they regard as belonging to national identity.

The emergence of crisis-like phenomena of disintegration has already given rise to various speculations as to whether and how the Court of Justice should react to these difficulties.[63] As understandable as the logic of this argument may seem from a political perspective, there appears to be little evidence that the development of the case law of the Court in the past has been shaped according to the political expediencies of the day.[64] Such modulation of judicial review or

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61. *See* JEAN-PIERRE COLIN, LE GOUVERNEMENT DES JUGES DANS LES COMMUNAUTÉS EUROPÉENNES (1966) (Fr.), whose general conclusion at 513 does not support this thesis. *See also* the famous critique against the judgment in case 22/70, Commission v. Council (AETR), ECLI:EU:C:1971:32 (Mar. 31, 1971) as an "arrêt politique" in the French newspaper Le Monde (Apr. 27, 1971), 19 *et seq*. Under the headline: "La Cour de Justice de Luxembourg – a-t-elle outrepassé ses compétences?".

62. Recently, these courts have not limited themselves to indicating the constitutional limits to the primacy of Union law, but have applied those limits, *cf*. French Conseil d'État, French Data Network et al., Décision Nr. 393099, ¶¶ 4–7, 58 (April 21, 2021); Polish Constitutional Tribunal, K 3/21, (Oct. 7, 2021) Romanian Constitutional Court, Nr. 390/2021, ¶¶ 81 *et seq*. with further references BVerfGE 140, 317, ¶¶ 40 *et seq*., 83, and 109 *et seq*. (June 8, 2021). European Arrest Warrant; BVerfGE 154, 17, ¶¶ 117 *et seq.)*—PSP-Programm. Other supreme and constitutional courts indeed follow for example the case law of the Court of Justice on data retention, *cf.* French Conseil constitutionnel, Collecte des données personnelles de connexion et al., 976/977 QPC (Feb. 25, 2022); Belgian Constitutional Court, Ordre des barreaux franciphones et germanophones, No. 57/2021 (Apr. 22, 2021); Supreme Court of Cyprus, joined cases on data retention, No. 97/18 (Oct. 27, 2021); Constitutional Court of Portugal, No. 268/2022 (Apr. 19, 2022). In this respect, it is remarkable that the Supreme Court of Ireland, despite having been overtly critical of the established case law of the Court of Justice in its reference that led to the judgment in the case of Commissioner of the Garda Síochána et al., *supra* note 53, dismissed the case after the Court of Justice gave its ruling, *see* Dwyer v. The Commissioner of an Garda Síochánam S:AP:2019:000018 (Jul. 13, 2022).

63. *See, e.g.*, the ideas of a former Justice of the German Federal Constitutional Court, Peter M. Huber, WARUM DER EUGH KONTROLLE BRAUCHT, 29 *et seq*. (2022) (Ger.).

64. The dynamic development of case law in the early 1990s, before the completion of the internal market, does not reveal a legal or constitutional policy program, but responded to the difficulties in Member State enforcement of Union law that became apparent in the 1980s, *cf*. Case C-

even the cultivation of such a self-image would fundamentally conflict with the institutional founding mission entrusted to the Court of Justice, which was precisely to preserve the objectivity of the law vis-à-vis the conflicting interests of Member States and private individuals,[65] but not to reduce EU law to the standard of what is politically acceptable or desirable.[66] Accordingly, in view of the strongly diverging interests, the Court of Justice has repeatedly emphasized in its recent case law the importance of the autonomy of the EU legal order and the effectivity of legal protection for the realization of the community of law constituted in the European Union.[67]

Against this background, it is important to bear in mind that in the course of its entire judicial activity, the Court of Justice has never adopted a "political questions doctrine"[68] or recognized "*actes de gouvernement*"[69] to exclude or limit judicial control over the actions of the institutions or that of the Member States. Accordingly, the Court has also exercised its judicial control in politically sensitive areas. Thus, in its line of case law emanating from the first *Kadi* case, the Court of Justice subordinated the exercise of the sanctioning powers of the European Union against private entities to the requirement of effective legal protection, even if these sanctions correspond to sanctions adopted by the United Nations.[70] Similarly, the *ZZ* case pointed out the need to strike a balance between

213/89, Factortame et al., ECLI:EU:C:1990:257 (Jun. 19, 1990); joined cases C-143/88 & C-92/89, Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest, ECLI:EU:C:1991:65 (Feb. 21, 1991); joined cases C-6/90 & C-9/90, Francovich et al., ECLI:EU:C:1991:428 (Nov. 19, 1991); joined cases C-46/93 & C-48/93, Brasserie du pêcheur and Factortame, ECLI:EU:C:1996:79 (Mar. 5, 1996).

65. Cf. Houjarray, *supra* note 10, at 29 and Bech, *supra* note 5, at 172.

66. This is ignored by the recent criticism against the judgment issued in case C-396/21, FTI Touristik, ECLI:EU:C:2023:10 (Jan. 12, 2023). While the reduction of the cost of travel granted to travelers affected by the COVID-19 pandemic may seem unsatisfactory, Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and Repealing Council Directive 90/314/EEC, OJ L 326/1 simply did not provide the Court of Justice with a normative basis for a more balanced solution.

67. *See* Opinion 1/17, CETA, ECLI:EU:C:2019:341, ¶¶ 107–111 (Apr. 30, 2019); Case 741/19, Republic of Moldova, ECLI:EU:C:2021:655, ¶¶ 42–46 (Sep. 2, 2021); Joined Cases C-924/19 PPU and C-925/19 PPU, Országos Idegenrendészeti Főrigazgatóság Dél-alföldi Regionális Igazgatósák, ECLI:EU:C:2020:367, ¶¶ 138–146 and 289–291; joined cases C-562/21 PPU and C-563/21 PPU, Openbaar Ministerie (Tribunal established by law in the issuing Member State), ECLI:EU:C:2022:100 (February 22, 2022), ¶¶ 40–46 and 50–52.

68. *See Coleman v. Miller*, 307 U.S. 433, 450 (1939); *Baker v. Carr*, 369 U.S. 186, 217 (1962); Lawrence H. Tribe, AMERICAN CONSTITUTIONAL LAW 105 (2d ed., 1988); Ronald D. Rotunda, John E. Nowak, J. Nelson Young, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.16 (Vol. 1, 1986).

69. *Cf*. French Conseil d'État, Association Les Verts, Nos. 54359&54360, (Nov. 23, 1984); Préfet de la Gironde c. Mhamedi, No. 120461 (Dec. 18, 1992); G.I.S.T.I., Nos. 120437&120737 (Sep. 23, 1992); *see René Chapus,* DROIT ADMINISTRATIF GÉNÉRAL ¶¶ 1152 *et seq*. (Vol. 1, 2001).

70. Joined Cases C-402/05 P and C-415/05 P, Kadi and Al Barakaat International Foundation v. Council and Commission, ECLI:EU:C:2008:461 ¶¶ 321–326 and 334 *et seq*. (Sep. 3, 2008); Joined Cases C-584/10 P, C-593/10 P and C-595/10 P Commission et al. v. Kadi, ECLI:EU:C:2013:518, ¶ 67 with further references and ¶¶ 97 *et seq*. (Jul. 18, 2013).

national security requirements and the fundamental right to effective judicial protection.[71] Even the highly politically charged questions surrounding the interpretation of Article 50 TEU in the context of Brexit have not prevented the Court of Justice in the *Wightman* case from announcing the answer to the questions referred to it during the ongoing negotiations on a withdrawal agreement.[72]

Of course, this is no more than a starting point for the sometimes highly complex task of the Court. In recent case law, there are instructive examples of the Court of Justice recognizing a high level of individual rights' protection as laid down in EU statutory law in the sense of "taking rights seriously,"[73] even when such a decision necessitated considerable changes for individual Member States and were therefore met with fierce resistance. Examples include the case law since the judgments in *Digital Rights Ireland*[74] and *Schrems*[75] on the fundamental right to respect for private and family life and to the protection of personal data under Articles 7 and 8 of the Charter as well as under the E-Privacy Directive 2002/58, the General Data Protection Regulation 2016/679, and the PNR Directive 2016/681. But no less is true for the case law on non-discrimination on the grounds of ethnic origin, sexual orientation, or disability,[76] for judgments on working time law[77] and the right to international protection.[78]

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71. Case C-300/11, ZZ, ECLI:EU:C:2013:363, paras. 57 and 64 (Jun. 4, 2013).

72. Case C-621/18, Wightman et al., ECLI:EU:C:2018:999 (Dec. 10, 2018).

73. *See* Jason Coppel & Aidan O'Neal, *The European Court of Justice: Taking Rights Seriously*, 29 CML REV. 669 (1992); Joseph H. H. Weiler & Nicolas J. S. Lockhart, "*Taking Rights Seriously" Seriously: The European Court of Justice and its Fundamental Rights Jurisprudence—Part I*, 32 CML REV. 51 (1995).

74. Joined Cases C-293/12 and C-594/12, Digital Rights Ireland, ECLI:EU:C:2014:238 (Apr. 8, 2014) .

75. *See* for the judgements in cases Schrems v. Data Protection Comm'r and Data Protection Comm'r v. Facebook Ireland und Schrems, *supra* note 49.

76. For a judgment on racial discrimination, *see* Case C-30/19, Braathens Regional Aviation, ECLI:EU:C:2021:269 (Apr. 15, 2021); for judgments on gender discrimination, *see* Case C-451/16, MB v. Secretary of State for Work and Pensions, ECLI:EU:C:2019:839 (Jun. 26, 2018), and Case C-171/18, Safeway, ECLI:EU:C:2019:839 (Oct. 7, 2019) ; for judgments on discrimination based on disability *see* Case C-356/12, Glatzel, ECLI:EU:C:2014:350 (May 22, 2014) and Case C-16/19, Szpital Kliniczny im. dra J. Babińskiego Samodzielny Publiczny Zakład Opieki Zdrowotnej w Krakowie, ECLI:EU:C:2021:64 (Jan. 26, 2021).

77. For an application of the Working Time Directive, *supra* note 52 to military personnel, *see* B.K. v Ministrstvo za obrambo, *supra* note 52 and for an application to other professions, *see* case C-580/19, Stadt Offenbach am Main, ECLI:EU:C:2021:183, ¶¶ 28, 38 (Mar. 9, 2021); case C-344/19, Radiotelevizija Slovenija, ECLI:EU:C:2021:182 ¶¶ 27, 37 (Mar. 9, 2021); on working time recording *see* case C-55/18, CCOO, ECLI:EU:C:2019:402, ¶¶ 43, 48, 50, 56, 60, 6 (Apr. 14, 2019).

78. Joined cases C-391/16, C-77/17 and C-78/17, M et al. ECLI:EU:C:2019:403, (May 14, 2019) applying Directive 201/95/EU of the European Parliament and of the Council of 13 December 2011 on standards fort he qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), OJ L 337/9; joined cases C-71/11 and C-99/11, Y, ECLI:EU:C:2012:518 (Sep. 5, 2012) applying Council Directive 2004/83/EC of 29 Aril 2004 on minimum standards for the qualification and status of third country nationals or stateless

Focusing on an interpretation of EU statutory law in conformity with fundamental rights, the Court of Justice is supporting its reasoning by reference to the values inherent in the relevant legal acts themselves, a technique which also enhances the legitimacy of the court's case law. While the application of this method usually leads to a uniform solution, especially in the case of harmonization realized at a high level of protection, it may well offer the possibility for a plurality of legal solutions consistent with EU law. Thus, in its decision *Centraal Israelitisch Consistorie van Belgie*, the Court of Justice decided—partly relying on the recitals of the relevant secondary law—that in implementing the European legal framework on ritual slaughter, the Member States may adopt diverging regulations that vary in the way they balance the interests of animal protection and religious freedom without violating the freedom of thought, conscience, and religion protected in Article 10 of the Charter.[79] Similarly, in cases relating to the wearing of religious symbols the Court of Justice has accepted a margin of appreciation of the Member States to resolve arising conflicts between the fundamental rights to freedom of religion and non-discrimination protected under Articles 10 and 21 of the Charter.[80] In this case law, the Court of Justice has not only ensured that a system of strict State neutrality in matters of religious confession is possible across Europe, but has also supported non-discriminatory systems based on the protection of the plurality of religious confessions.

Recently, Member States have repeatedly invoked the protection of national identity under Article 4(2) TEU, which posed particular challenges for the Court of Justice. According to this provision, the European Union is obliged to respect both the equality of the Member States before the EU Treaties and their respective national identities, as expressed in their fundamental political and constitutional structures, including regional and local self-government. The case law to date indicates above all the extent to which the Court of Justice must separate the wheat from the chaff when dealing with such claims. It is settled that Article 4(2) TEU can lead the Court to examine whether an obligation under EU law fails to take account of the national identity of a Member State.[81]

But as an exception to the fundamental freedoms guaranteed by the Treaty, Article 4(2) TEU must be interpreted narrowly and, therefore, cannot be invoked, for example, to escape the obligation to recognize the marriage of two persons of

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persons as refugees or as persons who otherwise need international protection and the content of the protection granted, OJ L 304/12; Case C-163/17, Jawo, ECLI:EU:C:2019:218 (May 19, 2019) applying Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national or stateless person (recast) (so-called: Dublin III Regulation), OJ L 180/31.

79. Case C-336/19, Centraal Israëlitisch Consistorie van België et al., ECLI:EU:C:2020:1031, ¶¶ 65–71, 79 *et seq*. (Dec. 17, 2020).

80. Joined cases C-804/18 und C-341/19, WABE and MH Müller Handel, ECLI:EU:C:2021:594, ¶¶ 84–88 (Jul. 15, 2021).

81. RS, *supra* note 27, ¶ 69.

the same sex that was legally concluded in another Member State[82] or to issue a passport or identity documents to descendants of parents of the same sex for the purpose of the freedom of movement.[83] In particular, Article 4(2) TEU cannot be invoked against the obligation of the Member States to guarantee the principles of the rule of law following from Article 2 TEU[84] and cannot allow this obligation to vary from one Member State to another.[85] Finally, this provision does not empower the constitutional court of a Member State to exclude the application of a rule of EU law on the ground that this rule disregards the identity of the Member State concerned, as defined by that constitutional court.[86] In contrast, the Court of Justice has recognized the protection of the official language of a Member State as a matter of national identity, which may justify necessary and proportionate restrictions on the freedom to provide services.[87]

The complexity of some EU legislation, which is increasingly adopted in times of crisis, regularly conceals dilatory formulaic compromises behind its façade. Under these circumstances, only judicial review by Court of Justice years later will gradually reveal whether and to what extent these measures comply with the rights of EU citizens, guaranteed by the Treaties and the Charter. Moreover, there is also an increasing shift of the European Union lawmaking into areas with considerable implications for the fundamental rights of EU citizens and business operators. Therefore, the Court of Justice's task in ensuring respect for the law in the interpretation and application of the Treaties resembles more and more that of a constitutional court and will continue to pose a very special challenge in the future. For the members of the Court of Justice, this challenge consists, above all, in fulfilling, on a daily basis, its founding mission as expressed by the foreign minister of Luxembourg *Joseph Bech* in 1952 "to give effect, in complete independence, to the objective legal norms in the face of conflicting interests."[88] In the European Union, which is based on the rule of law, the governments of the Member States should bear the common good of the peoples of Europe in mind, even after having "lost" a case, and put their own interests, however legitimate,

82. Case C-673/16, Coman, ECLI:EU:C:2018:385, ¶¶ 42 *et seq*. (Jun. 5, 2018).

83. Case C-490/20, Stolichna obshtina, rayon "Pancharevo," ECLI:EU:C:2021:1008, paras. 54 *et seq*. (Dec. 14, 2021).

84. Case C-157/21, Poland v. Parliament and Council, ECLI: EU:C:2022:98, ¶¶ 98 *et seq.* (Feb. 16, 2022).

85. Case C-156/21, Hungary v. Parliament and Council, ECLI:EU:C:2022:97, ¶ 233 (Feb. 16, 2022).

86. RS, *supra* note 27, ¶ 70.

87. Case C-391/09, Runevič-Vardyn and Wardyn, ECLI:EU:C:2011:291, ¶¶ 81 *et seq*. (May 12, 2011); C-202/11, Las, ECLI:EU:C:2013:239, ¶¶ 25–27 (Apr. 16, 2013); Case C-15/15, New Valmar, ECLI:EU:C:2016:464 ¶ 50 (Jun. 21, 2016); Case C-391/20, Cilevičs et al., ECLI:EU:C:2022:638, ¶¶ 66–70 (Sep. 7, 2022).

88. As it was put by Joseph Bech, *supra* note 5, at 172.

in the right perspective of the added value that European integration brings undeniably to each and every Member State.[89]

Finally, we should remember the conventional wisdom metaphor that we are all dwarfs sitting on the shoulders of giants when we are dealing with issues of European integration. Insight and progress emerge only when we add our own contribution to the treasure trove of knowledge we have found. This allows us, like dwarfs, to stand on the shoulders of giants who laid the foundation of the European Union.

89. Andrew Atkinson, *Brexit Is Costing the UK £100 Billion a Year in Lost Output*, Bloomberg Economics Report (Feb. 1, 2022), https://www.bloomberg.com/news/articles/2023-01-31/brexit-is-costing-the-uk-100-billion-a-year-in-lost-output.

Bringing The Right to Education into The 21st Century

Jonathan Todres* & Charlotte S. Alexander**

ABSTRACT

Education is not only foundational to children's development, it also helps children realize the full range of their human rights. Yet, the international law mandate on the right to education has changed little since 1948. This static state has left the right to education unfulfilled for millions of children. This Article argues that it is time to update the legal mandate on education, and in particular with respect to pre-primary and secondary education. The Article starts by explicating the limitations of the current mandate on the right to education and then evaluates whether so-called "soft law," or non-binding measures, may have helped fill the gaps in existing treaty law on education rights. The Article uses a combination of manual review and computational text analytics to examine discussions of education in the Concluding Observations of the Committee on the Rights of the Child from 1993 to 2020. The Committee's Concluding Observations evaluate States Parties' progress in meeting their obligations under the U.N. Convention on the Rights of the Child and, as such, serve as a primary vehicle for advancing the implementation of human rights. Finding that non-binding measures are insufficient in practice, the Article concludes that the international community needs to agree to an updated legal mandate on education that ensures all children have access to an equitable start, can complete secondary education, and can develop to their full potential.

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INTRODUCTION

Education is foundational to children's development and lifelong prospects. Education is also central to children's rights because it has a multiplier effect—that is, education helps situate children to secure a breadth of other rights during childhood and subsequently as adults.[1] Though the right to education is vital to children's healthy development and to the fulfillment of many other rights, human rights law's requirements regarding children's education have not evolved significantly since the adoption of the Universal Declaration of Human Rights in 1948. It is time for that to change.

This Article examines the two key aspects of the right to education—pre-primary/preschool[2] education and secondary education—under international human rights law. It highlights the weakness of States' obligations with respect to secondary education and the lack of express obligations regarding preschool. The Article then examines whether non-binding (or "soft law") measures have filled the gaps in the mandate on the right to education. As a case study, the Article examines the reporting process under the U.N. Convention on the Rights of the Child (CRC),[3] the most comprehensive treaty on children's rights and the most widely-ratified human rights treaty.[4] This Article investigates the extent to which

1. Jonathan Todres, *Making Children's Rights Widely Known*, 29 MINN. J. INT'L L. 109, 129 (2020); KATARINA TOMASEVSKI, HUMAN RIGHTS OBLIGATIONS IN EDUCATION: THE 4-A SCHEME 7 (2006).

2. Throughout, we use "preschool" and "pre-primary" interchangeably.

3. U.N. Convention on the Rights of the Child (CRC), Nov. 20, 1989, 44 U.N.T.S. 25. Similar to other human rights treaties, the CRC requires that states parties submit on a regular basis (within two years of ratification and every five years thereafter) "reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made on the enjoyment of those rights." *Id*. at art. 44(1). States Parties reports must also "indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention [and] shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention in the country concerned." *Id*. at art. 44(2).

4. THE OXFORD HANDBOOK OF CHILDREN'S RIGHTS LAW 1–2 (Jonathan Todres & Shani M. King eds., 2000).

the Committee on the Rights of the Child (CRC Committee), in its evaluation of States Parties' progress toward meeting their treaty obligations,[5] presses States to make progress on pre-primary and secondary education, thereby also advancing the mandate of children's rights law. By evaluating the outcomes of the reporting process—which is widely recognized as a central component of human rights law implementation[6]—we can assess whether non-binding measures are adequately advancing human rights law on education. We conclude that such soft law measures, while important, are insufficient and that the time has come for States to commit in a legally binding document to ensuring all children can access preschool and attend and complete secondary education so that they can develop to their full potential. Given the near-universal ratification of the CRC,[7] a new optional protocol to the CRC on the right to education could offer the greatest opportunity for a reinvigorated push for universal access to education for all children at all levels.[8]

I. STATES' OBLIGATIONS ON THE RIGHT TO EDUCATION

The right to education has been recognized since the beginning of the modern international human rights movement. The Universal Declaration of Human Rights, the cornerstone of international human rights law, recognizes that

5. *Concluding Observations*, CHILD RIGHTS CONNECT, https://crcreporting.childrightsconnect.org/convention-on-the-rights-of-the-child-concluding-observations/#:~:text=What%20are%20the%20concluding%20observations,for%20every%20State%20under%20review (Concluding Observations are issued at the conclusion of each review of a state party and they are "a public document, which indicates the progress achieved by the reviewed State, the Committee's main areas of concern and recommendations to the State to improve the implementation of the Convention on the Rights of the Child").

6. Benjamin Mason Meier & Yuna Kim, *Human Rights Accountability Through Treaty Bodies: Examining Human Rights Treaty Monitoring for Water and Sanitation*, 26 DUKE J. COMP. & INT'L L. 141, 155 (2015) ("Rather than a bureaucratic exercise, [the reporting] process creates opportunities for governments, NGOs, and civil society to learn from past reviews and engage in substantive debates regarding national priorities, successes, and obstacles in implementing human rights."); Anne Gallagher, *Ending the Marginalization: Strategies for Incorporating Women into the United Nations Human Rights System*, 19 HUM. RTS. Q. 283, 306 (1997) ("The reporting system is the basic *raison d'etre* of all treaty bodies and represents their best chance to affect the practices and attitudes of individual states.").

7. Every U.N. Member State is party to the CRC, except the United States. *See Convention on the Rights of the Child: Status of Ratifications*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (last visited Dec. 16, 2022) (noting that there are 196 states parties to the CRC; the United States signed the treaty in 1995, but remains the only country yet to ratify the treaty).

8. There are currently three optional protocols to the CRC covering (1) the sale and sexual exploitation of children, (2) children in armed conflict, and (3) a communications procedure. *See* G.A. Res. 54/263, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (May 25, 2000); G.A. Res. 54/263, Optional Protocol on the Involvement of Children in Armed Conflict (May 25, 2000); G.A. Res. 66/138, Optional Protocol on a Communications Procedure (Jan. 27, 2012).

"[e]veryone has the right to education."[9] Subsequent treaties, including most notably the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the CRC, cemented the right to education in legally binding instruments.[10] Further highlighting the importance of education, other treaties—including the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), and Convention against Discrimination in Education—require that States eliminate discrimination in education.[11]

While this consistent recognition of the right to education is important, the obligation on States has changed little over the decades. From the adoption of the Universal Declaration in 1948 to this date, States' foundational obligation has been to ensure that primary school is free and compulsory for all.[12] The ICESCR and CRC reiterate this mandate.[13] In contrast, there are weaker to non-existent express obligations on pre-primary and secondary education.[14] The Article takes each of these two issues in turn.

First, neither the CRC nor the ICESCR expressly mentions preschool or pre-primary education.[15] One might argue that education should be understood as a lifelong process and, thus, that preschool could be read into the general "right to education." However, both treaties explicitly mention the other three stages of

9. G.A. Res. 217 (III)A, Universal Declaration of Human Rights (UDHR), art. 26(1) (Dec. 10, 1948).

10. International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 13(2)(b), Dec. 16, 1966, 993 U.N.T.S. 3; CRC, *supra* note 3, art. 28(1)(b).

11. *See* Convention on the Rights of Persons with Disabilities, art. 24, Dec. 6, 2006, 2515 U.N.T.S. 3; Convention on the Elimination of All Forms of Discrimination Against Women, art. 10, Dec. 18, 1979, 1249 U.N.T.S. 1; G.A. Res. 2106 (XX); International Convention on the Elimination of All Forms of Racial Discrimination, art. 5(e)(v), Dec. 21, 1965, 660 U.N.T.S. 195; Convention Against Discrimination in Education, art. 1, Dec. 14, 1960, 429 U.N.T.S. 93. Further, the Convention Against Discrimination in Education includes the same mandate that is found in the ICESCR and CRC, requiring states parties "[t]o make primary education free and compulsory; make secondary education in its different forms generally available and accessible to all; make higher education equally accessible to all on the basis of individual capacity; assure compliance by all with the obligation to attend school prescribed by law;" *Id*. art. 4(a).

12. UDHR, *supra* note 9, art. 26(1) ("Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory."); *see also* CRC, *supra* note 3, art. 28(1)(a).

13. ICESCR, *supra* note 10, art. 13(2)(a); CRC, *supra* note 3, art. 28(1)(a). *See also* Convention Against Discrimination in Education, *supra* note 11, art. 4(a).

14. The "right to education" includes all education that would enable the child to develop to their full potential. Based on evolving understanding of child development science, that should now be understood as including early childhood education (most often framed as a year of preschool), primary school education, and secondary school education.

15. While the ICESCR and CRC are silent on early childhood education, there are sporadic references in other international instruments. *See Report of the Special Rapporteur on the right to education, Koumbou Boly Barry*, U.N. General Assembly, U.N. Doc. A/77/324, ¶ 27 (Sept 2, 2022) ("At present, legal obligations under international human rights law to provide [early childhood care and education] are not explicit and are captured piecemeal in multiple instruments.").

education: primary, secondary, and higher education. Their silence regarding preschool therefore casts doubt on its inclusion.[16] Moreover, the drafting history does not include any statements suggesting that pre-primary education was a consideration.[17] When these treaties were drafted, preschool enrollment was much lower,[18] and the body of literature on the science of child development and early childhood was less developed. Today, while enrollment in pre-primary education remains relatively low,[19] the science is clear on how important early childhood education is to not only the academic success of children but also more broadly to their healthy development.[20]

Second, although the CRC and ICESCR expressly address secondary education, the obligations on States Parties with respect to secondary education are weaker than those imposed for primary school education. The two treaties require only that States make secondary education "available and accessible" to all children.[21] For example, the CRC mandates that States Parties:

> Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need.[22]

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16. ICESCR, *supra* note 10, art. 13(2); CRC, *supra* note 3, art. 28(1).

17. *See* Office of the U.N. High Commissioner for Human Rights, *Legislative History of the Convention on the Rights of the Child*, vols. I & II, HR/PUB/07/1 (Jun. 29, 2007). The only comments addressing preschool include a comment submitted by Norway that "[c]hildren, including children of preschool age, shall have full opportunity of play, social activities and recreation, as a means to ensure their full mental and physical development" and a comment submitted by Venezuela proposing an obligation on states to "Introduce free and compulsory primary education as early as possible, as well as overall care for the child of preschool age;" *Id*., vol. II at 635, 648. In both cases, the proposed language did not make it into the final approved draft. *See id*.

18. *See School Enrolment, Preprimary (% gross)*, THE WORLD BANK https://data.worldbank.org/indicator/SE.PRE.ENRR (last accessed Dec. 18, 2023) (finding gross pre-primary school enrollment in 1990 was 29 percent when the CRC was adopted; and only 16 percent in 1970, four years after the ICESCR was adopted).

19. *See* UNICEF, *Early Childhood Education*, DATA.UNICEF.ORG (June 2023), https://data.unicef.org/topic/early-childhood-development/early-childhood-education/ ("Globally, only around 4 in 10 children are attending early childhood education programmes").

20. See UNICEF, *A World Ready to Learn: Prioritizing Quality Early Childhood Education* UNICEF GLOBAL REPORT, 8 (Apr. 2019), https://www.unicef.org/media/57926/file/A-world-ready-to-learn-advocacy-brief-2019.pdf ("Pre-primary education is an integral component of early childhood development, which refers to all the essential policies and programmes required to support the healthy development of children from birth to 8 years of age, including health, nutrition, protection, early learning opportunities and responsive caregiving."). *See also* The Urban Child Institute, Pre-K Matters: Children Are the Key to Our Community's Economic Future, http://www.urbanchildinstitute.org/resources/policy-briefs/pre-k-matters (visited Dec. 12, 2022).

21. *See* CRC, *supra* note 3, art. 28. *See also* UDHR, *supra* note 9, art. 26(1) ("Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.")

22. CRC, *supra* note 3, art. 28(1)(b).

This mandate for secondary education, which falls short of requiring free secondary education for all children, reflects the state of the world at the time the CRC was drafted in the 1980s.[23] In 1989, when the CRC was adopted, only 51 percent of children of secondary school age were enrolled in school.[24] In addition, resource constraints in numerous countries, particularly in the Global South, made it likely that many States simply could not provide free secondary education to all children in the near term.[25] Specifically, many countries still had high numbers of children who did not complete primary school.[26] As such, increasing the minimum requirements originally set forth in the Universal Declaration may not have been a viable option more than thirty years ago. However, today there is broad consensus on the critical role that education beyond primary school can play in helping young people develop to their full potential and break the cycle of poverty.[27]

II. THE NEED FOR LEGAL MANDATES TO EVOLVE

Now, more than three decades after the adoption of the CRC, it is widely recognized both that preschool/pre-primary education is vital to ensuring all children have a meaningful opportunity to benefit from schooling,[28] and that, conversely, having only a primary school education can significantly limit skill development, job prospects, lifetime earning potential, and other markers of

23. The ICESCR's language has a stronger push for free secondary education, but neither the CRC nor the ICESCR actually mandate free secondary education. *See* ICESCR, *supra* note 10, art. 13(2)(b) ("Secondary education … shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education").

24. UNICEF, State of the World's Children 1989, UN-iLibrary (Dec. 1989), https://www.un-ilibrary.org/content/books/9789210597357/read.

25. Office of the U.N. High Commissioner for Human Rights, Legislative History of the Convention on the Rights of the Child, Vol. II, at 634 (2007) (noting that Malawi expressed concerns about "the meaning of compulsory education in a country which has limited resources"); *see also id*. at 645 (noting that Bangladesh expressed concerns over the cost of "compulsory free education").

26. *See* UNICEF, State of the World's Children, 1989, at 100–101, https://www.un-ilibrary.org/content/books/9789210597357/read (finding that the "[m]edian percent of grade enrollment completing primary school: Very high U5MR (over 170) countries: 39%. . .High U5MR (95–170) countries: 65%. . .Middle U5MR (31–94) countries: 67%. . .Low U5MR (30 and under) countries: 95%." In contrast, "[s]econdary school enrollment ratio (M/F): Very high U5MR (over 170) countries: 18/8…High U5MR (95–170) countries: 39/27…Middle U5MR (31–94) countries: 56/56…Low U5MR (30 and under) countries: 83/82").

27. Joel E. Cohen, *Why We Need to Focus on Secondary Education*, WORLD ECONOMIC FORUM (Dec. 19, 2014), https://www.weforum.org/agenda/2014/12/why-we-need-to-focus-on-secondary-education/.

28. *See* UNICEF, *supra* note 20, at 11 ("Quality pre-primary education sets the stage for a positive transformation in learning outcomes throughout a child's lifetime. Successful students move more efficiently through the education system, which makes investing in quality early learning opportunities cost-effective, lessening the need for remedial efforts and resources to make up for lost learning"); *see also* Max Roser & Esteban Ortiz-Ospina, *Education Spending*, Our World In Data (2016), https://ourworldindata.org/financing-education.

socio-economic and human development.[29] In many cases, a primary school education alone does not break the cycle of poverty nor does it ensure that children will grow to their full potential.[30]

Although many countries have made important progress in terms of expanding pre-primary education [31] and increasing secondary school enrollment,[32] significant work remains to ensure every child can fully realize their right to education. In the absence of a strong legal mandate, governments may not take the steps necessary to secure the education rights of all children, from pre-primary through secondary education.

Therefore, human rights law, and specifically children's rights law, must evolve. In particular, the express mandate of children's rights law needs to reflect the current societal understanding of "education." Two important changes are necessary.

First, there needs to be a critical shift in our understanding of when genuine education—that is, education that enables children to develop to their full potential—begins. Both the CRC and the ICESCR, adopted more than thirty years and fifty years ago, respectively, enshrined that every individual has a right to education.[33] However, fifty, or even thirty, years ago, a meaningful "education" may have been understood as beginning with primary school. Since then, child

29. *See Median Weekly Earnings $606 for High School Dropouts, $1,559 for Advanced Degree Holders*, U.S. BUREAU OF LABOR STATISTICS (2019), https://www.bls.gov/opub/ted/2019/median-weekly-earnings-606-for-high-school-dropouts-1559-for-advanced-degree-holders.htm (reporting that individuals who do not finish high school earn significantly less than those who do); *see also* Tim Stobierski, *Average Salary by Education Level* (Jun. 2, 2020) https://www.northeastern.edu/bachelors-completion/news/average-salary-by-education-level/.

30. *See generally* Adam M. Lavecchia, Philip Oreopoulos, Robert S. Brown, *Long-Run Effects from Comprehensive Student Support: Evidence from Pathways to Education* 2–3 (2019), https://docs.iza.org/dp12203.pdf.

31. *See School Enrolment, Preprimary (% gross)*, THE WORLD BANK https://data.worldbank.org/indicator/SE.PRE.ENRR (showing an increase in pre-primary enrollment from 29% in 1990 to 61% in 2020); *see also* Department of Children, Equality, Disability, Integration and Youth*, Early Childhood Care and Education (ECCE) or Free Preschool*, GOV'T OF IRELAND (last updated Sep. 9, 2021), https://www.gov.ie/en/publication/d7a5e6-early-childhood-care-and-education-ecce-or-free-preschool/ (explaining that the ECCE program is a free "universal two-year preschool" program). *But see* Alison Earle, Natalia Milovantseva & Jody Heymann, *Is Free Pre-primary Education Associated with Increased Primary School Completion? A Global Study*, 12 INT'L J. CHILD CARE & EDUC. POL'Y 13 (2018). https://doi.org/10.1186/s40723-018-0054-1 (noting that "progress toward increasing pre-primary provision and enrollment has been slow and uneven. For example, while the global average pre-primary education gross enrollment rate reached 50% in 2011, it was only 18% in sub-Saharan Africa").

32. *See School Enrollment, Secondary (% gross)*, THE WORLD BANK, https://data.worldbank.org/indicator/SE.SEC.ENRR (in 2019, 76% of secondary school-aged children were enrolled globally, though the COVID-19 pandemic has eroded some of the progress made).

33. CRC, *supra* note 3, art. 28(1); ICESCR, *supra* note 10, art. 13(1).

development science has shown that early childhood development is critical, necessitating recognition that education starts before primary school.[34]

Second, there needs to be full recognition of the importance of secondary education to children's development. Both the CRC and the ICESCR suggest that States should progress toward and ultimately achieve free secondary school education.[35] While primary education is an essential building block, with its emphasis on literacy and other foundational skills, secondary education is necessary for people to thrive in the twenty-first century.[36] Secondary education can achieve several aims, including "preparing young people for productive employment, forming responsible citizens, selecting candidates for higher education, preparing students to become healthy parents, helping youth to develop socially, [and] teaching mathematics, science and social studies."[37] And the benefits of a secondary education are broad, as Bede Sheppard explains:

> Children with [a] secondary education are more likely to find work as adults, earn more, and escape or avoid poverty. They are more likely to use modern technologies. The children of parents with a secondary education are more likely to benefit themselves from a secondary education. It can reduce childhood deaths because children with higher education levels are more likely to have a healthy diet and seek medical care, and girls with secondary education are less likely to have children early. High quality secondary education promotes resilience and healthy development in adolescents, and protects mental health.[38]

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34. *See, e.g.*, Janell Ross & Amy Sullivan, *How Everything We Know About Early Childhood Has Changed Since Head Start Was Founded*, THE ATLANTIC (Apr. 18, 2014), https://www.theatlantic.com/politics/archive/2014/04/how-everything-we-know-about-early-childhood-has-changed-since-head-start-was-founded/430833/ (discussing how thinking and understanding of education has evolved over time). In our discussion of preschool education, we do not insist that preschool education must occur outside the home. For many children, home-based learning provides appropriate opportunities for education and development that positions them well when starting primary school. However, other families and communities may lack the resources to provide similar opportunities. Therefore, while this article focuses on ensuring *universal access to preschool*, the specific form and content of early childhood education are beyond the scope of this article.

35. ICESCR, *supra* note 10, art. 13(2)(b) ("Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and *in particular by the progressive introduction of free education*" (emphasis added); CRC, *supra* note 3, art. 28(1)(b) ("Encourage the development of different forms of secondary education, … make them available and accessible to every child, and take appropriate measures *such as the introduction of free education* and offering financial assistance in case of need;") (emphasis added).

36. Benjamin Alvarez, *Secondary Education: Critical Policy Issues*, INTER-AMERICAN DEVELOPMENT BANK, https://publications.iadb.org/publications/english/document/Secondary-Education- Critical-Policy-Issues.pdf

37. *Id*. at 6.

38. Bede Sheppard, *It's Time to Expand the Right to Education*, 40 NORDIC J. HUM. RTS. 96, 103 (2022).

Given that it often takes years to develop new international treaties or new optional protocols to existing treaties, and subsequently secure widespread ratification, one might assume that other steps short of a new treaty—that is, "soft law"—could be utilized to press countries to guarantee each child a free and compulsory education through secondary school.[39] Indeed, the international community agreed in 2015 through the Sustainable Development Goals (SDGs) that governments would "[b]y 2030, ensure that all girls and boys complete free, equitable and quality primary and secondary education leading to relevant and effective learning outcomes."[40] That goal is unlikely to be met, especially given the impact of the COVID-19 pandemic.[41]

Without a legal mandate that ensures access to preschool/pre-primary education and free secondary education for all children, child advocates and children themselves are left to rely on human rights treaty bodies and other institutions to press governments to make progress on children's education rights. The Committee on the Rights of the Child (CRC Committee)—the treaty body tasked with overseeing implementation of the CRC—is well positioned to play a leading role in urging governments to make free preschool education accessible to all and to secure free secondary education for all children.[42] Ultimately, if States and international monitoring bodies like the CRC Committee are acting as gap-fillers by effectively reading governments' obligations under human rights law as requiring universal preschool and free and compulsory secondary education, then additional treaty law might not be necessary. In other words, the soft law work of treaty bodies like the Committee on the Rights of the Child might obviate the need to expand the hard law mandate on the right to education.

To test this hypothesis, we used a combination of manual review and computational techniques to examine the text of the Concluding Observations issued by the CRC Committee. Treaty bodies, including the CRC Committee,

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39. *See id*. at 111–12 (discussing a range of soft law options). While some might argue for a new General Comment on the right to education, our prior research suggests that the impact of General Comments may be limited. Charlotte S. Alexander & Jonathan Todres, *Evaluating the Implementation of Human Rights Law: A Data Analytics Research Agenda*, 43 U. PA. J. INT'L L. 1, 49–51 (2021).

40. U.N. Dep't of Econ. and Soc. Aff., Sustainable Development Goals, *Target 4.1* (2015), https://sdgs.un.org/goals/goal4.

41. *See Urgent, Effective Action Required to Quell the Impact of COVID-19 on Education Worldwide*, THE WORLD BANK (Jan. 22, 2021), https://www.worldbank.org/en/news/immersive-story/2021/01/22/urgent-effective-action-required-to-quell-the-impact-of-covid-19-on-education-worldwide; *The Global Education Crisis Is Even Worse Than We Thought—Here's What Needs to Happen*, WORLD ECONOMIC FORUM, (Jan. 16, 2022), https://www.weforum.org/agenda/2022/01/global-education-crisis-children-students-covid19/ (highlighting educational impacts such as school closings or reductions in hours during the pandemic).

42. General Comments provide another avenue to move human rights law forward, though they have not gone so far as to call for free secondary education. *See, e.g*., U.N. Committee on the Rights of the Child, *General Comment No. 20 on the Implementation of the Rights of the Child During Adolescence*, ¶ 68 U.N. Doc. CRC/C/GC/20, (2016) ("States are encouraged to introduce widely available secondary education for all as a matter of urgency").

issue Concluding Observations after every review of a State Party,[43] assessing the State's progress in implementing and complying with the treaty's obligations and outlining a set of recommendations for the State to better secure the rights of individuals subject to its jurisdiction.[44] While there are other stages in the reporting process—e.g., the List of Issues and in-person dialogue with the State Party—when the Committee may raise any issue, including education, we focus on the Concluding Observations because they represent the final, formal evaluation of the State and the Committee's official recommendations to the State Party. Our review of the Concluding Observations evaluated the extent to which the CRC Committee (a) has addressed access to preschool/pre-primary education and (b) has pressed States Parties to move toward and achieve free secondary education for all children. Our dataset includes the Concluding Observations of the Committee on the Rights of the Child from 1993, the first year the CRC Committee began issuing Concluding Observations, through 2020. A total of 558 Concluding Observations were included in our dataset, which we assembled by downloading all available CRC Concluding Observations from the United Nations' publicly available treaty bodies database.[45]

We then used the search terms listed in Appendix A to identify every instance in which the CRC Committee discussed preschool/pre-primary education, and the terms listed in Appendix B to identify every instance in which the CRC Committee discussed secondary education, during this 28-year period (1993–2020). Specifically, we wrote code using the R programming environment and the text analytics package, Quanteda, to extract a window of forty words on either side of each search term, allowing for variation in the capitalization of search terms and hyphenation. We developed the search term list by gathering potential search terms and their synonyms from a review of the Concluding Observations and from other expert knowledge. We chose the word window size through an iterative process of experimenting with windows of various sizes. We then manually classified each word window as pertaining to one of six "codes" list below for pre-primary education and eight "codes" listed below for secondary education, representing different topics of discussion by the CRC Committee.[46]

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43. Each state party to the CRC is required to submit a report to the Committee within two years of ratification and every five years after that. *See* CRC, *supra* note 3, art. 44(1). The reporting process effectively builds in a mandatory monitoring and evaluation process into all major human rights treaties. Alexander & Todres, *supra* note 39, at 5.

44. Alexander & Todres, *supra* note 39, at 5–6, 10–13.

45. *U.N. Treaty Body Database,* U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en (last visited June 15, 2022). For this study, we did not include Concluding Observations issued by the Committee under the first two Optional Protocols to the CRC (on the sale of children, child prostitution, and child pornography, and on the involvement of children in armed conflict, respectively), as we presume that those documents typically would not include detailed discussion of pre-primary or secondary education.

46. Each reference was coded manually and separately by two research assistants and then checked manually by Jonathan Todres.

Our findings suggest that the lack of express language in the CRC on preschool/pre-primary education has led to it being overlooked at times, and the soft obligation with respect to secondary education has not translated into a strong push for free, universal secondary education.

III. FINDINGS

A. Preschool

Over the 28-year period covered by our set of Concluding Observations, we identified 1,033 references to preschool or early childhood education (Table 1; see Appendix A for the list of search terms), including both substantive references to the topics and miscellaneous references/false positives, as noted below. These appeared in 332 Concluding Observations, or 59 percent of the Concluding Observations issued by the CRC Committee during our period of study. As explained above, we manually categorized these references to early childhood and preschool education as follows:

Codes:

1. Committee calls for universal preschool/pre-primary education or for all children or equivalent.
2. Committee calls for more preschool/pre-primary education, but short of universal, just a general push for more.
3. Committee notes the inadequacy of current preschool coverage or lack of access to it for many children.
4. Committee commends progress by the state (*e.g.*, noting increased preschool enrollment or noting the opening of new preschool facilities).
5. Committee discusses early childhood care without express discussion of preschool/pre-primary education (early childhood care might mean education but does not necessarily, as it could also be daycare or other childcare arrangements).
6. Miscellaneous references, including false positives (*e.g.*, names of programs, or when "early childhood" is an adjective for other issues, such as "early childhood diseases").

When we remove the miscellaneous references (*i.e.*, code 6),[47] there are 677 references across 296 Concluding Observations over the 28-year period (Table 1).

47. For examples of Code 6 mentions of "preschool" and "early childhood" not related to education, see U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 2nd to 4th Periodic Reports of Guinea-Bissau*, U.N. Doc. CRC/C/GNB/CO/2–4, ¶ 53(c) (2013) ("Introduce targeted interventions to prevent the undernourishment of infants and preschool children…."); U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 5th and 6th Periodic Reports of Bosnia and Herzegovina*, U.N. Doc. CRC/C/BIH/CO/5–6, ¶ 34(a) (2019) ("Allocate adequate human and financial resources to fully implement policies and

Further, when we remove references to early childhood care and focus only on preschool or early childhood *education*, we find that from 1993 through until the end of 2020, the CRC Committee has expressly addressed access to, or enrollment in, preschool education in 49 percent of its Concluding Observations (275 COs, Table 2, codes 1–4 any). In other words, in just over half of its Concluding Observations, the CRC Committee did not address access to preschool or early childhood education.

Table 1. References to Preschool or Early Childhood Education

Code	Number of References	Percent of References (N=1033)	Number of COs with Reference	Percent of COs (N=558)
1 (universal pre-primary)	30	3%	30	5%
2 (more pre-primary)	225	22%	186	33%
3 (lack of coverage)	199	19%	162	29%
4 (commends progress)	100	10%	88	16%
5 (early childhood care)	123	12%	78	14%
6 (miscellaneous/ false positives)	356	34%	189	34%

Table 2. Concluding Observations with Substantive Reference to Preschool or Early Childhood Education (Clustered by Reference Type)

Code Cluster	Number of COs with Reference	Percent of COs (N=558)
1–4 any (any preschool education)	275	49%
5 (early childhood care)	78	14%
5 only; no 1–4 (early childhood care *but no* preschool education)	21	4%
5 and 1–4 (early childhood care *and* preschool education)	57	10%
1–4; no 5 (preschool education *but no* early childhood care)	218	39%

programmes that make available high-quality early childhood health services for all children in the State party").

Moreover, in only about 5 percent of Concluding Observations did the CRC Committee expressly call for States Parties to make preschool/pre-primary education universal or to ensure access to all children (those references appeared in thirty Concluding Observations) (Table 1, code 1).[48] In addition, 33 percent of Concluding Observations[49] include a call for more preschool education but stop short of urging coverage for all.[50] Further, in 29 percent of Concluding Observations, the CRC Committee notes that coverage is inadequate or there are access issues for some children.[51]

48. *See, e.g.*, U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3rd and 4th Periodic Reports of Uzbekistan, adopted by the Committee at its 63rd session*, U.N. Doc. CRC/C/UZB/CO/3–4, ¶ 60(c) (2013) ("Provide high quality accessible and preferable free early childhood care and education for all children up to school age"); U.N. Committee on the Rights of the Child, *Concluding Observations on the Initial Report of Nauru*, U.N. Doc. CRC/C/NRU/CO/1, ¶ 51(a) (2016) ("The Committee recommends that the State party: Further strengthen its efforts to improve access to quality education for all children including preschool, secondary and higher education"); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Burundi*, U.N. Doc. CRC/C/BDI/CO/2, ¶ 65(b) (2010) ("Make quality early childhood education and preschool accessible to all children including children growing up under poor and disadvantaged living conditions").

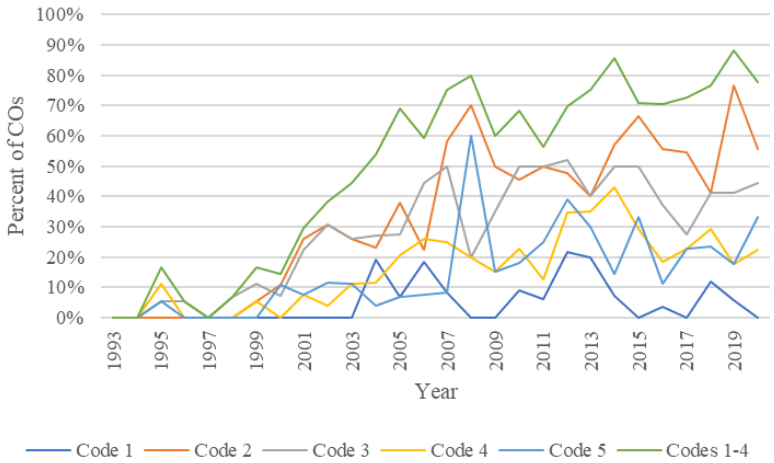
49. In reporting that 33 percent of Concluding Observations have a code 2 reference (more preschool), and 29 percent have a code 3 reference (lack of coverage)—see accompanying text infra notes 49 and 51—we note that some Concluding Observations contain references to both. As explained earlier, 49 percent of Concluding Observations have a reference to any of codes 1–4, meaning that some Concluding Observations include discussion of inadequate coverage and a call for more preschool.

50. *See, e.g.*, U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3d and 4th Periodic Report of Portugal*, U.N. Doc. CRC/C/PRT/CO/3–4, ¶ 40 (2014) ("The Committee further recommends that the State party strengthen the system of family benefits and child allowances and other services such as counselling services and accessible early childhood education and care to support families affected by the current economic crisis, single-parent families, families with two or more children, families with children with disabilities, and families living in persistent poverty"); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Sierra Leone*, U.N. Doc. CRC/C/SLE/CO/2, ¶ 65(b) (2008) ("Expand access to education including early childhood education to all regions of the State party"); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Ecuador*, U.N. Doc. CRC/C/15/Add.262, ¶ 60(a) (2005) ("the Committee recommends that the State party: Increase expenditure on education in particular in primary pre-primary and secondary education").

51. *See, e.g.,* U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 5th and 6th Periodic Reports of Panama*, U.N. Doc. CRC/C/PAN/CO/5–6, ¶ 33(a) (2018) ("the Committee is concerned about Slow progress in educational coverage at the preschool and basic levels"); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Hungary*, U.N. Doc. CRC/C/HUN/CO/2, ¶ 49 (2006) ("the Committee is concerned that the quality of schools suffers from regional disparities and that access to preschools is reportedly limited in regions where poverty is high and Roma population is dominant"); U.N. Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding Observations: Australia*, U.N. Doc. CRC/C/AUS/CO/4, ¶ 76 (2012) ("the Committee is concerned that the majority of early childhood care and education in the State party is provided by private profit-driven institutions resulting in the services being unaffordable for most").

We also investigated the distribution of the CRC Committee's comments about preschool education across time, as one might speculate that Committee references to early childhood education would increase as the science of child development advanced and became more widely known. Two notable jumps in references to early childhood education occurred—around 2001 and 2006/2007. From around 2001 on, the Committee's focus on preschool education has fluctuated between 30% to 88% of Concluding Observations issued in any given year (*see* codes 1–4, designated by the green line in Figure 1). The data suggest a general increase up until about 2007, followed by fluctuations since then, though consistently appearing in the majority of Concluding Observations in each year.

Figure 1. Percent of Concluding Observations with Substantive Reference to Preschool or Early Childhood Education, Per Year



We next examined the CRC Committee's discussion of preschool/pre-primary education across regions. While there are variations in the total number of Concluding Observations in each region that mention preschool education, these variations are driven in large part by the differences in the underlying number of States Parties (and thus, Concluding Observations issued) across regions (*e.g.*, there were 114 Concluding Observations issued for states parties in Sub-Saharan Africa over the 28-year period, while fourteen were issued for Central Asia). Given this variation, we tracked the percentage of Concluding Observations per region, rather than absolute number, that mentioned pre-primary or early childhood education. We found a high of 86 percent in Central Asia (that made any mention of access to, and enrollment in, pre-primary education; Table 3, codes 1–4) and a low of 34 percent of Concluding Observations in Northern,

Southern, and Western Europe.[52] Table 3 shows some differences across regions, but additional research would be needed to identify possible reasons for this variation. As an initial matter, we note that other than for States Parties in Central Asia, the CRC Committee addressed pre-primary education in 34 to 61 percent of Concluding Observations in each region.

Table 3. Percent of Concluding Observations with Substantive Reference to Preschool or Early Childhood Education, Per Subregion

Subregion	Code 1	2	3	4	5	1–4*
Central Asia	7%	57%	50%	21%	21%	86%
Eastern Asia	0%	29%	8%	17%	21%	50%
Eastern Europe	0%	42%	35%	23%	16%	55%
Latin America and the Caribbean	3%	24%	26%	20%	20%	46%
Northern Africa	12%	35%	41%	18%	6%	53%
Northern America	33%	33%	33%	0%	33%	33%
Northern, Southern, Western Europe	5%	23%	24%	11%	10%	34%
Oceania	9%	45%	36%	18%	6%	61%
South-eastern Asia	3%	52%	31%	10%	17%	55%
Southern Asia	7%	36%	32%	7%	18%	46%
Sub-Saharan Africa	5%	39%	30%	18%	13%	57%
Western Asia	12%	31%	31%	15%	10%	48%

Note: Northern America includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

* Represents percent of Concluding Observations with substantive reference to one or more of codes 1–4.

Thus, the overall picture presented by our analysis of the text of Concluding Observations indicates that while pre-primary education is expressly addressed more often than it was in the very early days of the CRC, it is still mentioned in only about half of the reviews of State Parties, albeit in the majority of Concluding Observations in recent years. In addition, we found that calls for universal pre-school education are infrequent (5 percent of Concluding Observations). We return to these findings below in connection with our discussion of the need for an expanded hard law mandate on education, given the sparsity of the Concluding Observations' soft law pronouncements.

52. While we include the Northern America region in Table 2, we did not count it in this narrative, because it includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

B. Secondary Education

Over the 28-year period covered by our set of Concluding Observations, we identified 695 references to secondary education. These appeared in 321 Concluding Observations, or 57.5 percent of the Concluding Observations issued by the CRC Committee in that period. As explained above, we manually categorized these references to secondary education as follows:

Codes:

1. Committee expressly calls for, or commends, free secondary education
2. Committee expressly calls more broadly for free primary and secondary education
3. Committee notes fee-related barriers (*e.g.*, school fees, costs of textbooks)
4. Committee notes non-fee related barriers, low enrollment, drop-out rates, and similar factors (*e.g.*, inadequate access for kids with disabilities, etc.; inadequate numbers of facilities or teachers)
5. Committee urges removal of various fees or more resources to address costs
6. Committee calls for other measures to improve enrollment (*e.g.*, reduce drop-out rates, improve access, etc.)
7. Committee commends progress by the state (short of free universal coverage)
8. Miscellaneous references, including false positives (*e.g.*, other mentions unrelated to access or enrollment, such as a call for human rights education in secondary schools).

When we remove references unrelated to access to and enrollment in secondary education (*i.e.*, code 8),[53] 528 references to secondary education remain across 275 Concluding Observations over the 28-year period. That is, the CRC Committee has expressly addressed access to, or enrollment in, secondary education in 49.3 percent of its Concluding Observations from the date it started issuing them through the end of 2020. This means that in just over half of the Concluding Observations it has issued, the Committee did not address access to secondary education.

Focusing on the 528 references that address access to and/or enrollment at the secondary education level, we found that fewer than 9 percent of those references expressly called for States Parties to make secondary education free for

53. For examples of Code 8 mentions of "secondary education" not related to this study, see U.N. Committee on the Rights of the Child, *Concluding Observations: Norway*, U.N. Doc. CRC/C/15/Add.263, ¶ 16 (Sep. 21, 2005) ("The Committee regrets in this regard that human rights is only taught in schools as an optional subject in upper secondary education"); U.N. Committee on the Rights of the Child, *Concluding Observations on the Fourth Periodic Report of Eritrea*, U.N. Doc. CRC/C/ERI/CO/4, ¶ 59(d) (Jul. 2, 2015) ("Ensure that secondary school students do not have to undertake obligatory military training").

all children (Table 4, codes 1 and 2).[54] Those references appeared in forty-six Concluding Observations, meaning that in only 8 percent of the Concluding Observations did the CRC Committee expressly call on States Parties to ensure free secondary education.

Roughly 45 percent of the references to secondary education addressed barriers to secondary education (Table 4, codes 3 and 4), although only 4 percent of those references expressly addressed financial barriers (Table 4, code 3).[55] Finally, 35 percent of the CRC Committee's references to secondary education involved calling for the removal of barriers to secondary education (Table 4, codes 5 and 6), though only 3 percent of these references called on States Parties to address/remove financial barriers (Table 4, code 5).

Table 4. Substantive References to Secondary Education

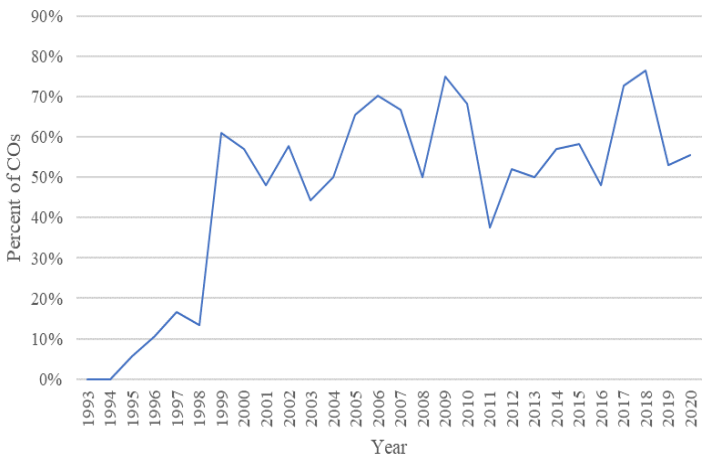
Code	Number of References	Percent of References (N=528)	Number of COs with Reference	Percent of COs (N=558)
1 (free secondary)	13	3%	12	2%
2 (free primary and secondary)	34	6%	34	6%
3 (financial barriers)	22	4%	21	4%
4 (other barriers, low enrollment)	215	41%	171	31%
5 (removal of fees)	17	3%	17	3%
6 (other measures)	170	32%	135	24%
7 (commends progress)	57	11%	50	9%

54. *See*, *e.g.*, U.N. Committee on the Rights of the Child, *Concluding Observations: Uzbekistan*, U.N. Doc. CRC/C/UZB/CO/2, ¶ 56 (Jun. 2, 2006) ("The Committee welcomes the information that public education is free and compulsory until the completion of secondary education"); U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3rd to 5th Periodic Reports of Nepal*, U.N Doc. CRC/C/NPL/CO/3–5, ¶ 58 (Jul. 8, 2016) ("Committee welcomes the constitutional provisions on free and compulsory basic education and free secondary education"); U.N. Committee on the Rights of the Child, *Concluding Observations: Kenya*, U.N. Doc. CRC/C/KEN/CO/2, ¶ 58(b) (Jun. 21, 2007) ("Undertake measures to provide secondary education free of cost").

55. *See*, *e.g.*, U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3rd and 4th Periodic Reports of Slovenia*, U.N. Doc. CRC/C/SVN/CO/3–4, ¶ 60 (Jul. 8, 2013) ("the Committee is also concerned that the passage of the Fiscal Balance Act in 2012 has resulted in the introduction of new education fees and removal of scholarships that were available for students at secondary level school"); U.N. Committee on the Rights of the Child, *Concluding Observations: Trinidad and Tobago*, U.N. Doc. CRC/C/TTO/CO/2, ¶ 59(c) (Mar. 17, 2006) (expressing concern over "[t]hat fact that approximately one third of the school-aged population do not attend secondary school").

We also looked at the distribution of the CRC Committee's comments about secondary education across time. One might speculate that in the early years of the CRC, the Committee's work would have focused more on primary education, as many countries still needed to make significant progress to meet the obligation to provide free and compulsory primary education to all children.[56] Accordingly, we might expect that references to, and discussion of, secondary education would increase over time. One might also posit that the adoption of the SDGs, which included the target of free secondary education by 2030, would have led to a push on secondary education after 2015, the year the SDGs were issued.[57] However, other than the low rates of references to secondary education in Concluding Observations from 1993 to 1998, the CRC Committee's focus on secondary education has fluctuated between 38 to 76 percent of Concluding Observations issued in any given year (see Figure 2), suggesting no obvious time trend or post-SDGs effect.

Figure 2. Percent of Concluding Observations with Substantive Reference to Free Secondary Education, Per Year



56. *See Primary Completion Rate, Total (% of relevant age group)*, UNESCO INSTITUTE FOR STATISTICS, THE WORLD BANK, https://data.worldbank.org/indicator/SE.PRM.CMPT.ZS (last visited Nov. 20, 2023) (reporting an 81% completion rate in 1989, the year the CRC was adopted). The overall rate somewhat masks the fact that in certain regions, far fewer children attended and completed primary school at the time the CRC was adopted; *See*, *e.g.*, *Primary Completion Rate, Total (% of relevant age group) – Sub-Saharan Africa*, UNESCO INSTITUTE FOR STATISTICS, https://data.worldbank.org/indicator/SE.PRM.CMPT.ZS?locations=ZG (last visited Nov. 20, 2023) (finding 54 percent of children in the region completed primary school in 1989, the year the CRC was adopted).

57. *See The 17 Goals, 4: Quality Education*, THE GLOBAL GOALS (2015), https://www.globalgoals.org/goals/4-quality-education/ (Target 4.1 of the SDGs calls for free primary and secondary education, while Target 4.2 calls for states to "[b]y 2030, ensure that all girls and boys have access to quality early childhood development, care and pre-primary education so that they are ready for primary education.").

We then examined the CRC Committee's discussion of secondary education across regions. As with pre-primary education, while there are variations in the total number of Concluding Observations in each region that mention secondary education, these differences are driven in large part by the variations in the underlying number of States Parties (and thus Concluding Observations issued) across regions. Tracking the percentage of Concluding Observations per region that mentioned access to or enrollment in secondary education, we find a high of 64 percent in Central Asia and a low of 31 percent in Northern, Southern, and Western Europe.[58] Table 5 shows some differences across regions, suggesting the CRC Committee might be more likely to address secondary education when reviewing States Parties from the Global South. However, further research would be needed to test that proposition. As a preliminary matter, we note that even in regions of the Global South, where the CRC Committee may be more likely to address access to secondary education, it does so in fewer than two-thirds of its Concluding Observations for those regions.

Table 5. Percent of Concluding Observations with Substantive Reference to Secondary Education, Per Subregion

Subregion	Code 1	2	3	4	5	6	7	1-7*
Central Asia	7%	7%	14 %	29%	0%	14%	21%	64%
Eastern Asia	0%	4%	8%	25%	0%	38%	0%	42%
Eastern Europe	10%	10%	0%	19%	3%	13%	3%	45%
Latin America and the Caribbean	1%	8%	1%	37%	2%	29%	16%	60%
Northern Africa	0%	0%	6%	24%	6%	29%	12%	35%
Northern America	0%	0%	0%	0%	0%	0%	0%	0%
Northern, Southern, Western Europe	1%	5%	4%	21%	0%	10%	8%	31%
Oceania	0%	12%	9%	36%	12%	27%	12%	55%
South-eastern Asia	0%	0%	0%	28%	0%	21%	10%	41%
Southern Asia	7%	0%	0%	36%	0%	36%	14%	61%
Sub-Saharan Africa	3%	9%	5%	39%	8%	33%	4%	61%
Western Asia	2%	4%	4%	31%	0%	21%	6%	48%

Note: Northern America includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

* Represents percent of Concluding Observations with substantive reference to one or more of codes 1–7.

58. While we include the Northern America region in Table 2, we did not count it in this narrative because it includes only one country (Canada) for which there were only 3 total Concluding Observations. The United States is not a party to the CRC, and Mexico is grouped in the Latin America and the Caribbean region.

Finally, we grouped some of our more granular coding into broader categories, enabling investigation of the frequency with which the CRC Committee addressed clusters of related topics (Table 6). In doing so, we found that the Committee's Concluding Observations call for free secondary education (either specifically, or generally with respect to all levels of education) in 8 percent of Concluding Observations (Table 6, codes 1 and 2). With respect to only the Concluding Observations, in which the CRC Committee addresses access to or enrollment in education, the Committee calls for free secondary education (again, either specific to secondary education, or in a general call for free education) in 17 percent of Concluding Observations.

Considering all 558 Concluding Observations, the CRC Committee addresses barriers in 32 percent of Concluding Observations and calls on States Parties to address and remove specific barriers in 26 percent of cases (Table 6).

Table 6. Concluding Observations with Substantive Reference to Secondary Education (Clustered by Reference Type)

Cluster	Sum of COs with any cluster mention	Percent of COs w/ code mention (N=275)	Percent of all COs (N=558)
1 and 2 (all free secondary references)	46	17%	8%
3 and 4 (all barriers/low enrollment)	180	65%	32%
5 and 6 (calls for progress)	147	53%	26%
7 (commends progress)	50	18%	9%

Note: the totals in the first data column of this table add up to more than 275 because it is possible for some Concluding Observations to have more than one reference to secondary education that fit, for example, code 3 and code 5.

IV. DISCUSSION

Our findings indicate that the CRC Committee engages States Parties on the issues of pre-primary and secondary education in about half of its Concluding Observations.[59] In addition, it expressly calls for universal preschool/pre-primary education in about 5 percent of Concluding Observations and free secondary education in about 8 percent of Concluding Observations. We also found in selected cases that the CRC Committee acknowledged the SDGs' standard of free secondary education, but stopped short of expressly pressing governments to meet that goal.[60]

59. This does not preclude the possibility that the CRC Committee raised the issues of pre-primary and secondary education either in the List of Issues or in the public session with the State Party, but as the Concluding Observations represent the treaty body's official assessment of the State Party and its formal recommendations, we focus on the Concluding Observations.

60. *See*, *e.g.*, U.N. Committee on the Rights of the Child, *Concluding Observations on the Combined 3d to 5th Periodic Reports of Bulgaria*, U.N Doc. CRC/C/BGR/CO/3–5, ¶ 49 (Nov. 21,

While we can determine when the CRC Committee speaks to pre-primary and secondary education and what it addresses or urges States Parties to do, this research does not explain why the Committee makes these choices. For example, the CRC Committee might choose not to address secondary education in States Parties that already have universal or near-universal secondary school enrollment.[61] In other instances, the CRC Committee may choose to prioritize other children's rights violations it assesses as more pressing. As our research did not extend to assessments of all 196 States Parties' on-the-ground progress on pre-primary and secondary education, we cannot evaluate specific choices at this

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2016), https://www.ohchr.org/en/documents/concluding-observations/crccbgrco3-5-concluding-observations-combined-third-fifth. The Committee acknowledges the SDGs mandate and helpfully makes tailored recommendations to ensure children in marginalized communities have better access, but it does not call on the government to provide *free* education:

> [W]ith reference to Sustainable Development Goals 4.1 and 4.2 on ensuring that, by 2030, all girls and boys complete free, equitable and quality primary and secondary education and have access to quality early childhood development, care and pre-primary education, the Committee recommends that the State party:
>
> (a) Further strengthen its efforts to improve access to quality education in rural areas and in small towns, including access to preschool and secondary and higher education;
>
> (b) Develop programmes with monitoring and evaluation mechanisms to reduce drop-out rates;
>
> (c) Facilitate the participation and inclusion of Roma children in education at all levels—including preschool education—raise awareness of teachers and staff of psychological and pedagogical counselling centres about the history and culture of Roma people and ensure the use of non-verbal and culturally sensitive tests;
>
> (d) Ensure the full enjoyment of the right to education by asylum-seeking children, regardless of their status, length of stay or residence, on equal footing with all other children in the country.

Id. ¶ 49; *see also* U.N. Committee on the Rights of the Child, *Concluding Observations on the Initial Report of Nauru*, U.N Doc. CRC/C/NRU/CO/1, ¶ 51 (Oct. 28, 2016), https://www.ohchr.org/en/documents/concluding-observations/crccnruco1-concluding-observations-committee-rights-child-initial, in which the Committee again highlights the SDGs, but does not call on the State to ensure or make progress toward free pre-primary or secondary education:

> [T]aking note of targets 4.1 and 4.2 of the Sustainable Development Goals to ensure that by 2030, all girls and boys complete free, equitable and quality primary and secondary education, and have access to quality early childhood development, care and pre-primary education, the Committee recommends that the State party:
>
> (a) Further strengthen its efforts to improve access to quality education for all children, including preschool, secondary and higher education;
>
> (b) Develop programmes, along with monitoring and evaluation of such programmes, to reduce dropout rates;
>
> (c) Ensure the full enjoyment of the right to education by asylum-seeking children on an equal basis with all other children in the country;
>
> (d) Establish campaigns within schools to prevent bullying and violence against all children.

Id. ¶ 51.

61. According to UNESCO, approximately 57 percent of States have introduced free secondary education. *See Sustainable Development Goals: 4.1.7 Number of years of (a) free and (b) compulsory primary and secondary education guaranteed in legal frameworks*, UNESCO INSTITUTE FOR STATISTICS, http://data.uis.unesco.org/.

stage. However, given the foundational nature of education, we believe the low rate at which pre-primary and secondary education are discussed (in only about half of the CRC Committee's Concluding Observations) highlights a potential gap and opportunity. That is, if international law does not have an express requirement to make pre-primary education available to all and does not mandate free secondary education, and the Committee on the Rights of the Child is not regularly pressing for these measures, then there is limited pressure on States to make progress on pre-primary or secondary education. In light of this potential gap, there is an opportunity to review and strengthen efforts to advance children's education rights at the pre-primary and secondary school level, specifically through reconsideration of the mandate on education in human rights law.

As we have noted in prior research,[62] the treaty bodies, including the CRC Committee, typically use diplomatic language in their Concluding Observations. The use of diplomatic language raises two potential issues. First, one might speculate that a call to remove certain barriers to education is intended as a diplomatic push toward universal free secondary education or pre-primary education. However, because the CRC Committee does not consistently articulate that pre-primary education is encompassed in the right to education, or that the expectation is free secondary education, or it only calls for universal pre-primary education or free secondary education in a small number of Concluding Observations (5 and 8 percent of COs, respectively), it is hard to argue that States are being pressed to secure *free* secondary education for every child or that preschool is being recognized as a right for all children.

Second, it is important to recognize that the CRC Committee's Concluding Observations have multiple audiences in addition to governments. Accordingly, the use of more subtle language, rather than expressly pushing States to implement free preschool or free secondary education, might leave children and civil society advocates with weaker language to draw upon when lobbying governments to make progress on children's education rights.

Overall, this review of the CRC Committee's Concluding Observations highlights that without a legal mandate, it is more challenging for both the CRC Committee and non-governmental organizations to press States to make progress on human rights.[63] Therefore, soft law, or non-binding measures, may not be

62. Alexander & Todres, *supra* note 39 at 55–57 ("Indeed, although diplomatic criticisms that express "concern" or "deep concern" might resonate with government officials from the relevant states parties, they may fall short of conveying, with sufficient clarity, the level of urgency that NGOs and local communities rely on when seeking to "mobilize shame" and press governments to improve their human rights practices."); René Provost, *Anne Bayefsky's The UN Human Rights [Treaty] System in the 21st Century*, 47 MCGILL L.J. 693, 694 (2002) (book review) (noting that across the human rights treaty bodies, the "committees' concluding observations are always framed in tame diplomatic language no matter how egregious the violations of human rights . . . ."); Cosette D. Creamer & Beth A. Simmons, *The Proof is in the Process: Self-Reporting Under International Human Rights Treaties*, 114 AM J. INT'L L. 1, 31 (2020) ("Since confrontation and harsh excoriation are likely to lead to backlash, treaty bodies are often careful to maintain a respectful posture toward states parties, using diplomatic and increasingly technical language.").

63. Although it is possible for the Committee to make recommendations beyond the legal mandate of the CRC (*e.g.*, the Committee has addressed child marriage in its Concluding

adequate to fill the gap in substantive international human rights law on education rights. Rather, further progress on education might require strengthening the human rights law mandate on education.

V. ADDRESSING THE RESOURCES QUESTION

In calling for human rights law on education to evolve, we recognize the concern that resource constraints in certain countries would make an enhanced mandate on pre-primary or secondary education unattainable.[64] Although resource limitations must be considered, we do not believe they should prevent the law from evolving. We offer four considerations in response to this concern.

First, from a pragmatic perspective, any change to the legal mandate on education rights to include access to pre-primary education and free secondary education—like all economic, social, and cultural rights—will impose an obligation of "progressive realization" that, in the case of the CRC, requires States to use the "maximum extent of available resources."[65] While this flexible standard has been criticized for allowing States too much leeway,[66] it should alleviate concerns that States would be expected to achieve full compliance immediately upon acceptance of a new legal mandate.[67] However, by undertaking a *legal* obligation, States would be expected to show demonstrable progress toward free pre-primary and secondary education, and in doing so, the mandate can spur full realization of this right more quickly than is currently occurring.[68]

Observations, even though the issue is not covered in the CRC), the absence of a legal mandate leaves the Committee with less of a basis for making such recommendations.

64. Such concerns are not new; when the CRC was drafted in the 1980s, developing countries expressed concerns about an immediate mandate on economic, social, and cultural rights, leading to incorporation of the progressive realization standard for economic social and cultural rights in Article 4 of the CRC. *See* "Considerations 1989 Working Group (1989)", *in* SHARON DETRICK ET AL., THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD: A GUIDE TO THE "TRAVAUX PRÉPARATOIRES" 155 (1992) (reporting that the delegations of Brazil, India, Venezuela, Libya, and Algeria opposed deletion of the words "in accordance with their available resources" due to concerns over limited resources).

65. *See* CRC, *supra* note 3, art. 4 ("With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation."). On progressive realization, see, for example, Office of the United Nations High Commissioner for Human Rights, *Frequently Asked Questions on Economic, Social and Cultural Rights* 13–14 (Dec. 2008), https://www.ohchr.org/sites/default/files/documents/publications/factsheet33en.pdf.

66. *See* KATHARINE G. YOUNG, THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 654–83 (2019).

67. Many States' compliance on civil and political rights, which are immediate obligations not tied to States' available resources, is imperfect at best, yet that does not prevent States from accepting the mandate and pursuing compliance.

68. *See*, *e.g.*, Douglass Cassel, *Does International Human Rights Law Make a Difference*, 2 CHI. J. INT'L L. 121, 128 (2001) ("Because international human rights law is expressed as law, it generates increased expectations of compliance. This gives human rights claimants stronger ground to demand compliance…."). Improvements in human rights is, in reality, often driven by multiple factors, but human rights law plays an important role. As Cassell writes:

Second, existing mandates on economic, social, and cultural rights establish a clear role for the international community to support the realization of rights of individuals in low-resource countries. For example, the CRC mandates that "States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, *within the framework of international co-operation*."[69] Therefore, we believe a legal mandate for free secondary education or for universal pre-primary education could help provide the impetus for the international community to coalesce around the goal of securing education for all children.[70]

Third, the international community has agreed through the SDGs to push for free secondary education.[71] In this regard, even amidst ongoing concerns about resource limitations, the international community has recognized the critical nature of ensuring access to pre-primary and free secondary education. If States support these goals, then we believe it is appropriate that they demonstrate their commitment to this obligation by accepting a legal mandate.[72]

Fourth, all rights, including civil and political rights, require resources to be realized.[73] For example, voting rights do not simply impose negative

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> Where rights have been strengthened the cause is usually not so much individual factors acting independent—whether in law, politics, technology, economics, or consciousness—but a complex interweaving of mutually reinforcing processes. What pulls human rights forward is not a series of separate, parallel cords, but a "rope" of multiple, interwoven strands. Remove one strand, and the entire rope is weakened. International human rights law is a strand woven throughout the length of the rope. Its main value is not in how much rights protection it can pull as a single strand, but in how it strengthens the entire rope.

Id. at 123. In addition, a legal mandate could open the door to more effective monitoring of the "progressive realization" standard, including through the use of such tools as human rights budget analysis. *See*, *e.g.*, OLIVIER DE SCHUTTER, THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 527–623 (2019); Fundar, Int'l Human Rights Internship Program & Int'l Budget Project, *Dignity Counts: A Guide to Using Budget Analysis to Advance Human Rights* (2004), https://internationalbudget.org/wp-content/uploads/Dignity-Counts-A-Guide-to-Using-Budget-Analysis-to-Advance-Human-Rights-English.pdf.

69. CRC, *supra* note 3, art. 4.

70. *See*, *e.g.*, *Global Campaign for Education*, STRATEGIC FOCUS AREAS: FINANCING EDUCATION, https://campaignforeducation.org/en/what-we-do/strategic-focus-areas (last visited Dec. 15, 2023).

71. *See supra* note 57, establishing "free, equitable and quality primary and secondary education" for all children by 2030 as a goal.

72. Moreover, States are already obligated to ensure there is no discrimination in implementation of education rights. Jonathan Todres, *Rights Relationships and the Experience of Children Orphaned by AIDS*, 41 U.C. DAVIS L. REV. 417, 467 (2007) ("although poorer countries may take time to progressively implement education rights, they may not tolerate discrimination at any stage in the implementation of these or other economic, social, and cultural rights").

73. *See* Jonathan Todres, *Making Children's Rights Widely Known*, 29 MINN. J. INT'L L. 109, 134 (2020) ("All rights—from voting rights to health rights—require resources to fully realize"); *see also* Joy Gordon, *The Concept of Human Rights: The History and Meaning of Its Politicization*, 23 BROOK. J. INT'L L. 689, 712 (1998) (footnote omitted) ("Civil and political rights are neither self-

obligations on States to refrain from interfering with voting, but they also require States to allocate resources to building and maintaining election infrastructure. Resource limitations are not an acceptable excuse for falling short on the implementation of civil and political rights because the value of civil and political rights is widely recognized.[74] Given the lifelong consequences of lack of access to education, it is time to recognize the true value of education and give higher priority to ensuring every child's education rights.

CONCLUSION

The law on education rights has changed relatively little since 1948 when the Universal Declaration was adopted. Without a strong legal mandate on free secondary education, progress has lagged. And without any express mandate for universal pre-primary education in treaty law, it is too easily overlooked. Given the importance of education for the fulfillment of all human rights, we believe it is time for the international community to make guaranteeing full education rights for all a priority. The international community can demonstrate that priority by committing to a legal mandate that guarantees every child access to education from the pre-primary stage through secondary school.[75] Such a mandate could be implemented through a variety of vehicles. However, given the near-universal support for the Convention on the Rights of the Child,[76] a new optional protocol on the right to education offers the greatest potential for enabling every individual to secure their right to an education and to be able to reach their full potential.[77]

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generating nor free of costs; they 'need legislation, promotion and protection and this requires resources.'").

74. *See*, *e.g.*, CRC, *supra* note 3, art. 4 (imposing an immediate and full obligation on states parties with respect to civil and political rights).

75. A number of children's rights experts have similarly called for an expanded legal mandate. *See*, *e.g.*, Human Rights Watch, *A Call to Expand the International Right to Education* (Jun. 6, 2022), https://www.hrw.org/news/2022/06/06/call-expand-international-right-education; *see also* UNESCO, TASHKENT DECLARATION AND COMMITMENTS TO ACTION FOR TRANSFORMING EARLY CHILDHOOD CARE AND EDUCATION (Nov. 16, 2022), https://www.unesco.org/sites/default/files/medias/fichiers/2022/11/tashkent-declaration-ecce-2022.pdf (expressing support for "[e]xamin[ing] the feasibility, suitability and necessity of enshrining the right to ECCE in an international normative instrument").

76. Every country in the world is party to the CRC, with one exception—the United States. U.N. Treaty Collection, Convention on the Rights of the Child, *Status of Ratifications*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en (last visited July 5, 2022) (196 countries have ratified or acceded to the CRC; only the United States has not).

77. An optional protocol could also address other vital issues in education that were not addressed in the CRC, ICESCR, or other human rights law to date including, importantly, access to preschool education. *See* Sheppard, *supra* note 38, at 17–18. We recognize that the CRC applies only to children, and therefore in the short-term, an optional protocol to the CRC would not reach adults who were not able to realize their right to pre-primary or secondary education. However, the almost-universal acceptance of the CRC makes it a powerful tool for advancing education.

Appendix A: Preschool/Early Childhood Education Search Terms

Search Terms
early_childhood (includes early-childhood, early childhood)
early-development
early development
early-developmental
early developmental
early-year
early-years
early year
early years
preprimary
preprimaries
pre-primary
pre-primaries
preschool
preschools
pre-school
pre-schools
preschooler
preschoolers
pre-schooler
pre-schoolers

Appendix B: Secondary Education Search Terms

Search terms
elementary and secondary
elementary as well as secondary
gymnasium
gymnasiums
high school
high schooler
high schoolers
high schools
highschool
high-school

Search terms
high-school
highschooler
high-schooler
high-schooler
highschoolers
high-schoolers
high-schoolers
highschools
high-schools
high-schools
lycee
lycees
lyceum
lyceums
primary and secondary
primary as well as secondary
secondary education
secondary level
secondary school
secondary schools
secondary-education
secondary-level
secondary-school
secondary-schools
senior high
senior highs
senior-high
senior-highs

A Framework for Synergy: Synthesizing the Relationship Between the International Criminal Court and Hybrid Tribunals

Sara L. Ochs[1]*

The field of international criminal justice has evolved into a series of disconnected processes with little overlap or synchronicity. Nowhere is this more evident than in the recent debate on how best to provide accountability for ongoing crimes in Ukraine. Much discussion has revolved around independent prosecutions by entities like the International Criminal Court (ICC) and a potential new court—which may be stylized as a hybrid tribunal, combining international and Ukrainian elements—to prosecute Russian crimes. Yet, relatively little attention has been given to how these entities may work together, which is reflective of a much more serious problem. This disjointed approach to justice is contributing to an ever-widening accountability gap for international crimes.

In efforts to obtain a more comprehensive approach to international criminal justice, this Article identifies the need for more streamlined, jurisdiction-sharing relationships between the ICC and hybrid tribunals. It analyzes how such a relationship works in practice by evaluating the ongoing collaboration between the ICC and the Special Criminal Court for the Central African Republic—the first jurisdiction-sharing relationship between the ICC and a hybrid tribunal. To encourage future iterations of this type of streamlining, this Article then outlines a "framework for synergy," which identifies the conditions under which such a jurisdiction-sharing relationship is appropriate and the procedures that should govern the relationship. Finally, this Article applies the proposed framework to the potential jurisdiction-sharing relationship between the ICC and a Ukrainian hybrid tribunal designed to prosecute ongoing Russian crimes.

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I. INTRODUCTION

While there are numerous goals inherent in the field of international criminal justice,[2] one key aim is to "promise an end to the impunity that perpetrators of some of the world's worst crimes have long enjoyed."[3] With the creation of the International Criminal Court (ICC) in 2002, the international community sought to do just that, with the idea that no additional judicial mechanism beyond the ICC would be needed.[4] However, it became clear that due to the ICC's shortcomings—including its limited resources and jurisdictional restrictions—the Court would

2. Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L L. 79, 84–85 (2009); Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 MINN. J. INT'L L. 179, 190 (2018) (identifying nine "commonly-articulated" goals of international criminal tribunals).

3. Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, HUM. RTS. WATCH (Jan. 26, 2004, 7:00PM EST), https://www.hrw.org/news/2004/01/26/beyond-hague-challenges-international-justice#:~:text=During%20the%201990s%2C%20the%20international,as%20a%20weapon%20of%20war.

4. Beth Van Schaack, *The Building Blocks of Hybrid Justice*, 44 DENV. J. INT'L L. & POL'Y 169, 171–72 (2016); Rome Statute of the International Criminal Court, preamble, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (explaining that the ICC was established in part "to put an end to impunity for the perpetrators of [atrocity] crimes and to contribute to the prevention of such crimes").

"only be able to handle a fraction of the situations demanding justice around the globe."[5]

Accordingly, the field of international criminal justice has developed into a "fragile" system composed of the ICC, domestic courts, ad hoc tribunals, and hybrid or mixed courts that combine domestic and international elements.[6] While we now have a "menu of architectural options for pursuing justice,"[7] these mechanisms primarily act unilaterally; the once-envisioned cohesive field of international criminal justice has been divided up into a collection of independent courts.[8]

Specifically, little cohesion remains between the operations of the ICC and what are known as hybrid tribunals. Hybrid tribunals continue to be created as joint initiatives between governments in post-conflict States and the greater regional or international community to prosecute atrocity crimes.[9] Until recently, hybrid tribunals and the ICC have operated independently, with the former historically utilized only to investigate and prosecute atrocity crimes that fall outside of the ICC's jurisdictional reach.[10] With little synchronicity, this division has contributed to a widening accountability gap for international crimes.[11]

Nowhere is this disconnect between the ICC and hybrid courts more evident than in the fragmented efforts to address atrocities committed during the ongoing War in Ukraine. Russia's invasion of Ukraine in early 2022 sparked significant debate regarding the most appropriate means and mechanisms for prosecuting

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5. Van Schaack, *supra* note 4, at 172.

6. Dicker & Keppler, *supra* note 3; *see also* Van Schaack, *supra* note 4, at 171–72 (providing a brief overview of the evolution of international legal mechanisms).

7. Harold Hongju Koh, *International Criminal Justice 5.0*, 38 YALE J. INT'L L. 525, 539 (2013).

8. *See* Mark Kersten, *As the Pendulum Swings – the Revival of the Hybrid Tribunal*, *in* INTERNATIONAL PRACTICES OF CRIMINAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES 1 (Mikkel Jarle Christensen & Ron Levi, eds., 2017); Marlise Simons, *Veteran International Prosecutor Foresees War Crimes Trials for ISIS*, N.Y. TIMES (Dec. 26, 2015), https://www.nytimes.com/2015/12/27/world/europe/veteran-international-prosecutor-foresees-war-crimes-trials-for-isis.html (quoting former US Ambassador-at-Large for War Crimes Issue, Stephen Rapp, as saying "there isn't a global system of justice, just some cases in The Hague and a few other places").

9. Van Schaack, *supra* note 4, at 172.

10. *See* Erika de Wet, *The Relationship Between the International Criminal Court and* ad hoc *Criminal Tribunals: Competition or Symbiosis?* 83 DIE FRIEDENS-WARTE 33, 43 (2008) (recognizing that as of 2008, no hybrid tribunal's jurisdiction overlapped with the ICC); Patryk I. Labuda, *Institutional Design and Non-Complementarity: Regulating Relations Between Hybrid Tribunals and other Judicial and Non-Judicial Institutions*, *in* HYBRID JUSTICE: INNOVATION AND IMPACT IN THE PROSECUTION OF ATROCITY CRIMES 2 (Kirsten Ainley & Mark Kersten, eds., 2020) (noting that the Special Criminal Court in the Central African Republic became the first hybrid court to share jurisdiction with the ICC upon its creation in 2015).

11. *See, e.g.*, Theodor Meron, *Closing the Accountability Gap: Concrete Steps Toward Ending Impunity for Atrocity Crimes*, 112 AM. J. INT'L L. 433, 434 (2018) (recognizing that "there is a huge gap between the actual accountability efforts undertaken, on the one hand, and the far larger number of individuals who are believed to be responsible for atrocity crimes, on the other").

these crimes. Shortly after the invasion, ICC Prosecutor Karim Khan concluded that the ICC's jurisdiction extended to the atrocities committed in Ukraine.[12] With the referral of the situation to the Office of the Prosecutor by no less than forty State Parties, Prosecutor Khan formally opened an investigation into alleged crimes against humanity, war crimes, and genocide committed in Ukraine.[13]

Yet, the opening of the ICC's investigation did not entirely resolve the debate regarding Russian accountability. Instead, scholars and the media quickly pointed out that arguably the most serious crime committed by Russia against Ukraine—the crime of aggression, or the unlawful invasion of one country by another[14]—fell outside the scope of ICC jurisdiction and thus could not be investigated or prosecuted in the ICC.[15] Accordingly, as the violence in Ukraine has progressed, calls have continued for the creation of a separate international tribunal to address Russia's crime of aggression.[16] These calls include proposals for the establishment of a hybrid tribunal—one that combines elements of international law, funding, and support with domestic laws and resources—or a court that incorporates elements of hybridity.[17] Yet, most proponents have called for the use

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12. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."*, INT'L CRIM. CT. (Feb. 28, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

13. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INT'L CRIM. CT. (Mar. 2, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states; *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Additional Referrals from Japan and North Macedonia: Contact Portal Launched for Provision of Information,* INT'L CRIM. CT. (Mar. 11, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-additional-referrals-japan-and; Rome Statute *supra* note 4, at arts. 14, 15(3) (Because State parties to the Rome Statute referred the Situation in Ukraine to the ICC, Prosecutor Khan was relieved of his duty pursuant to the Rome Statute to seek authorization for the investigation from the Court's Pre-Trial Chamber).

14. *See* Rome Statute, *supra* note 4, at art. 8 *bis*.

15. *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have been closely following recent developments in and around Ukraine with increasing concern."*, INT'L CRIM. CT. (Feb. 25, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following ("Given that neither Ukraine nor the Russian Federation are State Parties to the Rome Statute, the Court cannot exercise jurisdiction over this alleged crime in this situation."); *see also* Kristen E. Eichensehr, *International Institutions Mobilize to Impose Accountability on Russia and Individual Perpetrators of War Crimes and Other Abuses*, 116 AM. J. INT'L L. 631, 636 (2022).

16. *See, e.g.*, Press Release: Ukraine: MEPs Want a Special International Tribunal for Crimes of Aggression, EUROPEAN PARLIAMENT (May 19, 2022), https://www.europarl.europa.eu/news/en/press-room/20220517IPR29931/ukraine-meps-want-a-special-international-tribunal-for-crimes-of-aggression; Isobel Koshiw, *Ukraine Calls for International Tribunal to Bring Putin to Justice More Quickly*, THE GUARDIAN (Jul. 21, 2022), https://www.theguardian.com/world/2022/jul/21/ukraine-calls-for-international-tribunal-to-bring-putin-to-justice-more-quickly.

17. *E.g.* Kevin Jon Heller, *The Best Option: An Extraordinary Ukrainian Chamber for Aggression*, OPINIOJURIS (Mar.16, 2022), https://opiniojuris.org/2022/03/16/the-best-option-an-extraordinary-ukrainian-chamber-for-aggression/ (proposing a hybrid tribunal "established as part of

of a hybrid tribunal to *supplement* the ICC's investigation; namely, to investigate and prosecute the crime of aggression that falls outside the ICC's jurisdiction in the Situation in Ukraine.[18] In comparison, there has been relatively little discussion about utilizing a hybrid tribunal to *complement* the ICC's jurisdiction by coordinating prosecutions of alleged crimes that fall both within the ICC's jurisdiction and within the hybrid court's jurisdiction.[19] Moreover, there are currently no agreements governing how a special tribunal would work in conjunction with the ICC. This creates a potential situation in which actors of one mechanism could potentially undermine the other, or "trip over one another in their search for evidence and witnesses."[20]

The idea of a jurisdiction-sharing relationship between the ICC and hybrid courts is innovative and growing in prominence. To date, there has been only one hybrid court to share jurisdiction with the ICC–the Special Criminal Court for the Central African Republic[21]–and the details of that relationship remain largely elusive.[22] Yet, a more comprehensive approach to international criminal justice

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the Ukrainian judicial system with the support of the Council of Europe," which he has tentatively named the "Extraordinary Ukrainian Chamber for Aggression"); Statement: *The Elders call for a criminal tribunal to investigate alleged crime of aggression in Ukraine*, THE ELDERS (Mar. 5, 2022), https://theelders.org/news/elders-call-criminal-tribunal-investigate-alleged-crime-aggression-ukraine; Larry D. Johnson, *United Nations response Options to Russia's Aggression: Opportunities and Rabbit Holes*, JUST SECURITY (Mar. 1, 2022), https://www.justsecurity.org/80395/united-nations-response-options-to-russias-aggression-opportunities-and-rabbit-holes/; GLOBAL ACCOUNTABILITY NETWORK, CONSIDERATIONS FOR THE SETTING UP OF THE SPECIAL TRIBUNAL FOR UKRAINE ON THE CRIME OF AGGRESSION 3-8 (2022), https://2022.uba.ua/wp-content/uploads/2022/09/the-special-tribunal-for-ukraine-on-the-crime-of-aggression.pdf.

18. GLOBAL ACCOUNTABILITY NETWORK, *supra* note 17, at 16–17 (recognizing that "it seems widely accepted that [a hybrid tribunal designed to prosecute ongoing atrocities in Ukraine] should only have jurisdiction over the crime of aggression to limit the tribunal's focus and eliminate redundancy with the ICC's efforts").

19. One notable exception to this is a 2022 blog post authored by former US Ambassador-at-Large for War Crimes Issues David Scheffer, which explores a potential relationship between the ICC and the proposed Ukrainian special tribunal. *See* David Scheffer, *Forging a Cooperative Relationship Between Int'l Crim. Court and a Special Tribunal for Russian Aggression Against Ukraine*, JUST SECURITY (Oct. 25, 2022), https://www.justsecurity.org/83757/forging-a-cooperative-relationship-between-intl-crim-court-and-a-special-tribunal-for-russian-aggression-against-ukraine/?utm_source=rss&utm_medium=rss&utm_campaign=forging-a-cooperative-relationship-between-intl-crim-court-and-a-special-tribunal-for-russian-aggression-against-ukraine.

20. Dan Bilefsky & Matthew Mpoke Bigg, *The Many Parties Involved Complicate War Crimes Investigations*, N.Y. TIMES (July 15, 2022), https://www.nytimes.com/2022/07/15/world/the-many-parties-involved-complicate-war-crimes-investigations.html?searchResultPosition=15.

21. *See, e.g.* Labuda, *Institutional Design & Non-Complementarity*, *supra* note 10, at 2 (noting that the SCC-ICC relationship is the ICC's first jurisdiction-sharing relationship); Mark Kersten, *Why Central African Republic's Hybrid Tribunal Could be a Game-Changer*, JUST. IN CONFLICT (May 14, 2015), https://justiceinconflict.org/2015/05/14/why-central-african-republics-hybrid-tribunal-could-be-a-game-changer/ (recognizing the SCC as the first entity to attempt to "complement an ICC intervention rather than present an alternative to the Court").

22. *See* Julian Elderfield, *The Rise and Rise of the Special Criminal Court (Part I)*, OPINIOJURIS (Apr. 7, 2021), http://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-

is particularly important given the jurisdictional and resource limitations placed on the ICC, as well as its controversial record of achieving only five convictions on core crimes in the twenty years it has been operational.[23]

Given the current disjointed nature of international criminal justice, there exists a growing accountability gap whereby many perpetrators of past and ongoing atrocity crimes remain free with impunity.[24] Moreover, in circumstances where the ICC is exclusively exercising jurisdiction over atrocity crimes, it is largely incapable of fostering transitional justice among the victims and the post-conflict community where the crimes occurred.[25] By cultivating jurisdiction-sharing relationships between hybrid tribunals and the ICC, the international community can limit ever-expanding impunity by strategically utilizing limited resources to provide more widespread justice. Moreover, a more synergistic relationship between the ICC and hybrid tribunals can also ensure that victims receive more comprehensive justice both in terms of traditional criminal

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i/ [hereinafter *The Rise and Rise of the SCC Part I*] (recognizing the limited publicly available information about the Court); Julian Elderfield, *The Rise and Rise of the Special Criminal Court (Part II)*, OPINIOJURIS (Apr. 7, 2021), https://opiniojuris.org/2021/04/07/the-rise-and-rise-of-the-special-criminal-court-part-ii/ [hereinafter *The Rise and Rise of the SCC Part II*] (explaining that the details of the cooperation between the ICC and the Special Criminal Court for the Central African Republic are confidential).

23. Following its first trial, in 2012, the ICC convicted Thomas Lubanga Dylio, the leader of a rebel group in the Democratic Republic of the Congo, "of the war crimes of enlisting and conscripting children under the age of 15 years and using them to participate actively in hostilities." *Lubanga Case*, INT'L CRIM. CT., https://www.icc-cpi.int/drc/lubanga (last visited Sept. 29, 2022). Also, within the Situation in the Democratic Republic of the Congo, in 2014, the Court convicted Germain Katanga, a commander of a rebel group, of one count of the crime against humanity of murder as well as four counts of war crimes, and Bosco Ntganda of 18 counts of war crimes and crimes against humanity, and convicted Bosco Ntganda of 13 counts of war crimes and 5 counts of crimes against humanity. *Katanga Case*, INT'L CRIM. CT., https://www.icc-cpi.int/drc/katanga (last visited Sept. 29, 2022); *Ntaganda Case*, INT'L CRIM. CT., https://www.icc-cpi.int/drc/ntaganda (last visited Sept. 29, 2022). In 2016, the Trial Chamber convicted Ahmad Al Faqui Al Mahdi of committing the war crime of "intentionally directing attacks against religious and historic buildings" in Mali. *Al Mahdi Case,* INT'L CRIM. CT., https://www.icc-cpi.int/mali/al-mahdi (last visited Sept. 29, 2022). And, in 2021, the Trial Chamber convicted Dominic Ongwen of 61 counts of crimes against humanity and war crimes committed in northern Uganda in relation to his role as a commander of the Lord's Resistance Army. *Ongwen Case,* INT'L CRIM. CT., https://www.icc-cpi.int/uganda/ongwen (last visited Sept. 29, 2022).

While the Trial Chamber convicted Jean-Pierre Bemba Gombo, the leader of a rebel group in the Democratic Republic of the Congo, on charges of war crimes and crimes against humanity, including those related to sexual offenses, the ICC Appeals Chamber later acquitted Bemba of all charges. *Bemba Case*, INT'L CRIM. CT., https://www.icc-cpi.int/car/bemba (last visited Sept. 29, 2022). However, the ICC later brought charges and convicted Bemba Gombo and several other men of various offenses against the administration of justice related to false witness testimonies in the previous Bemba case. *Bemba et al. Case*, INT'L CRIM. CT., https://www.icc-cpi.int/car/Bemba-et-al (last visited Sept. 29, 2022).

24. Meron, *supra* note 11, at 433–35 (explaining this growing accountability gap and the reasons therefor).

25. *See* David Cohen, *"Hybrid" Justice in East Timor, Sierra Leone, and Cambodia: "Lessons Learned" and Prospects for the Future*, 43 STAN. J. INT'L L. 1, 6 (2007) (recognizing the issues purely international tribunals encounter with regard to involving local victims and communities in judicial proceedings).

accountability achieved through criminal trials and through transitional justice initiatives that hybrid tribunals can enact.

Yet, despite the growing need to streamline judicial mechanisms within the field of international criminal justice, there is minimal publicly available information on how jurisdiction-sharing relationships between the ICC and hybrid courts can and should practically work. Indeed, as scholar Patryk Labuda has recognized, there exists "little scholarship on institutional design . . . and jurisdictional design," and specifically on designing jurisdictional relationships between different international criminal justice systems.[26] Accordingly, this paper seeks to contribute to this field by first recognizing why streamlining within the field of international criminal law is both necessary and desirable, and then by providing a framework for how jurisdiction-sharing relationships between the ICC and hybrid tribunals should be designed and developed to achieve comprehensive justice for victims of atrocity crimes.

Part II of this Article introduces the ICC and hybrid tribunals and specifically identifies the jurisdictional reach of and limitations on each mechanism. Part III then analyzes the one instance in which the ICC has shared jurisdiction and cooperated with a hybrid court to date: the Special Criminal Court for the Central African Republic. Specifically, this part explores the background and history of the SCC as well as its structure and specific jurisdictional relationship with the ICC.

Part IV then advocates for additional jurisdiction-sharing relationships between the ICC and future hybrid tribunals by highlighting their necessity to achieve three goals: achieving more comprehensive criminal accountability for atrocity crimes; furthering transitional justice initiatives in post-conflict States; and improving efficiency and legitimacy for the courts themselves. Part V then identifies a framework pursuant to which future jurisdiction-sharing relationships between the ICC and hybrid tribunals may be realized.

II. OVERVIEW OF THE ICC & HYBRID TRIBUNALS

A. The International Criminal Court

At the time of its creation in 2002, the ICC became the world's first and only permanent international criminal court, designed to address the "most serious crimes of international concern."[27] Established and governed by the Rome Statute, the ICC currently has 123 States Parties.[28] And while the ICC has certainly achieved many accomplishments after twenty years of operation, it has

26. Labuda, *Institutional Design and Non-Complementarity*, *supra* note 10, at 2.

27. *See* Rome Statute, *supra* note 4, at art. 1.

28. *The States Parties to the Rome Statute*, INT'L CRIM. CT., https://asp.icc-cpi.int/states-parties (last visited Sept. 21, 2022).

secured only five convictions for core crimes recognized under the Rome Statute.[29]

A primary reason for this failure to achieve more widespread accountability is the strict limitations placed on the ICC's jurisdictional reach. These limitations are intentional; the drafters of the Rome Statute envisioned that the ICC would function as a "court of last resort," to be utilized only when a nation's domestic criminal courts are unwilling or unable to prosecute crimes of international concern that fall within their jurisdiction.[30] Accordingly, the ICC's subject matter jurisdiction is limited to the core crimes of international law, namely genocide, crimes against humanity, war crimes, and the crime of aggression.[31] The Court's jurisdiction is also limited temporally—to crimes committed after July 1, 2002, the date on which the Rome Statute entered into force[32]—and territorially—to crimes committed on the territory of or by a national of a State Party, except when referred to the Court by the United Nations Security Council.[33]

Moreover, the ICC may not hear all cases over which it has jurisdiction; instead, a case must first be deemed admissible. To be admissible, a case must, by virtue of its scale, nature, and impact, be "of sufficient gravity to justify" ICC action.[34] Moreover, the case must satisfy what is referred to as the "complementarity" principle,[35] in that the crimes within the case have not and

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29. *See supra* note 22; *see also* Ford, *A Hierarchy of the Goals of International Criminal Courts, supra* note 2, at 182–87 (explaining that the successes of an international criminal tribunal should not be measured solely on the number of trials and convictions it secures (its "outputs") and should instead be reflected by its "outcomes," which Ford defines as "the impact of [the court's] work on the world").

30. Sang-Hyun Song, *The Role of the International Criminal Court in Ending Impunity and Establishing the Rule of Law*, U.N. Chron. (Dec. 2012), https://www.un.org/en/chronicle/article/role-international-criminal-court-ending-impunity-and-establishing-rule-law.

31. Rome Statute, *supra* note 4, at art. 5.

32. For States that joined the Rome Statute after July 1, 2002, the Court generally will only have jurisdiction over crimes that were committed on those States' territories or by their nationals and that occurred after the Rome Statute entered into force for that State. *Id.* at arts. 11, ¶ 2, 12. With regard to the crime of aggression, the ICC only has jurisdiction over crimes committed one year after thirty States Parties' ratification or acceptance of amendments to the Rome Statute pertaining to the crime of aggression. *Id*. at art. 15 *bis*, ¶ 2.

33. *Id.* at art. 12. When the Security Council chooses to refer a matter to the ICC, the Court is relieved of its territorial jurisdictional limitations. Dapo Akande, *The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC*, 10 J. INT'L CRIM. JUST. 299, 305 (2012).

34. Rome Statute, *supra* note 4, at art. 17 ¶ 1 (d); *see also* Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT'L L.J. 1400, 1449–56 (2008) (identifying factors that the Court should rely upon in determining whether a case meets the gravity requirement).

35. While the term "complementarity" itself is not included in the Rome Statute, scholars, practitioners, and the ICC itself recognize that this term embodies the principle of States Parties' jurisdictional primacy over the ICC. *See, e.g.*, Int'l Crim. Ct. [ICC], Assembly of States Parties Res. ICC-ASP/20/Res.5, *Strengthening the International Criminal Court and the Assembly of States Parties at* 16-17 (Dec. 9, 2021), https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-Res5-AV-ENG.pdf.

will not be investigated by a State which has jurisdiction over it, due to the State's genuine unwillingness or inability to prosecute.[36]

Further, the Rome Statute delineates only three circumstances in which the Court may exercise its jurisdiction over admissible cases: (1) when a State Party refers the situation to the ICC Prosecutor; (2) when the United Nations Security Council refers the situation to the Prosecutor; or (3) when the Prosecutor initiates an investigation into a situation on his or her *propio motu* authority, which requires subsequent approval by the ICC Pre-Trial Chamber.[37]

These various limitations on the Court's power—especially the principle of complementarity—affirms the ICC's label as a "court of last resort," by prioritizing States' right to prosecute crimes within their jurisdiction and rendering the ICC's jurisdiction secondary to national jurisdictions.[38] Notably, this ensures that the ICC is "deferential and non-invasive to its member States, especially those with highly sophisticated and international justice conscious domestic judiciaries."[39]

Although these limitations on the ICC's reach were intended by the drafters of the Rome Statute, the ICC has also encountered other, less intentional obstacles in securing convictions for the world's most serious crimes. For instance, the ICC has regularly operated with stringent budgetary restrictions and limited resources.[40] Further, the ICC has also repeatedly had to defend itself from campaigns against powerful States—including the United States and Israel—who refuse to recognize the Court's authority to investigate and prosecute their nationals.[41]

In light of these jurisdictional and other limitations, it is much more understandable why the ICC has achieved only a handful of convictions in its twenty years of operations.[42] Yet, its operation alongside another type of judicial mechanism—hybrid tribunals—offers a number of options by which to expand its reach and successes.

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36. Rome Statute, *supra* note 4, at art. 17(1)(a)-(b).

37. *Id.* at arts. 13, 15.

38. Linda E. Carter, *The Future of the International Criminal Court: Complementarity as a Strength or Weakness*, 12 WASH. U. GLOBAL STUD. L. REV. 451, 455 (2013).

39. Christopher "Kip" Hale & Maanaska K. Reddy, *A Meeting of the Minds in Rome: Ending the Circular Conundrum of the U.S.-ICC Relationship*, 12 WASH. U. GLOBAL STUD. L. REV. 581, 599 (2013).

40. *See* Nirej Sekhon, *Complementarity And Post-Coloniality*, 27 EMORY INT'L L. REV. 799, 808 (2013) (noting that "the ICC's limited budget makes it impossible for it to do much more than process a relatively limited set of cases").

41. *See generally*, Sara L. Ochs, *Propaganda Warfare on the International Criminal Court*, 42 MICH. J. INT'L L. 581 (2021) (explaining the United States' and Israel's use of "propaganda warfare" against the ICC).

42. *See also* Ford, *A Hierarchy of the Goals of International Criminal Courts, supra* note 2, at 182–86 (delineating the reasons for the relatively few trials heard and completed by international criminal courts).

B. Hybrid Tribunals

The definition of a "hybrid" court or tribunal remains amorphous, likely due to the broad spectrum of forms such entities embody.[43] This Article utilizes the terms "hybrid tribunal" and "hybrid court" interchangeably to broadly refer to international criminal justice mechanisms that blend elements of international and domestic law, such as through the composition of their judiciary, the scope of substantive and procedural law applied, and their funding and resources.[44]

The hybrid model of justice was designed to limit the impunity gap for international crimes by providing justice for internationally recognized crimes when domestic judicial structures lack the capacity to do so.[45] Such a model is particularly necessary in post-conflict communities, where extensive violence may have decimated or heavily damaged local justice institutions.[46] The concept of hybrid courts came to fruition at the end of the twentieth century as an alternative to the two purely international ad hoc courts: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).[47] The hybrid model was intended to cure these courts' shortcomings—namely their high costs, lengthy proceedings, and lack of domestic involvement and legitimacy.[48] By combining local and international elements, such as by locating the court within the post-conflict affected State, creating mixed judicial benches of local and international judges, and applying both domestic and international laws, the original hybrid courts intended to

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43. *See, e.g.* Kirsten Ainley & Mark Kersten, DAKAR GUIDELINES ON THE ESTABLISHMENT OF HYBRID COURTS, 6 (2019) ("There is no consensus on what makes a hybrid tribunal 'hybrid.'"); Harry Hobbs, *Hybrid Tribunals and the Composition of the Court: In Search of Sociological Legitimacy*, 16 CHI. J. INT'L L. 482, 490 (2016) (admitting there is "'no comprehensive definition' of a hybrid tribunal").

44. *See* UN Office of the High Commissioner for Human Rights. Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts, 2008, 1 available at https://www.ohchr.org/Documents/Publications/HybridCourts.pdf (defining hybrid courts as "courts of mixed composition and jurisdiction, encompassing both national and international aspects"); de Wet, *supra* note 10, at 36.

45. Stephen Rapp, *Foreword* to KIRSTEN AINLEY & MARK KERSTEN, DAKAR GUIDELINES ON THE ESTABLISHMENT OF HYBRID COURTS, v–vi (2019), http://eprints.lse.ac.uk/101134/1/Dakar_Guidelines_print_version_corr_1_.pdf.; Antonio Cassese, *The Role of Internationalized Courts and Tribunals in the Fight Against International Criminality in* INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA 5 (Cesare P.R. Romano, André Nollkaemper and Jann K. Kleffner, eds. 2004).

46. *See* Etelle R. Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, 23 ARIZ. J. INT'L & COMP. L. 347, 354, n.16 (2006) ("While it is critical for international jurists not to denigrate local courts overall, it is undeniable that following mass atrocity local judiciaries are often devastated.").

47. Robert Muharremi, *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, 76 ZEITSCHRIFT FUER AUSLAENDISCHES OEFFENTLICHES RECHT UND VOELKERRECHT 967, 969 (2016), https://www.zaoerv.de/76_2016/76_2016_4_a_967_992.pdf.

48. *Id.* at 969.

"marry the best of two worlds—the expertise of the international community with the legitimacy of local actors."[49]

With this idealized image, the hybrid model also recognized its potential to achieve goals that had previously been overlooked by other international courts. Namely, scholars recognized that the hybrid model had the potential to enact not only traditional justice by imposing individual criminal accountability on perpetrators, but that it could also obtain more comprehensive justice and rehabilitation for affected States.[50] These transitional justice capabilities include fostering capacity building for local judges and legal practitioners through on-the-ground training alongside their international counterparts, allowing victims to become directly involved in the judicial process, and spurring on-the-ground outreach to ensure the community is engaged and enjoys a sense of ownership over the tribunal's work.[51]

In practice, all of the hybrid courts created to date have been markedly different in nearly all aspects; indeed, there is no one "model" hybrid tribunal.[52] Because of this, and because there is no single set of laws governing the creation of hybrid courts, creators have immense flexibility in drafting each hybrid mechanism's governing statute, which dictates the mechanism's jurisdiction, applicable law, structure, and geographic seat, among other important structural and operational aspects.[53]

Generally, hybrid tribunals are created through two general methods: (1) pursuant to a U.N. Security Council Resolution[54] or (2) by agreement between

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49. James Cockayne, *The Fraying Shoestring: Rethinking Hybrid War Crimes Tribunals*, 28 FORDHAM INT'L L. J. 516, 616 (2004).

50. *See* Koh, *supra* note 7, at 531 (recognizing that hybrid courts could seek to achieve "international justice, transitional justice, and institution-building").

51. *See* Sara L. Ochs, *A Renewed Call for Hybrid Tribunals*, 52 N.Y.U. J. INT'L L. & POL. 351, 395–403 (2020) (discussing the various transitional justice benefits associated with hybrid tribunals); Anna Triponel & Stephen Pearson, *What Do You Think Should Happen? Public Participation in Transitional Justice*, 22 PACE INT'L L. REV. 103, 112 (2010) (recognizing hybrid tribunals as a component of the "third wave of transitional justice").

52. Elena Naughton, *Committing to Justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals* INT'L CTR. TRANSITIONAL JUSTICE 5 (2018), https://www.ictj.org/publication/committing-justice-serious-human-rights-violations-lessons-hybrid-tribunals; Lindsey Raub, *Positioning Hybrid Tribunals in International Criminal Justice*, N.Y.U. J. INT'L L. & POL. 1013, 1023 (2009) (recognizing that "no two hybrid tribunals are identical").

53. Morse H. Tan, *Finding a Forum for North Korea*, 65 SMU L. REV. 765, 806 (2012); *see* Raub, *supra* note 52, at 1017.

54. It should be noted that while certain hybrid tribunals, like the Special Tribunal for Lebanon, were created directly by U.N. Security Council Resolution, others, including the Special Panels for Serious Crimes in East Timor and the "Regulation 64" Panels in the Courts of Kosovo, were created under the authority of a U.N. transitional authority, which in turn, was established through Security Council Resolution. *See* Suhong Yang, *Can Hybrid Courts Overcome Legitimacy Challenges?: Analyzing the Extraordinary African Chambers in Senegal*, 11 GEORGE MASON INT'L L.J. 45, 52 (2020); Van Schaack, *supra* note 4, at 185.

the post-conflict nation and a regional or international body.[55] A hybrid court's means of establishment often directly affects the level of internationalization it enjoys. For instance, international elements are much more prominent in hybrid tribunals created through UN Security Council resolutions, such as the Special Tribunal for Lebanon, rather than in those created through bilateral agreements.[56] A hybrid court's internationalization is further determined by the type of law it applies, the composition of its judiciary, its location (whether it is located in the affected State or elsewhere), and its funding sources—all of which are specific to each court and codified in its governing statute.[57] These many differences among hybrid courts have led to the creation of a hybridized spectrum.[58] On one end of this spectrum lie "internationalized domestic' courts," which are placed within a State's domestic judicial system and are primarily reliant upon domestic resources, and on the other end lie international courts with domestic elements, which are primarily international in nature, with relatively minimal domestic connections.[59]

A number of hybrid courts were established between 1999 and 2001, including the Serious Crimes Panels of the District Court of Dili in East Timor, the Extraordinary Chambers in the Courts of Cambodia, the Special Court for Sierra Leone, and the "Regulation 64" Panels in the Courts of Kosovo.[60] These courts did not obtain ubiquitous success; instead, they faced challenges such as political interference and lack of resources. They also earned criticism for being too costly and too slow, and for achieving too few convictions.[61] Even so, several of these courts are highly regarded for combating impunity and enacting transitional justice initiatives in the affected States.[62]

In the wake of the ICC's establishment, many predicted that hybrid tribunals would be rendered redundant, as atrocity crime prosecutions would be conducted

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55. Examples of hybrid courts created by agreements between an affected State and the United Nations include the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia, whereas the Extraordinary African Chambers in Senegal was created pursuant to a bilateral agreement between a State and a regional organization—the African Union. Yang, *supra* note 54, at 66; Van Schaack, *supra* note 4, at 195–96.

56. Muharremi, *supra* note 47, at 988–91.

57. *See* de Wet, *supra* note 10, at 41–42 (explaining that while all hybrid tribunals "are subject to some degree of international influence, the extent to which this is the case depends on the circumstances of each tribunal").

58. Muharremi, *supra* note 47, at 989.

59. *See id*.; *see also* Elizabeth Nielsen, *Hybrid International Criminal Tribunals: Political Interference and Judicial Independence*, 15 UCLA J. INT'L L. & FOREIGN AFF. 289, 325 (2010) (recognizing the two ends of the hybrid spectrum as a "domestic system with limited international features" and "a mainly international tribunal with a few national elements").

60. Higonnet, *supra* note 46, at 353.

61. *See generally*, Padraig McAuliffe, *Hybrid Tribunals at Ten: How International Criminal Justice's Golden Child Became an Orphan*, 7 J. INT'L L. & INT'L REL. 1 (2011) (explaining how the hybrid model fell short of its idealized expectations).

62. *See generally*, Ochs, *A Renewed Call for Hybrid Tribunals*, *supra* note 51.

either before the ICC or by courts at the domestic level.[63] Yet, this assumption soon proved to be laced with naivety, in large part because of the ICC's strict jurisdictional parameters and stringent resources that constrained its ability to investigate and prosecute atrocity crimes.[64] The ICC's limited number of successful convictions led Stephen Rapp, former international prosecutor and US Ambassador-at-Large for War Crimes Issues, to astutely recognize:

> The choices cannot be only a single court in The Hague that is necessarily expensive, distant and easy for local leaders to demoni[z]e, and national systems that are often challenged to overcome legacies of dysfunction that led to impunity before the mass violence and then were further disabled by it.[65]

Indeed, hybrid courts did not end with the creation of the ICC. The hybrid model temporarily fell out of favor with the international community in light of the above referenced criticisms in the late 1990s and early 2000s, leading to a universal decision not to create any hybrid tribunals between 2007 and 2014.[66] Yet, the past decade has marked a return to the hybrid model.[67] Since the ICC's establishment in 2002, hybrid courts have been established to prosecute atrocity crimes committed in the Central African Republic, Kosovo, and Chad,[68] and have recently been proposed to address crimes committed in South Sudan, the Democratic Republic of the Congo, Syria, Sri Lanka, and Myanmar, as well as the bombing of Malaysian Air MH 17 over Ukraine.[69]

Until recently, however, hybrid tribunals were exclusively used to address crimes or situations that fell outside the scope of the ICC's jurisdiction, namely in terms of temporality and territoriality.[70] For instance, notable hybrid tribunals such as the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone were created to adjudicate crimes committed prior to 2002 when the Rome Statute entered into force.[71] Consequently, the crimes falling within these hybrid courts' mandates were beyond the ICC's temporal

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63. Rapp, *supra* note 45, at iv.

64. *Id*.

65. *Id*.

66. Hobbs, *supra* note 43, at 485 (referring to this time as a "period of dormancy" for hybrid courts).

67. Ainley & Kersten, *supra* note 43, at 3.

68. *Id.* at 1.

69. *Id.*; Van Schaack, *supra* note 4, at 170.

70. *See* de Wet, *supra* note 10, at 43 (recognizing that as of her article's publication in 2008, no ad hoc tribunal—whether hybrid or fully international—overlapped jurisdictionally with the ICC).

71. Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), art. 1, available at https://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf (explaining that the ECCC was created to adjudicate crimes committed during the reign of the Khmer Rouge between April 17, 1975, and January 6, 1979); Statute of the Special Court for Sierra Leone, art. 1(1), available at http://www.rscsl.org/Documents/scsl-statute.pdf (explaining that the SCSL's jurisdiction extended to crimes committed as early as November 30, 1996).

jurisdiction.[72] For other hybrid courts, such as the Special Tribunal for Lebanon and the Kosovo Specialist Chambers, the crimes within their mandates fall outside the ICC's territorial jurisdiction, as neither Kosovo nor Lebanon are States Parties to the Rome Statute.[73]

Yet, this segregation of ICC and hybrid court jurisdiction is no longer absolute. As hybrid tribunals continue to be established for recent crimes committed on the territories of States Parties to the Rome Statute, there is much more opportunity for overlap. In fact, this jurisdictional overlap occurred for the first time in 2015 with the creation of the Special Criminal Court in the Central African Republic.[74]

III. STREAMLINING IN ACTION: THE SPECIAL CRIMINAL COURT IN THE CENTRAL AFRICAN REPUBLIC

To date, one hybrid court has actively shared jurisdiction with the ICC: The Special Criminal Court (SCC) in the Central African Republic (CAR).[75] The CAR's history has been marked by violence, and the country has enjoyed relatively few years of peace since it gained independence from France in 1960.[76] Despite its extensive conflicts, until relatively recently, there was a general lack of accountability or justice in the CAR for any parties' crimes, which has, in turn, fueled further violence.[77]

In 2002, rebel forces attempted to overthrow the CAR Government.[78] In response, the Government secured support from Libyan forces and the Movement

72. *See* Rome Statute, *supra* note 4, at art. 11.

73. de Wet, *supra* note 10, at 43 (noting that Lebanon is not a party to the ICC); Dafina Buçaj, *Acceptance of International Criminal Justice through Fragmented Domestication: The Case of Kosovo,* INT'L NUREMBERG PRINCIPLES ACADEMY, 6 (2016), https://www.nurembergacademy.org/fileadmin/media/pdf/acceptance/Kosovo.pdf (noting that "Kosovo is not a signatory member of the Rome Statute"); *see also The States Parties to the Rome Statute*, *supra* note 28.

74. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 2. For further discussion of the jurisdiction sharing between the ICC and the Special Criminal Court, *see infra* Part III.

75. *See, e.g.* Labuda, *Institutional Design & Non-Complementarity, supra* note 10, at 2 (noting that the SCC-ICC relationship is the first jurisdiction-sharing relationship); Kersten, *supra* note 21 (recognizing the SCC as the first entity to attempt to "complement an ICC intervention rather than present an alternative to the Court").

76. Godfrey M. Musila, *The Special Criminal Court and Other Options of Accountability in the Central African Republic: Legal and Policy Recommendations*, INT'L NUREMBERG PRINCIPLES ACADEMY 5 (2016), https://www.nurembergacademy.org/fileadmin/media/pdf/publications/car_publication.pdf.

77. *Central African Republic: First Trial at the Special Criminal Court*, HUM. RTS. WATCH (Apr. 12, 2022), https://www.hrw.org/news/2022/04/12/central-african-republic-first-trial-special-criminal-court#whatisthe.

78. *Central African Republic I*, INT'L CRIM. CT. PROJECT (Feb. 2, 2021), https://www.aba-icc.org/situations/central-african-republic/.

for the Liberation of the Congo to fight against the rebels, which resulted in the murder, torture, and rape of civilians and widespread destruction of civilian villages.[79] In December 2004, the CAR—which had previously ratified the Rome Statute and become a State Party to the ICC—referred the situation to the ICC's Office of the Prosecutor, thereby prompting the Prosecutor to open a preliminary investigation into crimes committed on CAR territory since July 1, 2002.[80] Given the CAR's State Party status and the fact that the crimes all occurred on CAR territory, the Prosecutor determined that the ICC held jurisdiction over the situation and formally opened an investigation into these crimes in 2007.[81]

Ultimately, the Prosecutor's investigation produced only one primary case against Jean-Pierre Bemba Gombo, the president and commander-in-chief of the Movement for the Liberation of the Congo.[82] Following a lengthy trial, ICC Trial Chamber III convicted Mr. Bemba of two counts of crimes against humanity for murder and rape and three counts of war crimes for murder, rape, and pillaging,[83] and subsequently sentenced him to 18 years imprisonment.[84] However, in a huge blow to the Court, the ICC Appeal Chamber ultimately reversed this judgment and sentence upon finding that the Trial Chamber erroneously convicted Mr. Bemba for acts outside of the confirmed charges against him and erred in concluding that Mr. Bemba failed to take all necessary and reasonable measures to prevent and punish crimes committed by his subordinates.[85]

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79. *Id.*

80. *Prosecutor Receives Referral Concerning Central African Republic,* INT'L CRIM. CT. (Jan. 7, 2005), https://www.icc-cpi.int/news/icc-prosecutor-receives-referral-concerning-central-african-republic.

81. *Prosecutor Opens Investigation in the Central African Republic* INT'L CRIM. CT. (May 22, 2007), https://www.icc-cpi.int/news/prosecutor-opens-investigation-central-african-republic.

82. *Central African Republic*, INT'L CRIM. CT., https://www.icc-cpi.int/car (last visited Sept. 20, 2022); *Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo*, INT'L CRIM. CT., https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/BembaEng.pdf (last updated March 2019). The Office of the Prosecutor also initiated a second case against Bemba and four other defendants for various alleged offenses against the administration of justice and related to providing false witness testimony before the ICC. *Case Information Sheet: The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, INT'L CRIM. CT., https://www.icc-cpi.int/sites/default/files/CaseInformationSheets/Bemba-et-alEng.pdf (last updated Sept. 2018).

83. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, ¶ 752 (Mar. 21. 2016), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_02238.PDF.

84. Prosecutor v. Bemba Gombo, ICC-01/05-01/08, Decision on Sentence Pursuant to Article 76 of the Statute, ¶ 97 (June 21, 2016) https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2016_04476.PDF.

85. *See generally*, Prosecutor v. Bemba Gombo, ICC-01/05-01/08 A, Judgment on the Appeal of Mr. Jean-Pierre Bemba Gombo Against Trial Chamber III's "Judgment Pursuant to Article 74 of the Statute" (June 8, 2018), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2018_02984.PDF; *ICC Appeals Chamber Acquits Mr Bemba from Charges of War Crimes and Crimes Against Humanity*, INT'L CRIM. CT. (June 8, 2018), https://www.icc-cpi.int/news/icc-appeals-chamber-acquits-mr-bemba-charges-war-crimes-and-crimes-against-humanity. Following the appeal judgment and the closure of the second trial focused

In 2012, within the CAR, a coalition of primarily Muslim groups known as the Seleka launched an offensive against the CAR government.[86] Shortly thereafter, coalitions of Christian fighters, known as the anti-balaka, responded by engaging in revenge attacks against Seleka fighters.[87] In subsequent years, the conflict has "mutated into one between the largely Christian farmers and Muslim herders and nomads in the countryside and villages."[88] This long-running conflict has resulted in the deaths of thousands and the displacement of more than 740,000 refugees,[89] and has left almost 75% of the CAR population in poverty.[90]

This violence prompted the CAR's transitional government to make a second referral to the ICC's Office of the Prosecutor in May 2014.[91] The ICC Prosecutor once again opened an investigation into the crimes committed in the CAR, this time focusing on crimes committed since 2012.[92] The ICC Prosecutor has made much more progress in this situation than in the first CAR situation; to date, two trials against three defendants (Alfred Yekatom, Patrice-Edouard Ngaïssona, and Mahamat Said Abdel Kani) are currently underway on charges of war crimes and crimes against humanity.[93]

The ICC is not the only entity that has sought to achieve justice for crimes committed in the CAR since 2012. First, domestic courts within the CAR have handled several cases against individuals involved in the 2012 violence.[94] Second, and more relevant to this article, the CAR—in cooperation with the international community—has created a hybrid tribunal to specifically address these crimes.

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on offenses against the administration of justice, the CAR I Situation has remained essentially "dormant." *Central African Republic: First Trial at the Special Criminal Court*, *supra* note 77.

86. *Instability in the Central African Republic*, CTR. FOR PREVENTATIVE ACTION, https://www.cfr.org/global-conflict-tracker/conflict/violence-central-african-republic (last visited Aug. 10, 2023).

87. *Id*.

88. Musila, *supra* note 76, at 6.

89. *Operational Portal: Regional Response – Central African Crisis*, U.N.H.C.R., https://data.unhcr.org/fr/situations/car (last visited Sept. 30, 2023) (noting that as of September 30, 2023, there are 747,792 refugees and asylum seekers from the CAR, and on top of that, 488,866 people are internally displaced).

90. *Instability in the Central African Republic*, *supra* note 86.

91. Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on *Opening a Second Investigation in the Central African Republic*, INT'L CRIM. CT. (Sept. 24, 2014), https://www.icc-cpi.int/news/statement-prosecutor-international-criminal-court-fatou-bensouda-opening-second-investigation.

92. *Id*.

93. *See Central African Republic II*, INT'L CRIM. CT., https://www.icc-cpi.int/carII (last visited Sept. 20, 2022).

94. *See* Robert Kosho Ndiyun, *The Justice Versus Amnesty Approach to Resolving the Protracted Conflict in the Central African Republic*, 7 LIBERAL ARTS & SOC. SCIS. INT'L J. 58, 70 (2023), https://www.ideapublishers.org/index.php/lassij/article/view/888/381.

A. Creation & Structure

In April 2014, UN Security Council Resolution 2149 officially established the UN Multidimensional Integrated Stabilization Mission in the Central African Republic (MINUSCA), a peacekeeping mission designed to restore peace and stability to the CAR and to bring perpetrators within the country to justice.[95] Shortly thereafter, MINUSCA and the CAR's transitional government signed a Memorandum of Understanding,[96] agreeing to establish a special jurisdiction under CAR domestic legislation to bring these perpetrators to justice.[97] Then, in April 2015, the Central African Transitional Parliament adopted the Statute establishing the Special Criminal Court (SCC Statute) into domestic law.[98]

The SCC Statute grants the Court jurisdiction to investigate, prosecute, and try "grave violations of human rights and of international humanitarian law perpetrated since January 1, 2003," that are recognized under the CAR domestic criminal code and the nation's international obligations.[99] Because the CAR is a State Party to the Rome Statute, which it has adopted into its domestic law, the SCC's jurisdiction extends to crimes of genocide, crimes against humanity, and war crimes.[100] The SCC Statute further dictates that the Court be seated in Bangui, the capital of the CAR,[101] and operate pursuant to a five-year mandate which may be renewed once, meaning the SCC may only be operational for a maximum of ten years.[102] While the judicial chambers of the SCC include international judges to "safeguard the objective conduct of proceedings," these judges are in the minority, with the majority of judges hailing from the CAR.[103] Moreover, whereas the SCC's Special Prosecutor must be international,[104] the

95. *See generally*, S. C. Res. 2149 (Apr. 10, 2014), https://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=S/RES/2149%20(2014)&Lang=E; *see also* Konstantinos D. Magliveras, *The Special Criminal Court of the Central African Republic*, 32 INT'L ENFORCEMENT L. REP. 69, 70 (2016).

96. Memorandum de Entente [Memorandum of Understanding] (Aug. 7, 2014), available in French only at https://www.fidh.org/IMG/pdf/mou_minusca_-_rca_concernant_la_cps.pdf.

97. Magliveras, *supra* note 95, at 70.

98. *Id.* Shortly thereafter, the CAR Constitutional Court upheld the legality of the law incorporating the SCC Statute. Patryk I. Labuda, *The Special Criminal Court in the Central African Republic: Failure or Vindication of Complementarity?* 15 J. INT'L CRIM. JUST. 175, 177 (2017).

99. Magliveras, *supra* note 95, at 70.

100. *Id.*

101. Loi Organique No. 15.003 Portant Creation, Organisation et Fonctionnement de la Cour Penale Speciale, art. 2 (June 3, 2015), https://www.fidh.org/IMG/pdf/loi_organique_portant_cre_ation_organisation_et_fonctionnement_de_la_cps.pdf [hereinafter SCC Statute].

102. SCC Statute, *supra* note 101, at art. 70; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

103. Magliveras, *supra* note 95, at 71.

104. SCC Statute, *supra* note 101, at art. 18; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

President of the Court must be a national from the CAR.[105] The SCC is funded by the international community; specifically, from voluntary donations from States.[106]

B. Relationship with the ICC & Operations to Date

The general framework of the SCC and ICC's jurisdiction-sharing relationship is outlined in the SCC Statute. Article 37 provides as follows:

> When, in application of the Rome Treaty of the International Criminal Court or special agreements binding the Central African State to this international jurisdiction, it is established that the Prosecutor of the International Criminal Court has seized a case which is concurrently under the jurisdiction of the International Criminal Court and the Special Criminal Court, the second relinquishes jurisdiction in favor of the first.[107]

As some scholars have recognized, this method of jurisdiction-sharing essentially turns the ICC's complementarity principle "on its head," giving the ICC jurisdictional primacy over cases that fall within the jurisdiction of both the ICC and the SCC, while relegating the SCC—which is in many aspects a domestic court—to secondary jurisdiction.[108]

This upside-down approach to complementarity has created concern regarding the legality of the SCC's jurisdictional provisions. As Patryk Labuda has recognized, Article 37 opens up the SCC Statute—along with pending ICC cases against defendants from the CAR—to jurisdictional challenges.[109] Indeed, counsel for at least one defendant facing charges before the ICC, Alfred Yekatom, has already challenged the ICC's jurisdiction on the grounds that under the Rome Statute's complementarity principle, the SCC must be given the opportunity to adjudicate his case.[110] While the Trial Chamber rejected this challenge,[111] which the Appeals Chamber affirmed,[112] the reasoning behind these decisions does not

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105. SCC Statute, *supra* note 101, at art. 6; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

106. Magliveras, *supra* note 95, at 71; Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22.

107. SCC Statute, *supra* note 101, at art. 37 (translation taken from Situation in the Central African Republic II, ICC-01/14-01/18, Yekatom Defence's Admissibility Challenge—Complementarity, 3 (Mar. 17, 2020), https://www.icc-cpi.int/court-record/icc-01/14-01/18-456 [hereinafter Yekatom Defence's Admissibility Challenge]); *see also* Magliveras, *supra* note 95, at 71 (describing article 37 as meaning that "when the ICC Prosecutor investigates a case for which the ICC and the SCC have concurrent jurisdiction, the latter shall decline jurisdiction in favor of the former").

108. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 12.

109. *Id.*

110. *See generally*, Yekatom Defence's Admissibility Challenge, *supra* note 107.

111. *See generally*,Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona, ICC-01/14-01/18, Decision on the Yekatom Defence's Admissibility Challenge, (Apr. 28, 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2020_01715.PDF.

112. *See generally*, Prosecutor v. Alfred Yekatom and Patrice-Edouard Ngaissona, Case No. ICC-01/14-01/18 OA, Judgment on Mr. Yekatom's appeal against Trial Chamber V's Decision on the

specifically address the seemingly contradictory provisions set forth in Rome Statute Article 17 (governing complementarity and admissibility) and SCC Law Article 37. Therefore, both the SCC and the ICC apparently remain vulnerable to future jurisdictional challenges on similar grounds.

Despite this strict jurisdictional distribution, the SCC and ICC work collaboratively in other aspects of their operations. The SCC-ICC relationship is further delineated in the SCC's Rules of Procedure and Evidence, which requires the SCC's Special Prosecutor "in the interests of efficiency and judicial economy [to] consult, as much as possible, [with] the Prosecutor of the International Criminal Court regarding the implementation of his investigation and prosecution strategy."[113] While details of any specific cooperation agreements developed between the SCC and ICC are confidential,[114] it is anticipated that the ICC will pursue the prosecution of senior leadership involved in the crimes, whereas the SCC will focus more broadly on "lower-level" perpetrators, to encompass a "wider set of cases."[115] Additionally, it is publicly known that the SCC Special Prosecutor and the ICC Prosecutor have implemented a "robust, working-level cooperation and information exchange," under which the SCC Special Prosecutor may consult with the ICC Prosecutor prior to opening a preliminary investigation.[116] As Julian Elderfield, former Legal Advisor to the SCC, recognizes, this cooperation "serves the interests of both preserving judicial economy and furthering the investigation and prosecution of cases at both institutions."[117]

The cooperation between the two entities can be seen through SCC judges' visits to the ICC as part of "training and capacity-building efforts,"[118] along with ICC officials, including ICC Deputy Prosecutor Mame Mandiaye Niang, visiting the SCC.[119] Moreover, ICC Prosecutor Karim Khan has voiced his support for the cooperative relationship between the ICC and the SCC, saying:

> Justice is best delivered closest to those impacted by crimes. We should support all efforts that aim to engage with and empower communities, that allow them to participate more directly in the process of justice. The SCC is an excellent example

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Yekatom Defence's Admissibility Challenge, (Oct. 9, 2020), https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_01261.PDF.

113. Elderfield, *supra* note 22 (quoting Art. 41, Rules of Procedure and Evidence (SCC 2018)).

114. *Id.*

115. *Central African Republic: War Crimes Court's First Trial*, HUM. RTS. WATCH (Apr. 12, 2022), https://www.hrw.org/news/2022/04/12/central-african-republic-war-crimes-courts-first-trial.

116. Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

117. *Id.*

118. *Id.*

119. *Central African Republic: First Trial at the Special Criminal Court*, *supra* note 77; *ICC Prosecutor Underlines Commitment to Support the Special Criminal Court of the Central African Republic Following Address by Deputy Prosecutor, Mr Mame Mandiaye Niang at opening of First Frial in Bangui*, INT'L CRIM. CT. (May 11, 2022), https://www.icc-cpi.int/news/icc-prosecutor-underlines-commitment-support-special-criminal-court-central-african-republic [hereinafter ICC Prosecutor Underlines Commitment].

> of how this partnership between the international community, national authorities and local actors can result in tangible steps towards this goal.[120]

The operational challenges that the SCC has faced to date are well acknowledged. As with most international courts, the SCC has been forced to address issues stemming from a lack of resources.[121] The SCC's budget, which is funded primarily by voluntary contributions from international countries, with "limited support" from the CAR government, is particularly small, even relative to other under-funded hybrid tribunals.[122] In addition, the SCC has faced serious impediments to progress caused by the COVID-19 pandemic and continues to struggle with hiring and retaining international judicial staff.[123] Moreover, the CAR faced another violent conflict following its election in 2021,[124] which exacerbated security issues for the SCC and deterred witnesses and potential witnesses from cooperating.[125]

Despite these challenges, and taking into consideration that the SCC is in its early days of operations, it has already achieved significant accomplishments. The SCC opened its first trial in April 2022 against three defendants—Issa Sallet Adoum, Ousman Yaouba, and Tahir Mahamat—all of whom are members of an armed rebel group known as 3R.[126] Collectively, they are accused of killing forty-six civilians and are charged with war crimes and crimes against humanity.[127] Additionally, as of August 2021, twenty-one suspects were in pretrial detention, with eleven cases under preliminary analysis, and twelve cases referred by the prosecutor to the investigating judges.[128]

Julian Elderfield has also examined the many successes the SCC has already achieved in terms of transitional justice within the CAR.[129] He notes that the SCC provides the CAR with a functioning legal body, which has largely been missing throughout its numerous generations of violence.[130] In addition, the SCC has

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120. *Id.*

121. Elderfield, *The Rise and Rise of the SCC Part I*, *supra* note 22.

122. Elderfield, *The Rise and Rise of the SCC Part I, supra* note 22 (recognizing that the SCC's annual budget is the equivalent of only 30% of the annual budgets for the Special Court for Sierra Leone and the Extraordinary Chambers of the Courts of Cambodia, and only 20% of the annual budget for the Special Tribunal for Lebanon).

123. *Id.*

124. For an explanation of CAR's post-election violence, see Elizabeth Murray & Rachel Sullivan, *Central African Republic's Disputed Elections Exacerbate Rising Tensions*, U.S. INST. OF PEACE (Jan. 7, 2021), https://www.usip.org/publications/2021/01/central-african-republics-disputed-elections-exacerbate-rising-tensions.

125. Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

126. *Central African Republic: War Crimes Court's First Trial*, *supra* note 115.

127. Dr. Ewelina U. Ochab, *Central African Republic's Special Criminal Court to Hear its First Trial*, FORBES (Apr. 19, 2022), https://www.forbes.com/sites/ewelinaochab/2022/04/19/central-african-republics-special-criminal-court-hears-its-first-trial/?sh=556bcc393e3f.

128. *Id.*

129. Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

130. *Id.*

contributed to improving the capability of the CAR's judicial system, both in terms of strengthening judicial and government infrastructure and in providing CAR national staff with knowledge of and experience with international norms.[131] Moreover, Elderfield explains that the SCC has led an initiative to collect and publish in one anthology all of CAR's criminal law-related judgments rendered since 2003, which he recognizes as "an important step towards understanding and clarifying Central African criminal legal principles and their application in local courts, both for SCC judges who must apply them … and for future law students and legal professionals in CAR."[132] These benefits are not entirely one-sided; through its relationship with the SCC, the ICC has also enjoyed an opportunity to expand visibility in the CAR regarding its ongoing trials and to educate local CAR residents about its judicial efforts.[133] All in all, the creation and operation of the SCC to date provides hope for generating more comprehensive justice for CAR violence as well as implementing greater transitional justice for victims within the CAR.

IV. THE NEED TO STREAMLINE

As mentioned above, the SCC is innovative as the first hybrid tribunal to share jurisdiction with the ICC.[134] Previously, the ICC operated alone, with hybrid tribunals adjudicating different sets of crimes independently from the ICC.[135] Unfortunately, this level of disconnect has not been without consequences. The increasingly disjointed nature of international criminal justice has been a barrier to holding perpetrators accountable for atrocity crimes and implementing transitional justice measures for communities recovering from conflict. In order to achieve more comprehensive justice, both with regard to the breadth of accountability and the types of justice offered to post-conflict communities, more streamlining and synergism between the ICC and hybrid courts is needed. The potential benefits of implementing effective jurisdiction-sharing relationships between hybrid courts and the ICC include greater criminal accountability for perpetrators, more comprehensive justice for victims, and greater legitimacy and efficiency for the courts themselves.

131. *Id.* (also recognizing that the international funds entering the CAR in relation to the SCC have resulted in various infrastructure improvements, including to the national morgue and central police station, as well as a prison and law library in Bangui).

132. *Id.*

133. *See* Elderfield, *The Rise and Rise of the SCC Part II*, *supra* note 22.

134. *See* Labuda, *Institutional Design and Non-Complementarity*, *supra* note 10, at 2, 10 (recognizing that in 2015, the SCC formed the first concurrent jurisdiction relationship between a hybrid court and the ICC).

135. *See* Part B, *infra*.

A. Greater Accountability

First, as discussed previously, the ICC is extremely limited in its ability to obtain comprehensive justice—both in investigating and prosecuting various atrocities throughout the world and ensuring complete justice for a single set of atrocity crimes. For instance, as the US Ambassador-at-Large for Global Criminal Justice Beth Van Schaack has recognized, "it is now clear that the ICC cannot handle all the atrocity situations ravaging our planet," especially with regard to atrocity situations occurring on territories of nations who have not joined the Rome Statute.[136] Moreover, in the atrocity situations that the ICC Prosecutor *is* able to investigate, the ICC lacks the resources to prosecute "more than a handful of senior figures involved in any conflict."[137]

This is easily demonstrated in the ICC's experiences with regard to the situation in the Democratic Republic of the Congo. Following the DRC's referral of the situation in 2004—which encompassed war crimes and crimes against humanity committed in the DRC since July 2002—the ICC Prosecutor opened an investigation into this situation.[138] Despite the widespread nature of the atrocities being committed in the DRC, which had resulted in at least 5.4 million deaths as of 2008,[139] the ICC has convicted only three defendants and issued arrest warrants for a total of seven individuals.[140]

Furthermore, the ICC is not the only judicial mechanism that is constrained in its goals of prosecuting perpetrators of mass atrocities. For instance, the Extraordinary Chambers for the Courts in Cambodia (ECCC), the hybrid tribunal created jointly by the United Nations and the Royal Government of Cambodia, was designed to investigate and prosecute the atrocities committed by the Khmer Rouge regime in the 1970s, which resulted in approximately two million deaths.[141] The ECCC formally concluded its operations in September 2022, after sixteen years of operations and the convictions of only three defendants.[142] Both the ICC and the ECCC show that judicial mechanisms acting independently can

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136. Van Schaack, *supra* note 4, at 169; Kersten, *supra* note 8, at 17 (recognizing that "the majority of the world's population resides beyond the [ICC]'s territorial jurisdiction").

137. Higonnet, *supra* note 46, at 349.

138. *Democratic Republic of the Congo*, INT'L CRIM. CT., https://www.icc-cpi.int/drc (last visited Sept. 29, 2022).

139. Joe Bavier, *Congo war-driven crisis kills 45,000 a Month: Study*, REUTERS (Jan. 22, 2008), https://www.reuters.com/article/us-congo-democratic-death-idUSL2280201220080122; *Democratic Republic of Congo*, INT'L RESCUE COMMITTEE, https://www.rescue.org/country/democratic-republic-congo (last visited Sept. 29, 2022).

140. *Democratic Republic of the Congo*, INT'L CRIM. CT., https://www.icc-cpi.int/drc (last visited Sept. 29, 2022).

141. Marija Đorđeska, *The ECCC Begins Winding Down: In Cambodia, a Hybrid Tribunal's Hybrid Legacy*, JUST SECURITY (Oct. 3, 2022), https://www.justsecurity.org/83316/eccc-winding-down-in-cambodia-hybrid-tribunals-hybrid-legacy.

142. *Id*.

often only skim the surface of providing justice for an extended period of atrocity crimes.

Thus, by combining forces when circumstances allow, hybrid courts and the ICC could utilize their resources to attain greater accountability for atrocities. The ICC, in part because of its international visibility and its refusal to recognize sovereign immunity, is well-suited to prosecute high-profile defendants, including heads of State and military leaders.[143] By tasking hybrid courts with prosecuting similar crimes committed by culpable perpetrators who do not enjoy the same "high-profile" notoriety, the ICC and the hybrid court could collectively obtain "more complete and just accountability," by ensuring that a broader range of culpable perpetrators are prosecuted.[144]

Taking this approach would also greatly improve courts' efficiency. Patryk Labuda has recognized that streamlining relations between hybrid tribunals and the ICC could "minimize a duplication of tasks" and "maximize cross-fertilization."[145] At a basic level, instead of having two independent mechanisms in two different geographical areas acquiring the same evidence through investigation and interviews, information acquired could be shared, thereby freeing up resources to engage in other investigations or to focus on prosecuting additional defendants within the same investigation. As Labuda further notes, this approach also avoids subjecting witnesses to several rounds of interviews, thereby minimizing the risk of inconsistent testimony and the re-traumatization of witnesses.[146]

B. More Comprehensive Justice

Moreover, a cohesive working relationship between the ICC and hybrid tribunals could also significantly enhance the breadth of justice rendered to victims and post-conflict communities. As mentioned above, the ICC is often unable to connect with its victims directly and, instead, is regularly viewed at the local stage as providing justice from the outside.[147]

As an international court permanently located in the Hague, far removed from where many of the crimes within its jurisdictional mandate were committed, the ICC is severely limited in its ability to provide tailored justice to victims.[148]

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143. Jennifer Trahan, *The Case for Creating a Special Tribunal to Prosecute the Crime of Aggression Against Ukraine, Part III: How Many to Prosecute, Immunities, Amnesty and More*, JUST SECURITY (Sept. 26, 2022), https://www.justsecurity.org/83238/tribunal-crime-of-aggression-part-three/ (recognizing that the distinct advantages of an international or hybrid tribunal—over a purely domestic tribunal—is that immunity does not attach at the international level).

144. *Id.*; *see also* Higonnet, *supra* note 46, at 349 (recognizing that the ICC's success "can be bolstered by establishing complementary hybrids").

145. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 3.

146. *See id.*

147. *See* Cohen, *supra* note 25, at 6; Higonnet, *supra* note 46, at 349.

148. *See* Cohen, *supra* note 25, at 6.

Aside from limited outreach programs, the ICC cannot help rebuild domestic legal systems in affected States following a conflict, train local judges and lawyers, or even provide means by which victims can actively participate in its judicial proceedings.[149] As a result, "wholly international courts," like the ICC, "have proven disconnected with local realities and [have] even be[en] considered imperialistic," by the States for whom the ICC seeks to obtain justice.[150] This imposition of justice from "the outside" deprives victims from participating in or enjoying a sense of ownership over ICC proceedings, which directly hampers the ICC's legitimacy.[151] Without this ownership, a court like the ICC is limited to achieving criminal accountability, and is effectively prevented from "promoting reconciliation, developing a culture of accountability, and creating respect for judicial institutions in a post-conflict society."[152]

As previously mentioned, one of the driving forces behind creating the hybrid model was to foster local ownership over—and legitimacy in—court proceedings, and to return criminal justice—at least in part—to the victims and the affected State.[153] Given the incorporation of local judges, lawyers, and staff in a hybrid court's operations, as well as—in many cases—the court's physical location within the affected State, the hybrid model carries significant benefits when it comes to transitional justice.[154] Specifically, unlike the ICC, hybrid tribunals have the potential to strengthen and rebuild local judicial systems, both through the physical rebuilding of infrastructure as well as capacity building of local lawyers, judges, and court staff.[155] Hybrid tribunals can also foster the rule of law within the affected State and deter future violence, and, moreover, they can help establish reconciliation and stability by providing the affected State with ownership over the justice process.[156]

It thus logically follows that in circumstances in which international crimes are exclusively investigated and prosecuted by the ICC, the affected State is often

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149. *Id.* at 5 ("Locating a tribunal outside of the country virtually ensures that, though public in principle, it will not be accessible to those who should in the first instance be able to attend.").

150. Higonnet, *supra* note 46, at 349.

151. Ainley & Kersten, *supra* note 43, at 2; Phillip Rapoza, *Hybrid Criminal Tribunals and the Concept of Ownership: Who Owns the Process?* 21 AM. U. INT'L L. REV. 525, 526 (2006) (defining one form of ownership as the "popular acceptance of a particular tribunal or its work, especially within the jurisdiction to which it relates," and further recognizing that the degree of victims' ownership "serves as an important measure of the tribunal's credibility and the extent to which it is perceived to have done justice").

152. Cohen, *supra* note 25, at 6.

153. Naomi Roht-Arriaza, *Making the State Do Justice: Transnational Prosecutions and International Support for Criminal Investigations in Post-Armed Conflict Guatemala*, 9 CHI. J. INT'L L. 79, 81 (2008); Cohen, *supra* note 25, at 6; de Wet, *supra* note 10, at 33.

154. *See generally* Higonnet, *supra* note 46 (discussing the elements of "effective justice" that can be achieved through the hybrid model).

155. *See generally* i*d.*

156. Higonnet, *supra* note 46, at 358–72; Ochs, *A Renewed Call for Hybrid Tribunals*, *supra* note 51, at 395–401.

left wanting some transitional justice initiatives. Indeed, as Etelle Higonnet has recognized, "the ICC was not designed to accomplish all the goals that can be achieved through hybrids and provides only a partial solution to impunity."[157] By combining the ICC's potential to obtain criminal accountability with the type of outreach and capacity building that can only be provided by hybrid tribunals located within affected States, victims can seek both traditional and transitional justice.

In conclusion, as ICC Deputy Prosecutor Mame Mandiaye Niang has said concerning the collaborative relationship between the ICC and the SCC in the Central African Republic, "it is this synergy and these combined actions that make the fight against impunity for crimes under international law effective and that make justice relevant to the most affected communities."[158]

C. Benefits to Courts Themselves

It is not only the victims who benefit from more collaborative relationships between the ICC and hybrid courts; there are immense benefits to the courts as well. First, such a streamlined relationship can conserve valuable resources for both mechanisms. As scholar Patrick Labuda has insightfully remarked, "at a basic level, effective coordination and conflict resolution mechanisms can prevent wasteful practices, free up money, and channel resources to areas which receive less attention."[159] In a field routinely plagued by budgetary and resource constraints, an efficient approach to investigation and prosecution that would avoid the duplication of time, funds, and personal resources would be a welcomed relief.[160]

Moreover, both the ICC and hybrid tribunals struggle with legitimacy—or how the people and States which the courts are designed to serve perceive their operations.[161] Legitimacy for both the ICC and any hybrid court is essential, and

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157. Higonnet, *supra* note 46, at 348–49.

158. *ICC Prosecutor Underlines Commitment*, *supra* note 119.

159. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 3.

160. *See* de Wet, *supra* note 10, at 50 (recognizing that a division of labor between the ICC and hybrid courts would "contribute to ensuring that the different institutions remain functional despite financial constraints"); *see also* Yuval Shany, *The Role of National Courts in Advancing the Goals of International Criminal Tribunals*, 103 AM. SOC'Y INT'L L. PROC. 210, 212 (2009) (recognizing the "mismatch" between international criminal courts' goals and capabilities due to limited resources); Janet H. Anderson, *The ICC in Times of Budget Crunch*, JUSTICEINFO.NET (Dec. 13, 2021), https://www.justiceinfo.net/en/85475-icc-times-budget-crunch.html (discussing the ICC Prosecutor's request for a budget increase in light of complaints that the Office of the Prosecutor has "spread itself too thin" by opening investigations and preliminary examinations in 11 and 16 States, respectively).

161. This Article utilizes the term "legitimacy" to refer to "perceived legitimacy," or as Stuart Ford defines it, "how audiences subjectively perceive the legitimacy of international criminal courts." Stuart Ford, *A Social Psychology Model of the Perceived Legitimacy of International Criminal Courts: Implications for the Success of Transitional Justice Mechanisms*, 45 VAND. J. TRANSNAT'L L. 405, 406, n.1 (2012). *See* Ochs, *Propaganda Warfare on the International Criminal Court*, *supra* note 41, at 582 (discussing the critical impact recent "propaganda wars" have had on the ICC's perceived

indeed, Professor Stuart Ford recognizes a large body of literature that deems perceived legitimacy to be a "prerequisite to the success of all transitional justice mechanisms, including international criminal courts."[162]

By combining forces, both the ICC and hybrid courts can foster greater legitimacy. One of the most strident criticisms against the ICC and hybrid tribunals pertains to the limited number of convictions they have obtained. As previously discussed, combining forces could expand the courts' ability to obtain greater convictions and broader accountability, thereby directly contributing to greater legitimacy of both mechanisms.

Streamlined relations between the ICC and hybrid tribunals—especially one located in an affected State—can significantly improve how the ICC is perceived by local communities. The ICC's legitimacy is hampered among local populations due to its imposition of justice from the outside, and the difficulty it experiences in engaging in outreach in affected States.[163] For example, despite the ICC's "concerted effort to expand its visibility" in the CAR, it struggles in State cooperation and public outreach, given its lack of "significant permanent field presence in a country that still functions most efficiently on the basis of face-to-face encounters."[164] By coordinating with the SCC, which is located in Bangui and is thus much better suited to engage in face-to-face outreach, the ICC can now ensure that the local community within the CAR will be well informed not just of the SCC's operations, but also of its partner's—the ICC.

Alternatively, while hybrid courts may have greater perceived legitimacy in the affected State as opposed to the outsider ICC, they may also receive skepticism from the local community, especially in countries with judicial systems that are historically corrupt or subject to political influence.[165] By collaborating with the ICC, hybrid courts will benefit from international oversight beyond the courts' embedded international actors. Operating in close conjunction with an international organization like the ICC could lend a hybrid court credibility and legitimacy that may otherwise be absent in the eyes of the local population.[166]

While there have been concerns that hybrid tribunals may undermine the authority and reach of the ICC, and conversely, that the ICC may render hybrid

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legitimacy); Hobbs, *supra* note 43, at 485 (concluding that as of 2016, the field of international criminal justice was "suffering something of a crisis of legitimacy").

162. Ford, *A Social Psychology Model, supra* note 161, at 407 (citing Jaya Ramji-Nogales, *Designing Bespoke Transitional Justice: A Pluralist Process Approach*, 32 MICH. J. INT'L L. 1, 12–13 (2010)).

163. *See* Jane E. Stromseth, *The International Criminal Court and Justice On the Ground*, 43 ARIZ. ST. L.J. 427, 435 (2011); *see* Elderfield, *The Rise and Rise of the SCC Part II, supra* note 22.

164. Elderfield, *The Rise and Rise of the SCC Part II, supra* note 22.

165. Stromseth, *supra* note 163, at 435.

166. *See* Higonnet, *supra* note 46, at 349 (explaining the "credibility of international law and the legitimacy of international institutions, which can lend hybrid courts a degree of authority as a fair mechanism for holding perpetrators accountable").

tribunals redundant, these concerns have so far proved unfounded.[167] Indeed, to view these two mechanisms in a competitive relationship specifically "ignore[s] the possibility of cooperation" and undermines the ability of these mechanisms to "curb impunity for international core crimes."[168] Instead, the focus should be on developing the courts' symbiotic relationship and enhancing its synergy.[169] As Ambassador Van Schaack has put it, "rather than threatening to undermine the ICC, [hybrid tribunals] have the potential to contribute to a more integrated, differentiated and impactful international justice system that will mount a stronger challenge to impunity by reaching more victims and perpetrators."[170]

Unsurprisingly, this article is not the first to advocate for such streamlining of international justice, given the evident benefits associated with a more cohesive international criminal justice system.[171] Indeed, scholars have proposed different methods utilizing pre-existing international criminal law mechanisms to achieve a more comprehensive and seamless approach to justice. These include proposals for a permanent "hybrid chamber" within the ICC jointly composed of international judges and ad hoc domestic judges from the territory where the crimes subject to the proceedings occurred;[172] a permanent hybrid tribunal;[173] embedding international legal experts into existing domestic judicial frameworks to work side-by-side with domestic judges and prosecutors;[174] and even a "roaming ICC," which envisions a decentralized international criminal system that would create temporary courts of law at the domestic, regional, and international levels.[175]

While many of these proposals are significant—and should be considered in due course—none is more pressing than the need for a streamlined relationship between the ICC and hybrid tribunals. There have been proposals for—and in some cases, international efforts taken to create—additional hybrid tribunals to address crimes committed in States currently subject to ICC investigation,

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167. Ainley & Kersten, *supra* note 43, at 3; de Wet, *supra* note 10, at 50 (explaining that allegations that hybrid courts undermine ICC jurisdiction "ignore the possibility of cooperation between these institutions in an attempt to curb impunity for international core crimes").

168. de Wet, *supra* note 10, at 50.

169. *See generally*, de Wet, *supra* note 10 (recognizing the opportunity for international and hybrid courts to enjoy synergies by which they can contribute to domestic legal capacity in addition to achieving criminal accountability).

170. Van Schaack, *supra* note 4, at 171.

171. *See generally, e.g.*, de Wet, *supra* note 10.

172. David Donat-Cattin & Philippa Greer, *Making the Case for a Hybrid Chamber at the ICC*, HARV. INT'L L. J. BLOG, https://harvardilj.org/2021/05/making-the-case-for-a-hybrid-chamber-at-the-icc/ (last visited Aug. 10, 2022).

173. *See* Kersten, *supra* note 8, at 24–26.

174. *See* Elderfield, *The Rise and Rise of the SCC Part II, supra* note 22.

175. *See* Christopher "Kip" Hale, *Does the Evolution of International Criminal Law End with the ICC? The "Roaming ICC": A Model International Criminal Court for a State-Centric World of International Law*, 35 DENV. J. INT'L L. & POL'Y 429, 431–32, 487 (2007).

including Kenya, Sudan, and the Democratic Republic of the Congo.[176] This is positive news, given that these mechanisms could achieve more comprehensive accountability and broader justice for victims; however, these results are largely dependent on a clear framework that ensures a smooth and cohesive relationship between these new hybrid courts and the ICC's ongoing operations.

V. A FRAMEWORK FOR SYNERGY

Given the clear benefits associated with establishing jurisdiction-sharing relationships between the ICC and hybrid tribunals, it is evident that these relationships should be pursued in the future. Yet, it is much less clear how exactly these jurisdiction-sharing relationships should be structured. Accordingly, the need to develop a framework that governs these future relationships is essential.

Unlike with other permanent courts, hybrid courts are ad hoc, temporary, and highly flexible, enabling them to tailor to specific situations.[177] This flexibility is highly beneficial in the context of creating hybrid tribunals that intend to share jurisdiction with the ICC, as it provides the possibility of molding the tribunal's structure, governing rules, and jurisdictional grounds in consideration of its relationship to the ICC. Accordingly, the circumstances and features of each ICC-hybrid tribunal relationship will likely differ significantly.

However, considering that the jurisdictional sharing relationship may be here to stay, it is essential to have at least a very basic framework for how these two entities may cooperate to achieve the most comprehensive justice possible. While the ICC-SCC relationship provides an excellent starting point for such a framework, the high level of secrecy, both between the courts and with the public, make it very difficult for this particular relationship to be used as a model for future ICC-hybrid tribunal cooperation.

Accordingly, this Article seeks to provide a highly simplified, foundational framework for the primary features that should exist in any ICC-hybrid tribunal jurisdiction-sharing relationship. Specifically, it sets forth: (1) the requisite circumstances needed for an ICC-hybrid tribunal relationship; (2) a jurisdictional framework, with specific examples for how these two mechanisms may share jurisdiction while also avoiding the jurisdictional challenges that have plagued the ICC-SCC relationship; (3) suggestions for how a hybrid tribunal may be designed to most effectively cooperate with the ICC's existing features and structure; and (4) a discussion on the need for consistent procedural rules and guidelines between the ICC and the envisioned hybrid tribunal. Additionally, this section seeks to show how each tenant may work in practice should a future jurisdiction-sharing relationship come to fruition between the ICC and a proposed hybrid tribunal for Ukraine. This Article will hereon refer to this proposed hybrid tribunal as the "Special Ukrainian Tribunal."

176. Labuda, *Institutional Design and Non-Complementarity*, *supra* note 10, at 2.

177. Yang, *supra* note 54, at 54.

A. Requisite Circumstances

First and foremost, in determining whether a jurisdiction-sharing relationship between the ICC and a hybrid court is appropriate to adjudicate a specific situation, there must be requisite circumstances in place to warrant the creation of a hybrid tribunal. It is easy to get caught up in tribunal fever, with the idea that the creation of more and more courts will proportionately reduce impunity. However, Patryk Labuda cautions, "the very real existence of an accountability gap should not be confused with the notion that 'more institutions' necessarily translates into 'more justice.'"[178] And indeed, this paper is not advocating for the creation of more tribunals simply for tribunals' sake. The creation of a hybrid tribunal is not necessary for every situation before the ICC. Instead, hybrid tribunals should only be used to complement the ICC's work when broader justice is necessary and when the creation of a hybrid tribunal in an affected State is feasible.

The circumstances of each post-conflict State are often radically different.[179] As Jane Stromseth has recognized, "whether holding domestic or hybrid atrocity trials within the affected [State] is realistic at all or whether, instead, only international proceedings outside the [State] offer prospects for fair justice will also differ significantly across [States] recovering from atrocities."[180] Not every one of these affected States is suitable for the creation of a hybrid tribunal. The late Judge Antonio Cassese identified the following requirements that any affected State must have for a hybrid tribunal to be successful: (1) the national judicial system must be at least partially viable; and (2) there must be a need to "assuage the nationalistic demands of the local population" for the administration of justice, or in other words, "the national government must *want* to be involved."[181] Moreover, as recommended in the Dakar Guidelines on the Establishment of Hybrid Courts, a comprehensive "needs assessment" should be conducted to determine "whether or not a hybrid court is an appropriate mechanism to institute in response to mass crimes."[182] Such an assessment should intimately examine the post-conflict State's "political, social, legal and economic contexts."[183]

Unfortunately, these requirements make hybrid tribunals improper in many post-conflict States. Lessons can be drawn from the Extraordinary Chambers in the Courts of Cambodia, which faced countless barriers and endless challenges

178. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 2–3.

179. Stromseth, *supra* note 163, at 432.

180. *Id.*

181. Cassese, *supra* note 45, at 5; Raub, *supra* note 52, at 1042.

182. Ainley & Kersten, *supra* note 43, at 9.

183. *Id.*

pertaining to political interference and judicial deadlock, which was in part due to a lack of political support within Cambodia.[184]

But the circumstances necessary for an ICC-hybrid tribunal jurisdiction-sharing relationship extend well beyond those warranted for the creation of a hybrid court. In the event that the former circumstances are satisfied, and the creation of a hybrid tribunal is appropriate for addressing conflict crimes, a jurisdiction-sharing relationship between that hybrid tribunal and the ICC should only be utilized when: (1) the affected State has a positive and supportive relationship with the ICC; and (2) the ICC Prosecutor supports such a jurisdiction-sharing relationship.

Regarding the first requirement, the affected State must have a stable relationship with the ICC. Not only must the State be a State Party to the Rome Statute—or have otherwise accepted the ICC's jurisdiction—it must also have a history of supporting the ICC by upholding its duties under the Rome Statute, such as turning over evidence and witnesses as required.[185] Or put differently, the affected State must not have a track record of impeding the Prosecutor's investigations or prosecutions.

Moreover, the relationship must not be one-way; without the ICC Prosecutor's support for a jurisdictional-sharing relationship, it is highly unlikely that said relationship will be successful. As noted in the next section, the Prosecutor and his office must establish a specific agreement with the hybrid tribunal that delineates the shared jurisdiction at the outset of the relationship and prescribes the precise details of the relationship; without prosecutorial support, the creation of this agreement will be highly unlikely. Moreover, a lack of prosecutorial support poses significant obstacles to cooperation between the ICC and the hybrid tribunal, especially when it comes to the sharing of evidence. As such, both an affected State's support for the ICC and the ICC's support for the hybrid tribunal with which it seeks to share jurisdiction are vital for such a relationship to work.

I will turn now to applying these requirements to the Situation in Ukraine. As has been deftly discussed at length by Kevin Jon Heller, the circumstances in Ukraine are favorable for the creation of a hybrid tribunal.[186] Specifically, applying the requirements identified by Judge Cassese reveals: (1) Ukraine's national judicial system remains viable, as it continues to conduct domestic

184. *See generally*, Shannon Maree Torrens, *Allegations of Political Interference, Bias and Corruption at the ECCC*, *in* The EXTRAORDINARY CHAMBERS IN THE COURT OF CAMBODIA, eds. Simon M. Meisenberg & Ignaz Stegmiller (Springer 2016) (discussing the issues that arose in part from a lack of support of the ECCC by the Cambodian Government).

185. A State party's obligations to cooperate with the ICC are set forth in Part 9 of the Rome Statute. Rome Statute, *supra* note 4, at Part 9.

186. Heller, *supra* note 17; *see also* Janet H. Anderson, *Everything You Need to Know or Argue About a Special Tribunal on Russia's Crime of Aggression*, JUSTICEINFO.NET (Dec. 13, 2022), https://www.justiceinfo.net/en/110201-everything-you-need-to-know-argue-special-tribunal-russia-crime-of-aggression.html (setting forth the author's interview with Kevin Jon Heller).

trials—including those for Russian war crimes—as the conflict within its borders rages;[187] and (2) Ukrainians have specifically expressed a desire for the creation of an internationally supported tribunal to prosecute Russian crimes.[188] Moreover, while a full "needs assessment" as envisioned by the Dakar Guidelines is beyond the scope of this paper, it is possible—if not likely, given the contexts currently present in Ukraine—that such an assessment would find the hybrid tribunal to be an appropriate mechanism for investigating and prosecuting at least some of Russia's crimes.

However, the additional requirements I note above make the prospects of a jurisdiction-sharing relationship between the ICC and the Special Ukrainian Tribunal much more complicated. Although Ukraine is not a formal State Party to the Rome Statute, it has accepted ICC jurisdiction for Russian crimes extending back to 2014.[189] Moreover, there is no public evidence to suggest that Ukraine has attempted to thwart the ICC's ongoing investigation; therefore, the first requirement—that the affected State be supportive of the ICC—is met. However, ICC Prosecutor Karim Khan has expressed his doubts as to the creation of a new tribunal for Ukraine.[190] Specifically, when questioned by reporters about his views on the proposed tribunal in 2022, Prosecutor Khan famously said, "We should avoid fragmentation, and instead focus on consolidation,"[191] a statement that would ironically appear to justify a jurisdiction-sharing relationship with the proposed tribunal. While the specific reasons behind Prosecutor Khan's unwillingness to support the tribunal have not been made public, given his hesitancy at this juncture, it does not appear that the second requirement for a jurisdiction-sharing relationship between the ICC and the Special Ukrainian Tribunal is met.

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187. See Elena Sanchez Nicolas, *Ukraine files cases against 45 suspected war criminals*, EU OBSERVER (Oct. 13, 2022), https://euobserver.com/ukraine/156281.

188. *See, e.g.*, Jennifer Hansler, *Ukrainians push for US to support special tribunal to prosecute Russian leadership for crime of aggression*, CNN POLITICS (Dec. 14, 2022), https://edition.cnn.com/2022/12/14/politics/ukraine-special-tribunal-russia-crime-of-aggression/index.html.

189. Ukraine has lodged two declarations with the ICC formally accepting the Court's jurisdiction over Russian crimes committed on Ukrainian territory. The first, lodged with the court in 2014, granted the ICC jurisdiction starting from November 21, 2013, to February 22, 2014, and the second, filed in 2015, extended this jurisdiction for an "indefinite duration." Ukrainian Declaration to the ICC (Apr. 9, 2014), https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJuristiction09-04-2014.pdf; Ukrainian Declaration to the ICC (Sept. 8, 2015), https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf#search=ukraine.

190. Molly Quell, *ICC Prosecutor Opposes EU Plan for Special Ukraine Tribunal*, AP (Dec. 5, 2022), https://apnews.com/article/russia-ukraine-war-crimes-netherlands-the-hague-ursula-von-der-leyen-9e83e1107064ef6e9c375576b998373a (recognizing Prosecutor Khan's pushback to the creation of a Special Tribunal for Ukraine).

191. *Id.*

B. Jurisdictional Delineation

Should the circumstances in an affected State prove viable for the creation of a hybrid tribunal, as well as a jurisdiction-sharing relationship with the ICC, the international community must then turn to the issue of how such overlapping jurisdiction is divided. As discussed previously with regard to the SCC, how jurisdiction is shared can be problematic should a hybrid tribunal grant the ICC jurisdictional primacy, as such could turn the concept of complementarity "on its head," and open up both the hybrid tribunal's governing statute and ICC proceedings to jurisdictional challenges.[192]

However, the general view of complementarity has largely shifted in recent years. While "traditional complementarity" espoused the idea that the ICC could coerce States into conducting domestic trials under threat of ICC intervention, the concept of "positive complementarity" envisions a more "cooperative relationship" between State legal systems and the ICC.[193] Under a positive complementarity approach, the ICC would work with national jurisdictions to prosecute by actively communicating with the affected State's judiciaries, conducting legal and judicial training in-State, and monitoring State prosecutorial processes.[194] And indeed, scholars have noted that ICC Prosecutor Karim Khan has been open to this practice of positive complementarity, expressing a willingness to enter into "a more positive cooperative relationship with those States that are fundamentally willing and able to conduct national criminal prosecutions and work with his office to this end."[195]

A jurisdiction-sharing relationship between the ICC and a hybrid tribunal—which would likely qualify as a domestic court for complementarity purposes—would be consistent with this shift towards positive complementarity. Moreover, the Rome Statute and its interpreting jurisprudence do not prevent the ICC from sharing jurisdiction with a domestic or hybrid court, especially if the hybrid court consents to such a jurisdiction-sharing relationship. Specifically, complementarity becomes less of an issue when a hybrid court agrees to surrender some—but not all—of its primacy to the ICC. In this situation, the hybrid court could agree that the ICC has primary jurisdiction over either certain defendants or certain crimes. Such a relationship should not violate the complementarity principle because it would not exclusively give the ICC primary jurisdiction over all crimes (as was done with the SCC[196]); it would instead affirmatively delineate

192. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 7.

193. Katherine A. Marshall, *Prevention and Complementarity in the International Criminal Court: A Positive Approach*, 17(2) HUM. RTS. BRIEF 21, 22 (2010), https://www.corteidh.or.cr/tablas/r24177.pdf.

194. *Id.*

195. Kai Ambos, *The return of 'positive complementarity'*, EJIL: TALK! (Nov. 3, 2021), https://www.ejiltalk.org/the-return-of-positive-complementarity/.

196. SCC Statute, *supra* note 101, at art. 37.

the types of individuals or crimes the hybrid tribunal would deem itself "unwilling" to investigate.

The actual distribution of the jurisdictional primacy between a hybrid tribunal and the ICC would be dependent upon the specific circumstances surrounding the nature of the crimes that fall within the shared jurisdiction and capacity of the hybrid tribunal. Certain scholars have proposed that the ICC should focus on prosecuting the highest-ranking and highest-profile defendants due to its wide potential media reach and its focus on the gravest crimes.[197] Hybrid tribunals could then concentrate on prosecuting the "lower ranking officials and the less severe crimes" that fall within that shared jurisdiction.[198]

While this distribution may be suitable in many hybrid-ICC jurisdiction-sharing relationships, it will not always be ideal, or even possible. For example, in a potential jurisdiction-sharing relationship between the ICC and a Special Ukrainian Tribunal, assigning the ICC to high-profile defendants while relegating lower-level defendants to the jurisdiction of the Special Ukrainian Tribunal would not be feasible. As discussed previously, one of—if not the exclusive—crime within the Special Ukrainian's Tribunal's jurisdiction would be the crime of aggression, for which only persons who are in a position to effectively "exercise control over or to direct the political or military action of" the aggressor State may be convicted.[199] Thus, should the Special Ukrainian Tribunal exercise jurisdiction over the crime of aggression, it must thus retain jurisdiction over Vladimir Putin and any other high-ranking Russian leaders who exercised control over Russia's invasion of Ukraine. Accordingly, should the Special Ukrainian Tribunal and the ICC consent to shared jurisdiction, the proposed division of jurisdictional primacy would need to be flipped from the model proposed above, with the Special Ukrainian Tribunal retaining jurisdiction over more high-profile defendants and the ICC pursuing cases against lower-ranking officials. It is, however, unclear whether the ICC would agree to such a proposed division of jurisdiction, and such a concept could be the reason for Prosecutor Khan's pushback against the creation of the Special Ukrainian Tribunal.[200] Again, these complications make clear that the specific jurisdictional division in any ICC-hybrid tribunal relationship must be determined on a case-by-case basis.

Regardless of the actual division reached by the ICC and the hybrid tribunal, the jurisdictional distribution should be clarified from the outset. As Patryk Labuda concluded, failing to identify clear means of distribution at the start of the ICC-hybrid relationship will have "pernicious effects further down the line," and may lead to future conflicts over jurisdictional primacy that will waste both time

197. *See* de Wet, *supra* note 10, at 49.

198. *Id*. at 49.

199. *Elements of Crimes*, ICC, art. 8 *bis*, element (2), https://www.icccpi.int/sites/default/files/Publications/Elements-of-Crimes.pdf.

200. *See* Quell, *supra* note 190.

and precious resources for both entities.[201] Instead, Labuda recognizes that "an institutional framework that establishes prospective criteria for competing jurisdictional claims and a clear division of institutional responsibilities will help to prevent confusion, a duplication of tasks and unnecessary conflicts."[202] Such an agreement should be codified in the form of a "Master Agreement" that regulates the relationship between the ICC and the hybrid tribunal, and which may be modeled—to some extent—after the Relationship Agreement between the ICC and the UN.[203] This Master Agreement would specifically lay out the jurisdictional agreement between the two mechanisms and also govern any potential investigatory or prosecutorial dilemmas that may arise within the relationship, including but not limited to: arrest warrant procedures, confidential records sharing, and detention and custody concerns.

Moreover, the jurisdictional division agreed upon by the two courts should be transparent to foster the legitimacy of both entities. This requires making the Master Agreement and any amendments publicly available to the extent possible in light of security concerns. If the public is made readily aware of what types of investigations each entity is tasked with, it will be much better equipped to measure progress. Likewise, should such a jurisdictional division be successful, its codification could provide clear precedent for future jurisdiction-sharing relationships.

C. Open Cooperation

In structuring a hybrid court to share jurisdiction with the ICC, significant attention must be given to the court's institutional design, with special consideration as to how the two entities will collaborate and share resources to most effectively synergize their relationship.

It largely goes without saying that the ICC's Office of the Prosecutor and the prosecutorial arm of the hybrid court should work cohesively, not only to ensure that the jurisdiction-sharing agreement is followed, but to plan investigations and prosecutions so as to avoid replicating work.[204] Accordingly, an open stream of communication between the two prosecutorial offices is critical. To the extent possible, the international prosecutors involved in the hybrid tribunal should have experience working with the ICC's Office of the Prosecutor and be able to provide knowledge of the intricacies of the ICC's prosecutorial investigations with the

201. Labuda, *Institutional Design and Non-Complementarity, supra* note 10, at 25.

202. *Id.* at 26.

203. *Negotiated Relationship Agreement between the International Criminal Court and the United Nations*, https://legal.un.org/ola/media/UN-ICC_Cooperation/UN-ICC%20Relationship%20Agreement.pdf. *See* Scheffer, *supra* note 19 (arguing that the ICC-UN Relationship Agreement should apply to a relationship between the Special Ukraine Tribunal and the ICC).

204. *See* Scheffer, *supra* note 19 ("The last thing proponents of justice want is two strong-willed prosecutors bickering over procedures of cooperation. But that is quite easily avoided.").

hybrid tribunal's local prosecutors. This will also further the potential for the hybrid tribunal to foster capacity building of local prosecutors.

This level of cooperation should also extend to various other offices within both courts, namely the registry and any offices specifically dedicated to outreach. Beginning with the registry, which is generally responsible for providing "judicial support services and [the] overall administration of the tribunal,"[205] it would be convenient for the ICC and the hybrid tribunal's registries to work cohesively, specifically when it comes to issues of funding and communications. First, funding is an essential aspect of any international tribunal. The delineation of funds between the ICC and the hybrid tribunal involved in the jurisdiction-sharing scheme should be agreed upon at the outset and formally codified within the Master Agreement governing the relationship. In the event issues arise in how funds are to be budgeted among the two mechanisms, it is vital that members of the ICC's registry as well as the hybrid tribunal's registry have a clear method of resolution for how to avoid critical budgetary issues.[206]

Additionally, it is important that both registries—or the offices dedicated specifically to communications, should the hybrid tribunal choose to assign communication tasks to a separate office—collaborate to effectively convey information about the ICC and the tribunal's work to the general public. Both entities must provide regular public updates, as communication with the public is essential to fostering an international criminal mechanism's legitimacy.[207] Given the ICC's widespread reach, it certainly has an advantage in reaching the broader public. Yet, the hybrid tribunal's communications team has the advantage of being located within the affected State, and is capable of providing on-the-ground updates, especially in communities that lack reliable access to international media.[208] Sharing press releases and other news pertaining to prosecutorial and judicial developments will ensure that the public is apprised of the mechanisms' work, which will help positively influence public opinion and thereby foster the legitimacy of both entities.

This approach to institutional design—by coordinating work between the ICC's offices and those of its hybrid counterpart—is especially feasible in a

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205. Ainley & Kersten, *supra* note 43, at 32.

206. The potential harm caused by improper budgeting is not merely theoretical; budgeting issues threatened to close the Special Tribunal of Lebanon in 2021. See Severe Financial Crisis Threatens the STL's Ability to Fulfil its Mandate, Special Tribunal Lebanon (June 2, 2021), https://www.stl-tsl.org/en/media/press-releases/severe-financial-crisis-threatens-the-stls-ability-to-fulfil-its-mandate (explaining that the Special Tribunal faced an "unprecedented financial crisis" which threatened its ability to operate beyond July 2021, despite several pending cases).

207. Ochs, *Propaganda Warfare on the International Criminal Court*, *supra* note 41, at 626–28.

208. *See* Cohen, *supra* note 25, at 36 (recognizing that hybrid tribunals' "location in the country where the crimes occurred" provides an advantage over purely international courts when it comes to community outreach); John D. Ciorciari & Anne Heindel, HYBRID JUSTICE: THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA 236 (2014) (noting that the Cambodian hybrid tribunal's in-country location provided it with significant advantages when it came to outreach).

potential relationship between the ICC and the potential Special Ukrainian Tribunal. As noted by former Ambassador-at-Large for War Crimes David Scheffer, establishing a "cooperative relationship agreement" between the ICC and the Special Ukrainian Tribunal is "the most critical issue."[209] Having an open stream of communication between the two prosecutorial offices, as well as the registry and any dedicated outreach or communication teams, could effectively obtain the synergy envisioned by an ICC-hybrid tribunal jurisdiction-sharing relationship.

D. Applicable Procedure

Finally, cohesive procedural and evidentiary rules are essential for creating legitimate jurisdiction-sharing relationships between the ICC and hybrid tribunals. Rules of procedure and evidence governing hybrid tribunals are generally created by the tribunal's judges.[210] In jurisdiction-sharing relationships with the ICC, hybrid tribunal judges should take steps to ensure that the tribunal's rules align with the ICC's Rules of Procedure and Evidence so that proceedings are as procedurally consistent as possible. Such consistency will not only guarantee clearer international criminal jurisprudence, but will also preempt potential challenges to legitimacy, as both courts' judicial opinions regarding the admissibility of evidence or sentencing decisions will be in alignment.

In addition to creating compatible rules of procedure and evidence, the ICC and its companion hybrid tribunal should strive for uniformity in evidence gathering procedures through a relevant Master Agreement. Such an agreement is not particularly unusual. In fact, the ICC and the European Union Agency for Criminal Justice Cooperation (Eurojust) recently jointly established a set of guidelines for nongovernmental organizations collecting evidence of atrocities in Ukraine. These guidelines ensure that evidence collected by NGOs and other civil society organizations will comply with the collection and preservation requirements necessary for admissibility in court.[211] Similar guidelines should also pertain to any hybrid tribunal with which the ICC decides to pursue a jurisdiction-sharing relationship.

Moreover, these cohesive rules should extend beyond evidence-gathering procedures to the regulations governing the conduct of the actors involved in both mechanisms. The ICC has already implemented codes of conduct that govern its

209. Scheffer, *supra* note 19.

210. *See* Trahan, *supra* note 143.

211. Mike Corder, *Intl Court, EU Agency Publish Evidence-collecting Guidelines,* (Sept. 21, 2022), https://apnews.com/article/russia-ukraine-european-union-international-criminal-court-government-and-politics-8f11ae4601f12db2bfacd01806de17c3.

judges,[212] as well as members of its Office of the Prosecutor,[213] and its defense counsel.[214] While these codes are not always utilized in hybrid courts, the Dakar Guidelines strongly recommends their adoption to "maintain high professional standards and demonstrate internal accountability."[215] Accordingly, in a jurisdiction-sharing relationship, to ensure that judges, prosecutors, and defense counsel across both mechanisms are held to the same standards and in efforts to further legitimize them, the hybrid tribunal should employ codes of prosecutorial and judicial conduct that mirror those adopted by the ICC.

These suggestions would be fairly straightforward to implement should a jurisdiction-sharing relationship between the ICC and the proposed Special Ukrainian Tribunal progress. While the two mechanisms may seek to investigate and prosecute different crimes—if the Special Ukrainian Tribunal indeed limits its jurisdiction to the crime of aggression, as scholars have suggested[216]—there will be considerable overlap in the type of evidence each mechanism will utilize, especially regarding proof of Russia's initial invasion into Ukraine in February 2022. Accordingly, the Special Ukrainian Tribunal should adopt rules of evidence and procedure that closely mirror those already implemented by the ICC.

Further, efforts to promote the legitimacy of the Special Ukrainian Tribunal are imperative, as its legitimacy is already being questioned—even before concrete plans have been implemented for the tribunal's establishment.[217] Thus, it is critical that all members of the Special Ukrainian Tribunal—from the judges, to the prosecutors, to the staff—act in accordance with international norms of professionalism. The Special Ukrainian Tribunal could utilize the same codes of conduct already established within the ICC. By closely mirroring these overarching rules, the Special Ukrainian Tribunal can ensure consistency with the ICC and thereby foster its legitimacy and effectiveness, both within Ukraine and worldwide.

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212. *Code of Judicial Ethics,* ICC-BD/02-02-21, INT'L CRIM. CT. (Jan. 19, 2021), https://www.icc-cpi.int/sites/default/files/Publications/Code-of-Judicial-Ethics.pdf.

213. *Code of Conduct for the Office of the Prosecutor*, INT'L CRIM. CT. (Sept. 5, 2013), https://www.icc-cpi.int/iccdocs/PIDS/docs/Code%20of%20Conduct%20for%20the%20office%20of%20the%20Prosecutor.pdf.

214. *Code of Professional Conduct for Counsel,* INT'L CRIM. CT. (Dec. 3, 2005), https://www.icc-cpi.int/sites/default/files/Publications/Code-of-Professional-Conduct-for-counsel.pdf.

215. Ainley & Kersten, *supra* note 43, at 30.

216. Oona A. Hathaway, *The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine (Part I)*, JUST SECURITY (Sept. 20, 2022), https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/.

217. Kai Ambos, *A Ukraine Special Tribunal with Legitimacy Problems?* VERFASSUNGSBLOG (Jan. 6, 2023), https://verfassungsblog.de/a-ukraine-special-tribunal-with-legitimacy-problems/.

VI. CONCLUSION

As Professor Jane Stromseth has astutely recognized, "the blending of international capacity and local aspirations and abilities in the pursuit of criminal justice is a complex human endeavor—one that will never be free of tension or turbulence."[218] However, despite these inevitable challenges, efforts must be made to change international criminal law from a handful of courts with distinct objectives and independent operations into a more cohesive and evolving field. Not only would such a movement lead to greater accountability for international crimes, which is vital in light of growing impunity, it would also provide significant benefits for victims (in the form of more comprehensive justice) and the courts themselves (through more effective and efficient use of minimal resources).

Efforts towards creating a more collaborative and less disjointed field of international criminal justice have already resulted in one cohesive, jurisdiction-sharing relationship between the ICC and a hybrid tribunal—the Special Criminal Court in the Central African Republic. However, given the lack of transparency surrounding the practicalities of this relationship, it fails to provide a framework for future jurisdiction-sharing relationships. This Article hopes to lay the foundations of such a framework and implant the idea that one is vital to the future of international criminal law. Synergy and stronger relationships between international criminal mechanisms will undoubtedly translate into more widespread and comprehensive justice worldwide, and these benefits certainly outweigh any inevitable challenges.

218. Stromseth, *supra* note 163, at 445.