The Law and Politics of the General Principles of Law in the Twenty-First Century

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The paper argues for the centrality of GPLs [general principles of law] as a primary source of international law. GPLs constitute basic building blocks of systemic coherence, both internally and between regimes (Part I). Focusing on them casts a bright light on judicial lawmaking, the fate of the "fragmentation" of international law, and inter-court dialogue. Debating the topic within the field of general public international law reveals fundamentally different "traditionalist" and "progressive" camps (Part II). In the meantime, the courts and tribunals of regional and specialized treaty regimes have constructed semi-autonomous domains of inter-locking principles, transcending jurisdictional boundaries, altering the nature and scope of international law and the decision-making of powerful domestic courts (Part V). The law and politics of GPLs have now become prominent, as the International Court of Justice (Part III) and the International Law Commission (Part IV) have recently moved to recognize, and contribute to, the development of GPLs. In the conclusion, we address an intractable dilemma: in developing principles, as a means of enhancing the effectiveness of international legal systems, judges reveal gaps between state consent and control, potentially undermining their own support.

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INTRODUCTION

The paper examines the law and politics of general principles of law (GPLs) in the international system. We conceptualize GPLs in terms of three components. First, they comprise unwritten, judge-made legal norms that a court recognizes as enforceable "obligations of conduct" or "obligations to achieve an objective"[1] within the regime. Second, they announce a justification for their recognition and enforcement. Third, GPLs are self-referential and vertically integrated: sub-principles and related norms operationalize more abstract covering principles; and covering principles typically implement even more abstract principles. Some readers will find this definition problematic, as it implies that courts possess inherent interpretive powers

1. Rüdiger Wolfrum, *General International Law (Principles, Rules and Standards)*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 6 (2010).

and discretion to make law. Some will note the absence of methodological constraints, such as the expectation that principles identified by international courts must have been previously enshrined by national courts. Others will prefer to analyze GPLs as stand-alone norms, or to derive classification schemes based on essential, defining characteristics.

Most standard accounts of GPLs emphasize that judges create and use GPLs as a means of enhancing systemic effectiveness and judicial governance.[2] Typical examples include moves to bolster judicial review of state compliance, fine-tune the court's own managerial authority, interpret incomplete treaty provisions, derive new remedies, and harmonize norms across treaty regimes. The incremental or progressive elaboration of GPLs is most commonly understood as an exercise in "fill[ing] gaps" in the law,[3] which are revealed as the law is adjudicated. We argue that the principle's announced purpose, including gap-filling, must be connected to the goal of enhancing systemic effectiveness, in the sense of "perfecting" a system's commitment to the judges' own understandings of "rule of law." We recognize that some will reject this definition outright. After all, contentious disagreements about the nature and scope of GPLs are at the heart of what we consider to be a fraught "politics of sources."

Why embark on this project now, if at all? One might think that there is precious little to say of an authoritative nature about GPLs. What is up for grabs is currently in flux, with outcomes uncertain. Our answer is that the politics of principles are more central to the field of international law than ever before. The International Court of Justice (ICJ)—still the focal point of judicial power for the field—has subtly but fundamentally altered its approach to GPLs. These changes, we argue, comprise a bid on the part of the ICJ to secure its own relevance, not least, with reference to more active international courts and tribunals. Meanwhile, the International Law Commission (ILC)—the focal point of legislative power for the field—has embarked on its own project on general principles, having now issued three reports on the topic:

2. *See generally* Alec Stone Sweet, *Judicialization and the Construction of Governance*, 32 COMPAR. POL. STUD. 147 (1999).

3. Catherine Redgwell, *General Principles of International Law*, *in* GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES 5, 7–8 (Stefan Vogenauer & Stephen Weatherill eds., 2017).

in 2019,[4] 2020,[5] and 2022,[6] and adopted the text of the draft conclusions on general principles on first reading with commentaries.[7] Thus, one overarching purpose of this paper is to examine the decision-making of the ICJ and the ILC in light of the proposed concept of GPLs and the broader practices we observe. With the explosion of treaty-based systems of judicial review,[8] an increasingly networked group of international courts are actively developing GPLs. They do so in order to build systemic effectiveness and coherence, internally (from the point of view of an individual regime) and externally (from the point of view of general public international law). Indeed, the incremental or progressive development of principles has led to episodes of "politicization" and "backlash" against these courts and tribunals, including efforts on the part of some state officials to curb their powers.

It is important to note in advance the paper's main objectives. We seek to present an account of GPLs that explains what values international judges are seeking to maximize when they construct principles. Our approach conflicts with those that deny any overlap between GPLs and the other sources of international law announced in Article 38 of the Statute of the International Court of Justice.[9] On the scholarly terrain, publicists regularly give *de facto* primacy to customary international law or treaty law, whereas GPLs are regularly

4. Marcelo Vázquez-Bermúdez (Special Rapporteur), *First Rep. on General Principles of Law*, U.N. Doc. A/CN.4/732 (Apr. 5, 2019) [hereinafter First Report—ILC].

5. Marcelo Vázquez-Bermúdez (Special Rapporteur), *Second Rep. on General Principles of Law*, U.N. Doc. A/CN.4/741 (Apr. 9, 2020) [hereinafter Second Report—ILC].

6. Marcelo Vázquez-Bermúdez (Special Rapporteur), *Third Rep. on General Principles of Law*, U.N. Doc. A/CN.4/753 (Apr. 18, 2022) [hereinafter Third Report—ILC].

7. Int'l L. Comm'n, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee on First Reading, U.N. Doc. A/CN.4/L.982 (May 12, 2023); Int'l L. Comm'n, Rep. of the International Law Commission, Seventy-Fourth Session, U.N. Doc. A/78/10, ¶ 41 (Aug. 14, 2023).

8. KAREN J. ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS (2014).

9. Article 38 of the Statute of the International Court of Justice reads:

> 1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
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> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
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> b. international custom, as evidence of a general practice accepted as law;
>
> c. the general principles of law recognized by civilized nations;
>
> d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
>
> 2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono, if the parties agree thereto.

Statute of the International Court of Justice art. 38.

"underexplained" and "overlooked."[10] This paper makes a case for giving analytical primacy to GPLs, at least with respect to certain purposes and processes. In most instances, however, we seek to build bridges to the existing literature on sources, rather than to criticize or supplant it. Our goals are primarily empirical. While we make no attempt to elaborate a distinctive normative theory of GPLs, we do address the normative consequences of our approach to the lawmaking of international courts, the meaning of Article 38 of the ICJ Statute, and to various provisions of the Vienna Convention on the Law of Treaties (1969).

The paper proceeds as follows. Part I analyzes our three-part definition of GPLs in more detail. Part II discusses three manifestations of the politics of principles: (i) the judicialization of international legal regimes; (ii) the fragmentation of international law; and (iii) the consolidation of mechanisms of coordination and convergence across regimes. These contexts raise thorny questions about the nature and sources of international law, and, therefore, about the bases and extent of state consent. Parts III and IV examine how the ICJ and the ILC have engaged the law and politics of GPLs, respectively. In Part V, we discuss how other specialized and regional courts have developed GPLs, in light of particular issues, including: the overlap among sources; the increase in the salience of public law principles relative to those originating in private law; legal pluralism and the "constitutionalization" of international law; and the capacity of GPLs to "transform" treaty-based regimes.

I. GENERAL PRINCIPLES OF LAW: A THREE-PART DEFINITION

It is common for scholars and judges to define GPLs with reference to an alleged function (e.g., "gap-filling") or methodology (e.g., surveying the relevant jurisprudence of domestic courts) that international judges deploy to identify and apply them.[11] In this paper, we propose a three-part conceptualization of GPLs. This definition comprises a type of first order explanation for GPLs, to be considered when one examines more detailed instances of "gap-filling" and transposition, and in light of case studies of the operation of any specific legal system.

10. Craig Eggett, *The Role of Principles and General Principles in the 'Constitutional Processes' of International Law*, 66 NETH. INT'L L. REV. 198, 198 (2019).

11. As does the International Law Commission. First Report—ILC, *supra* note 4, ¶ 25.

GPLs are unwritten legal norms[12] that are identified, constructed, and applied by judges in the course of resolving legal disputes. All GPLs exhibit three defining characteristics. First, GPLs are legal norms that stipulate obligations of conduct or purposes (an attribute that characterizes all sources of law). Some GPLs comprise power-conferring rules—a category of "secondary rules" (in Hart's terms)[13]—which enable and constrain how the court is to act. In many regimes, courts have asserted their own Kompetenz-Kompetenz, the broad, *inherent* authority to determine the scope of their own competences, with or without the textual support of treaty provisions. GPLs also declare particular "criteria" of legal validity (such criteria comprise yet another class of secondary rules). Many courts require that states respect the proportionality principle, for example, when they act under a derogation from otherwise applicable treaty obligations. Other principles (which include what Hart labelled as "primary rules"[14]) stipulate the rights and duties of the subjects of regulatory measures taken by the regime's organs.

Second, a general principle declares a (reason-based) justification for its own existence. This justification announces a proposed improvement of the legal system, in particular, as it relates to how disputes are adjudicated. Certain covering principles express very broad purposes, from which a host of sub-principles are derived. Consider the principle of effectiveness—partly embodied in the maxim, *ut res magis valeat quam pereat*—which courts regularly use to justify virtually any innovation in doctrine, procedure, or remedy that they might choose to evolve as a means of rendering legal norms and judicial review more effective. The function of the covering principle is to legitimize the derivative sub-principle (*ut res magis valeat quam pereat*) just declared. At the same time, effectiveness may be understood, as Lauterpacht did, as "simply a requirement of good faith."[15] The so-called "general principles of EU law" have expressly evolved according to such dynamics, as a means of enhancing systemic effectiveness; today, a corpus of principles possess "constitutional status," which are connected, hierarchically, to rungs of lower-order principles.[16] But

12. GPLs may, of course, be subsequently codified by legislators and other lawmakers in forms of "written" positive law, such as treaties and conventions.

13. *See* H. L. A. HART, THE CONCEPT OF LAW 78–79 (2d ed. 1994).

14. *See id.*

15. Iain G.M. Scobbie, *The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function*, 8 EUR. J. INT'L L. 264, 278 (1997) (citing HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT 292 (1958)).

16. TAKIS TRIDIMAS, THE GENERAL PRINCIPLES OF EU LAW 1–17 (2d ed. 2006).

GPLs in all legal systems—international and domestic—instantiate commitments purporting to improve "rule of law" itself, from the internal point of view of the judges who make them.

This second criterion addresses certain deep problems of jurisprudence. To what extent do the sources of law confer on courts "legitimate authority"? Why should actors respect and obey court rulings? What values in morality—"rule of law" usually held to be one such value—does the law embody and express? As Nicole Roughan has argued, such questions relate to international law's "normativity," and deserve to be analyzed alongside the criteria of validity of its sources:

> Normativity . . . requires a notion of validity which allows law to concretize obligations, adjudicate between equally or incommensurably valuable options, give salience and publicity to coordinative rules, and indeed to enhance compliance with the procedural values instantiated in the rule of law. In turn, how much value (and how much progress towards normativity) is carried by the idea of validity (as determined by sources of law) depends upon how valuable such validity is, i.e., the quality of the sources. A procedurally robust standard of validity, then, imbues substantively valuable norms with procedural propriety and value.[17]

In our account, GPLs are norms that require—as a crucial point of judicial procedure—an explicit justification. Failure to provide such a justification—reasons for why a specific principle is "substantively [morally] valuable,"[18] in Roughan's terms—negates the claim that the norm in question constitutes a GPL, rendering it, at best, fatally incomplete.

A court that develops a new GPL simultaneously, if sometimes only implicitly, asserts that the principle exists in order to improve how the legal system operationalizes, for example, its capacity to better promote justice or to realize existing treaty norms. One may well disagree with the court; one might even consider that the new GPL in question will harm rather than improve the legal system. Indeed, a judge should expect that the development of the values that inhere in GPLs will not be opposed by some, or even many, state officials and subjects of the

17. Nicole Roughan, *Sources and the Normativity of International Law: From Validity to Justification*, *in* THE OXFORD HANDBOOK OF THE SOURCES OF INTERNATIONAL LAW 680, 689 (Samantha Besson & Jean d'Aspremont eds., 2017).

18. *Id.*

law. Nonetheless, justification is an intrinsic component of every GPL.

Third, no principle exists in isolation; instead, they are causally connected to one another and to other legal norms on a ladder of abstraction. By ladder of abstraction, we refer to the understanding that concepts, such as principles, can be expressed in relatively general terms, or in a form that is relatively concrete (as when one applies general legal norms to resolve specific legal conflicts, given the facts of the case).[19] Typically, principles are operationalized by more concrete sub-principles and rules,[20] while (at the same time) implementing a more abstract covering principle. Here by "covering principle" we mean any principle that provides a reason for deducing and applying a legal norm to the specifics of a case.[21] For example, a new remedy is regularly justified as (and, indeed, is) a means of implementing a more abstract principle. Downstream, the more intensively this new remedy is litigated, the more we can expect it, in turn, to function as a covering norm for related sub-principles, reflecting how judges have worked out the remedy's scope conditions. Put very differently, GPLs develop in path-dependent ways, as webs of precedent-based reasons for deciding cases that are related in distinct ways.

We recognize that this third conceptual component can be challenged in various ways. Most importantly, it may be argued that some important principles exist as stand-alone, autonomous norms. We do not deny that much might be gained through close examining of a GPL in isolation from covering or implementing principles. We

19. For a classic discussion of the ladder of abstraction as applied to theoretical concepts and causal variables, see Giovanni Sartori, *Concept Misinformation in Comparative Politics*, 64 AM. POL. SCI. REV. 1033, 1040–46 (1970).

20. Although we do not dwell on the issue in this paper, we accept distinctions between "rules" and "principles" made by Alexy and Barak. *See* ALEC STONE SWEET & JUD MATHEWS, PROPORTIONALITY BALANCING AND CONSTITUTIONAL GOVERNANCE: A COMPARATIVE AND GLOBAL APPROACH 30–58 (2019). For present purposes, it is important to note that a lower level application of a higher level principle (including one generated through "balancing" two principles) results in a concrete rule that then resolves the case, while leaving the abstract principle intact. In such a situation, the rule constitutes an "as applied" enforcement of one or more principles, which remain at a higher level abstraction (and on a higher rank on the hierarchy of norms), regardless of its application to the specific case. Put differently, a rule (X) that results from the balancing of two principles does not obviate the need for future balancing in cases that are not fully covered by rule (X). *See generally* Aharon Barak, *Proportionality and Principled Balancing*, 4 L. & ETHICS OF HUM. RTS. 1 (2010).

21. The judicial derivation of "sub-principles" from more abstract "covering principles" is analogous to the way some historians and philosophers of science deploy "covering laws" to derive, describe, and evaluate specific propositions about explanations in history or science. *See* Murray G. Murphey, *Explanation, Causes, and Covering Laws*, 25 HIST. & THEORY 43, 54 (1986).

nevertheless argue that international judges, in developing inter-locking chains of GPLs, maximize a primary value: to build systemic coherence. Such coherence is substantiated, if at all, in hierarchies of norms (levels of abstraction, from more abstract formulations to their more concrete implementation). Indeed, judges routinely rely on GPLs to guide their interpretation and application of customary norms and treaty provisions. Further, some might, for purposes of analysis, seek to group principles into clusters, based on shared attributes or functions. Again, we do not deny that such an approach might yield valuable analytical insights. Since at least the 1980s, however, no important scholarship in this vein has been produced, including by academic international lawyers and legal philosophers.

This three-part conceptualization points to a radical expansion in the nature and functions of GPLs. In contrast, a long-dominant, minimalist conception in the field suggests that GPLs are legitimate to the extent that they "fill gaps" in international law, reflect pre-existing norms embedded in all national legal systems worthy of respect, or represent little more than "inchoate custom."[22] Consider the quasi-constitutional "functions" that judges and scholars ascribe to GPLs in both domestic and international systems: they establish "the essential elements of the legal order,"[23] declare the "fundamental legal concepts and essential values of any legal system,"[24] and justify "all or any of the more specific rules in question."[25] A related question concerning hierarchy: what is the ultimate principle justifying this ladder-like structure, this chain of principles? We return to the relationship between principles and the so-called "constitutionalization" of various branches of international law in Part V.

22. For a critique of minimalism, see Craig Eggett, *The Role of Principles and General Principles in the 'Constitutional Processes' of International Law*, 66 NETH. INT'L L. REV. 198, 198 (2019) (noting the view that GPLs comprises "inchoate custom").

23. Armin von Bogdandy, *Doctrine of Principles* 10 (Jean Monnet Ctr., NYU Sch. of L., Jean Monnet Working Paper No. 9/03, 2003), http://www.jeanmonnetprogram.org/archive/papers/03/030901-01.pdf. [https://perma.cc/J2HW-WF4V].

24. Meinhard Hilf & Goetz Goettsche, *The Relation of Economic and Non-Economic Principles in International Law*, *in* INTERNATIONAL ECONOMIC GOVERNANCE AND NON-ECONOMIC CONCERNS: NEW CHALLENGES FOR THE INTERNATIONAL LEGAL ORDER 5, 10 (Stefan Griller ed., 2003).

25. NEIL MACCORMICK, LEGAL REASONING AND LEGAL THEORY 152, 152 (1978).

II. CONTROVERSIES

The "politics of sources" refers to the struggle to control the content, application, and evolution of the sources on international law. Article 38 of the Statute of the International Court of Justice states that the ICJ "shall apply . . . (c) the general principles of law recognized by civilized nations." In this process, a host of actors (both public and private) strive to determine how GPLs are to be recognized and applied.[26] We can simplify matters by sorting arguments into two basic camps. A relatively "traditionalist" camp holds that GPLs are (i) national in origin, (ii) widespread among the globe's well-functioning legal systems, and (iii) to be distinguished from principles of customary international law and treaty law. Traditionalists acknowledge that GPLs are unwritten legal norms that judges choose to recognize; but they advocate methodological constraints (e.g., a comparative showing of a principle's status across the major legal systems of the world) to tightly restrict this lawmaking.[27]

In contrast, a relatively "progressive" camp holds that GPLs (i) can overlap with principles of customary international law and treaty law, (ii) may originate either in international or domestic legal orders, and that (iii) international courts possess broad, inherent authority to construct and apply them. Progressives ground their arguments in how international courts actually evolve and deploy GPLs. Traditionalists typically assess the social legitimacy of GPLs from the perspective of state consent, problematizing judicial reliance on GPLs that have been produced in the absence of consent or mechanisms of ongoing state control.

We now analyze three contexts in which the politics of GPLs routinely take place: (i) the judicialization of international regimes; (ii) the fragmentation of international law; and (iii) the interpretation of customary international law and treaties.

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26. Our focus remains on the judicial process and the case law of international courts and tribunals, including international arbitral tribunals. GPLs are referred to in the UN Charter, treaties, resolutions by the UN Security Council and General Assembly, and in a range of non-judicial instruments and statements.

27. One could expect traditionalists concerned with judicial law making to be less restrictive with the use of GPLs in international lawmaking in treaties, and also with the use of GPLs in non-judicial fora, and in instruments such as Security Council resolutions.

A. Judicialization

The judicialization of an international regime "refers to the process through which [a] court accretes influence over the treaty system's institutional evolution."[28] Under certain conditions, a court's case law will come to reflect the regime's evolution:

> To the extent that important disputes alleging noncompliance with treaty law are routinely brought to the court, the judges produce defensible rulings, and states treat the reasons the court gives to justify rulings as having precedential effect, then the steady judicialization of the regime is all but inevitable.[29]

These three conditions can also be expressed as variables: the more they are fulfilled, the more one expects judicialization to proceed. From this perspective, judicialization describes an increase in the court's *effectiveness* through ongoing adjudication and state compliance with judicial rulings. International legal systems that have registered appreciable gains in effective judicial governance have done so through a concomitant development of GPLs. Empirically, the enhancement of effectiveness of the legal system, and the progressive development of GPLs, are co-constitutional processes. We know of no exceptions.

Few will dispute that judges seek to build the effectiveness of the regimes they manage through the development of GPLs. These same processes, however, are controversial in that they fully expose courts as lawmakers and framers of their own systems. GPLs appear as by-products of adjudication. Their content is, at least at first, rooted in specific cases and judicial rulings. Situations of "structural judicial supremacy"—wherein it is difficult or (in practice) virtually impossible to override a court's ruling except through subsequent rounds of adjudication—exacerbate the problem. In such situations, the court will routinely produce outcomes that state officials would not have produced on their own. We are not suggesting that judicial supremacy is indefensible; after all, judicial lawmaking and supremacy routinely generate controversy in domestic legal systems for similar reasons.[30] Nonetheless, a powerful international court is such because its rulings

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28. Alec Stone Sweet & Thomas Brunell, *Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the European Convention on Human Rights, the European Union, and the World Trade Organization*, 1 J. L. & CTS. 61, 62 (2013).

29. *Id.* at 62–63.

30. Alec Stone Sweet, *Constitutional Courts*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 816, 829 (Michel Rosenfeld & András Sajó eds., 2012).

are well insulated from override given that, generally, states must act in consensus to revise the treaty. This decision-rule gives a huge advantage to a court that seeks to build a jurisprudence of GPLs, rendering its jurisprudence "sticky."

Progressives typically argue that, for many international systems of judicial review of state measures, an act of prior state delegation is enough to legitimize affairs going forward. At the *ex ante* moment of treaty making and institutional design, the argument goes, states have explicitly conferred on the court the authority to supervise compliance with the regime's law, to punish non-compliance, along with the inherent powers necessary to achieve the treaty's purposes. The court's subsequent case law, including its construction of GPLs, records the court's efforts to achieve its mandate and appointed tasks. Further, judges and scholars tie this view to the covering principles of *pacta sunt servanda* and good faith, which are also foundational norms of both customary international law and the law of treaties. But the argument from state delegation has not quelled the politics of sources. Indeed, a showing that powerful courts have reconfigured—even "transformed"—specific treaty regimes has only increased anxiety about the dynamics of judicial lawmaking and recurrent gaps in state consent.

GPLs are unwritten norms that judges discover or identify, name, and then enforce against states and other legal actors. Not surprisingly, conservatives worry that judges too often displace states as the makers of international law. The more judges work to enhance the effectiveness of the dispute resolution systems they manage, the more they run the risk of being accused of usurping state control. This dilemma is especially acute when judges portray the development of GPLs as a necessary aspect of their commitment to evolutive interpretation, or to enhancing the *effet utile* of a treaty instrument. As noted, GPLs evolve in dynamic, path-dependent ways (both in a temporal and causal sense), which entails assuming a notion of precedent (a necessary condition of judicialization). Principles, after all, are designed to help courts govern prospectively.

B. Fragmentation

The politics of sources is also animated by a second systemic property, which has been labelled the "fragmentation of international

law."[31] This issue was the topic of a Study Group of the ILC, under its chairperson, Martti Koskenniemi. The final Report (2006)[32] presented fragmentation as the result of several factors, including: the increase in the number of international courts with judicial review authority; the expansion of "new technical and functional requirements" of regulation beyond the state; the development of regionalism; and the emergence of individuals as bearers of rights and duties under international law. The most important factor of all, a void, was also stressed: the absence of a centralized means of authoritatively resolving disputes involving jurisdictional conflict and legal validity.[33]

It is important to stress that states themselves built the foundations upon which fragmentation rests, often to strengthen their own executive powers.[34] As Koskenniemi noted elsewhere, states have used their treaty-making powers to erect an "elaborate framework" of (seemingly) self-contained regimes, while deferring many major substantive decisions,[35] including problems of systemic coherence, to the courts.[36] This kaleidoscopic structure reflect the highly constrained possibilities of collective action given states' diverse preferences. Meanwhile, many specialized regimes, under the tutelage of their court, had developed their own particular "ethos" and relative autonomy.[37]

The Study Group focused more narrowly on "conflict ascertainment and conflict resolution," elements of applied "legal reasoning"[38] that directed attention on judges. The Report defined a legal conflict as "a situation where two rules or principles suggest different ways of dealing with a problem."[39] Fragmentation threatens the unity

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31. *See generally* Mads Andenas & Eirik Bjorge, *Introduction: from fragmentation to convergence in international law*, *in* A FAREWELL TO FRAGMENTATION: REASSERTION AND CONVERGENCE IN INTERNATIONAL LAW 1 (Mads Andenas & Eirik Bjorge eds., 2015).

32. Study Group of the Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 and Add.1 (finalized by Martti Koskenniemi, Apr. 13, 2006) [hereinafter Fragmentation Report].

33. *Id.* ¶¶ 10–17.

34. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 STAN. L. REV. 595, 597 (2007).

35. Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4, 28 (1990).

36. Martti Koskenniemi & P. . .ivi Leino, *Fragmentation of International Law? Postmodern Anxieties,* 15 LEIDEN J. INT'L L. 553, 559–60 (2002).

37. Fragmentation Report, *supra* note 32, ¶ 15.

38. *Id.* ¶ 27.

39. *Id.* ¶ 25.

of international law insofar as multiple, potentially contradictory rules might be applied by different courts in similar cases. This aspect of the Report elicited wide comment from scholars,[40] judges,[41] and former members of the Study Group,[42] many of whom have taken pains to deny—as Koskenniemi himself did[43]—the seriousness of the threat to unity, given how international courts actually decided cases. Others forcefully argued that the debate had dissipated; indeed, the patchwork state of affairs diagnosed by the Report had been "normalized."[44] As the Study Group had itself suggested, fragmentation could be examined not merely as a pathology of the international system, but as a catalyst for productive change. Positives included growing cross-jurisdictional recognition, dialogue, and doctrinal cross-fertilization, all of which involved legal techniques designed to facilitate inter-regime convergence. [45]

In our view, GPLs have a major role to play in building systemic coherence, a value that many judges seek, quite self-consciously, to maximize. The view has deep roots. For Lauterpacht (writing in 1933), "the completeness of international law is an *a priori* [presumption] of the international legal system," which the "international judiciary" must ensure, notably, "with recourse to general principles of

40. *See* Mads Andenas, *Reassertion and Transformation: From Fragmentation to Convergence in International Law*, 46 GEO. J. INT'L L. 685, 705 (2015); Tomer Broude, *Keep Calm and Carry On: Martti Koskenniemi and the Fragmentation of International Law*, 27 TEMP. INT'L & COMP. L.J. 279, 280 (2013); Pierre-Marie Dupuy, *A Doctrinal Debate in the Globalisation Era: On the "Fragmentation" of International Law*, 1 EUR. J. LEGAL STUD. 25, 27 (2007); ANDRZEJ JAKUBOWSKI & KAROLINA WIERCZYŃSKA, FRAGMENTATION VS THE CONSTITUTIONALISATION OF INTERNATIONAL LAW: A PRACTICAL INQUIRY 2 (2016); Anne Peters, *The Refinement of International Law: From Fragmentation to Regime Interaction and Politicization*, 15 INT'L J. CONST. L. 671, 672 (2017); Ernst-Ulrich Petersmann, *De-Fragmentation of International Economic Law through Constitutional Interpretation and Adjudication with Due Respect for Reasonable Disagreement*, 6 LOY. U. CHI. INT'L. L. REV. 209, 238 (2008). For a summary overview of the "fragmentation debates," see MARIO PROST, THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW 8–14 (2012).

41. *See, e.g.*, Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20 EUR. J. INT'L L. 265, 265–66 (2009).

42. *See, e.g.*, Gerhard Hafner, *Pros and Cons Ensuing from Fragmentation of International Law,* 25 MICH. J. INT'L L. 849, 849 (2004).

43. *See* Koskenniemi & Leino, *supra* note 36, at 578.

44. "[I]t seems that the only truly interesting development in the fragmentation discourse over the last few years—indeed, since the release of the ILC Report and its first round of commentaries—has been the debate's evident demise." Broude, *supra* note 40, at 280.

45. *See* discussion *infra* Section II.C.

law."[46] Andenas and Chiussi describe the contemporary situation succinctly. For international judges:

> Principles fill gaps left by customary or treaty rules and provide a tool for their interpretation. Such a two-pronged role enables them to perform three main functions, all of which are vital to the healthy operation of the international legal system. First, principles of law represent a central cohesive force, revealing and reinforcing the systemic nature of the system. Second, they operate as a tool for intra-systemic convergence in the constellation of international courts and tribunals, avoiding or reducing fragmentation in the approaches adopted in different sub-fields of international law by ensuring that they remain part of general international law. Third, principles of law promote inter-systemic coherence by bridging the gap between international law and domestic legal systems.[47]

Following this formulation, many important international courts and tribunals embrace what we will call the "triple function" approach to GPLs, which judges self-consciously deploy to (i) enhance the regime's effectiveness, (ii) build norms of inter-judicial comity, and (iii) reduce threats to the "unity" of international law.[48] As we show in part III, the ICJ has gradually thrown off its own self-imposed reticence to become a more active participant in efforts to achieve these goals. The ILC, for its part, expressly embraced the Andenas-Chiussi "triple function" approach in its Third Report (2022).[49]

C. Inter-Court Dialogue and Coordination

The Study Group focused its analysis of fragmentation on the patchwork of specialized and regional courts created since the 1950s. Certain judges on the ICJ had also expressed "anxieties" in stronger

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46. Eggett, *supra* note 10, at 209, 212; *see* HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 68–72, 123–27 (1933).

47. Mads Andenas & Ludovica Chiussi, *Cohesion, Convergence and Coherence of International Law*, *in* GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 9, 10 (Mads Andenas et al. eds., 2019).

48. *Id.*; *see generally* MARIO PROST, THE CONCEPT OF UNITY IN PUBLIC INTERNATIONAL LAW (2012).

49. Third Report—ILC, *supra* note 6, ¶ 143.

terms.[50] Meanwhile, a counter-narrative called attention to the capacity of inter-judicial dialogue to generate cross-jurisdictional doctrinal convergence. A great deal of this convergence has been recorded as the progressive evolution of GPLs. Obvious examples include: the wide diffusion of the proportionality principle, and the use of the proportionality framework by courts to structure the adjudication of derogation clauses, and the limitation clauses of qualified rights[51]; the emergence of the "legitimate expectations" of traders and investors as an umbrella principle for a host of sub-principles, which is tied to the even more abstract principle of good faith[52]; and the evolution of common standards and justifications of norms of due process in the building of otherwise discrete procedural "rules of the court" by judges operating in diverse settings.[53] In these cases, the principles at issue meet our definition of a GPL; and, in specific regimes, the principles at hand interact dynamically with a variety of related principles on increasingly articulated ladders of abstraction.[54]

Since the 1980s, courts have steadily consolidated norms of mutual recognition and "reciprocity"[55] with their most important peers. The initial stages of dialogic engagement have a particular structure.[56] Court (X) recognizes the authority of a second court (Y) to resolve disputes of some similarity to those coming before X; X then

50. *See, e.g.*, U.N. GAOR, 54th Sess., 39th plen. mtg. at 1–5, U.N. Doc. A/54/PV.39 (Oct. 26, 1999) (address by ICJ President Stephen Schwebel) (proposing an advisory opinion or preliminary reference procedure for the ICJ, to be made available to international courts and tribunals); U.N. GAOR, 56th Sess., 32nd plen. mtg. at 6–9, U.N. Doc. A/56/PV.32 (Oct. 30, 2001) (address by ICJ President Gilbert Guillaume) (supporting Judge Schwebel's proposal for an advisory opinion power to be conferred in the ICJ, given that: "The proliferation of international courts may jeopardize the unity of international law"). Speeches available at https://www.icj-cij.org/statements-by-the-president [https://perma.cc/GF2P-73Z8]. For a critical analysis, see Koskenniemi & Leino, *supra* note 36, at 553–56.

51. *See* STONE SWEET & MATHEWS, *supra* note 20, at 162–67, 172–96.

52. *See generally* ALEC STONE SWEET & FLORIAN GRISEL, THE EVOLUTION OF INTERNATIONAL ARBITRATION: JUDICIALIZATION, GOVERNANCE, LEGITIMACY 191–210 (2017); Mads Andenas & Stefan Zleptnig, *Proportionality and Balancing in WTO Law: A Comparative Perspective*, 42 TEX. INT'L. L.J. 371, 380 (2007).

53. *See generally* GIACINTO DELLA CANANEA, DUE PROCESS OF LAW BEYOND THE STATE: REQUIREMENTS OF ADMINISTRATIVE PROCEDURE (2016).

54. *See* discussion *supra* Part I.

55. *See generally* ALEC STONE SWEET & CLARE RYAN, A COSMOPOLITAN LEGAL ORDER: KANT, CONSTITUTIONAL JUSTICE AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 231 (2018).

56. *See id.* at 84–85, 230–45; Peters, *supra* note 40, at 685–87; *see also* Charles Sabel & Oliver Gerstenberg, *Constitutionalising an Overlapping Consensus: The ECJ and the Emergence of a Coordinate Constitutional Order*, 16 EUR. L.J. 511, 511 (2010).

proceeds to take into account the ways in which Y has resolved such disputes. Dialogues often mix cooperative and conflictual elements, as when two courts—neither of which possesses the power to impose a solution on the other—expose their doctrinal differences in exchanges with one another, only to adjust their own approaches and outcomes in subsequent rulings, in the direction of mutual accommodation. The result of these interactions had varied across cases, courts, and time. X may adopt or adapt a position that has been taken by Y; or X may give reasons for rejecting Y's positions, and vice-versa. Empirical studies have shown that the positions of X and Y have evolved significantly as interactions have become more intensive. In some regimes, inter-court dialogue, both international and domestic, has been formalized as a quasi-official means of encouraging cooperation and coordination, and of reducing conflict. Of course, positive results depend heavily upon the willingness of judges on X to acknowledge commonalities in their own role, function, and mandate, with respect to judges sitting on Y.

Although the Fragmentation Report (ILC) emphasized the importance of "systemic integration" as a remedy for problems associated with fragmentation, it did not expressly deploy the term "dialogue." The Report, however, treated systemic interpretation as, in essence, a set of dialogic practices that had already become embedded in myriad ordinary techniques of adjudication. Indeed, it characterized these techniques as normal— "every day," and often "unconscious"—facets of legal interpretation.[57] The Study Group anchored their arguments in Article 31 of the Vienna Convention on the Law of Treaties,[58] in particular Article 31, para. 3(c) which states that:

> There shall be taken into account, together with the context . . . any relevant rules of international law applicable in the relations between the parties.[59]

From this discussion, the Fragmentation Report derives two propositions, "one positive, the other negative":

> (*a*) According to the *positive presumption*, parties are taken to refer to general principles of international law

57. Fragmentation Report, *supra* note 32, ¶¶ 410–11.

58. The Study Group also emphasized that obligations to engage in systemic interpretation also reflected norms of customary international law and GPLs. *Id.* ¶¶ 193, 427, 462–65.

59. Vienna Convention on the Law of Treaties art. 31, ¶ 3(c). The ILC also stressed that customary international law, too, required judges to interpret a treaty with regard to "its normative environment" and general international law. Fragmentation Report, *supra* note 32, ¶¶ 413–23.

> for all questions which the treaty does not itself resolve in express terms or in a different way;
>
> (*b*) According to the *negative presumption*, in entering into treaty obligations, the parties intend not to act inconsistently with generally recognized principles of international law or with previous treaty obligations towards third States.[60]
>
> In accordance with these presumptions, an especially significant role for customary international law and general principles of law opens up.[61]

Although the Fragmentation Report all but ignores the normative issues swirling around judicial lawmaking, it acknowledges that these presumptions have not been "enacted by positive acts of the state … but [exist as] parts of the general framework of international law, or – which amounts to the same thing – aspects of the legal craft of justifying decisions in legal disputes."[62] Put differently, they issue from general principles. For the Study Group, the good judge will engage in systemic interpretation—not least, because it is obligatory[63]—which will (all but naturally) result in reducing the threat to the unity of international law.

To what extent do judges actually engage in systemic interpretation? Empirical research has shown that they have done so increasingly, over time, and conclusively, in our view.[64] Moreover, systemic interpretation comprises a powerful indicator of inter-court dialogue. Such dialogues—which are increasingly formalized[65]—could not proceed in the absence of shared or overlapping GPLs. As a result, processes of inter-regime convergence have accelerated, at least with

60. Fragmentation Report, *supra* note 32, ¶ 465.

61. *Id.* ¶ 466.

62. *Id.* ¶ 469.

63. *Id.* ¶ 419 ("This is all that article 31, paragraph 3 (*c*), requires: the integration into the process of legal reasoning – including reasoning by courts and tribunals – of a sense of coherence and meaningfulness.").

64. *See* Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101, 139 (1998). With respect to the protection of human rights, see generally Wayne Sandholtz*, Human Rights Courts and Global Constitutionalism: Coordination through Judicial Dialogue*, 10 GLOB. CONSTITUTIONALISM 439 (2021).

65. *See generally* Alec Stone Sweet, Wayne Sandholtz & Mads Andenas, *The Failure to Destroy the Authority of the European Court of Human Rights: 2010-2018*, 21 L. & PRAC. INT'L CTS. & TRIBUNALS 244, 271–77 (2022).

respect to international economic law,[66] human rights,[67] due process and administrative procedure,[68] national and international approaches to adjudication within regimes,[69] among other areas. "Rather than resulting in fragmentation," Simma, then a judge on the ICJ, argued that international courts "[have] revived international discourse," in which the values of "mutual respect, coordination, and cooperation" across jurisdictions have informed the "progressive development of the law," producing far more inter-regime harmonization than discord and debilitating conflict.[70] In Anne Peters's words, a great deal of "mutual" "systemic harmonization" has been achieved; indeed, "it is time to bury the f-word."[71] Today, international law is enforced by a "decentralized sovereign,"[72] a "polyarchy" of courts,[73] and they do so through dialogues heavily mediated by GPLs.

III. THE INTERNATIONAL COURT OF JUSTICE

As the international legal system's only general court,[74] the ICJ's positions on important questions of international law carry great

66. *See* Petersmann, *supra* note 40, at 209. For international economic law, see generally JÜRGEN KURTZ, THE WTO AND INTERNATIONAL INVESTMENT LAW: CONVERGING SYSTEMS (2016).

67. *See* JANNEKE GERARDS, GENERAL PRINCIPLES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 46–107 (2019). In the ECHR, modes of systemic interpretation emerged even before the entry into force of the Vienna Convention of the Law of Treaties, and the ECHR regularly incorporates norms from external treaties to interpret, and fill gaps in, the European Convention. *See, e.g.*, Golder v. The United Kingdom, App. No. 4451/70, ¶ 29 (Feb. 21, 1975), https://hudoc.echr.coe.int/eng?i=001-57496 [https://perma.cc/2FG5-W7FJ].

68. *See generally* DELLA CANANEA, *supra* note 53, at 205.

69. *See* EIRIK BJORGE, DOMESTIC APPLICATION OF THE ECHR: COURTS AS FAITHFUL TRUSTEES 112 (2015); *see generally* Mads Andenas & Eirik Bjorge, *National implementation of ECHR Rights*, *in* CONSTITUTING EUROPE: THE EUROPEAN COURT OF HUMAN RIGHTS IN A NATIONAL, EUROPEAN AND GLOBAL CONTEXT 181, 181 (A. Føllesdal, B. Peters, & G. Ulfstein eds., 2013).

70. Simma, *supra* note 41, at 279, 290.

71. Peters, *supra* note 40, at 671, 688.

72. Alec Stone Sweet, *The Structure of Constitutional Pluralism: Review of Nico Krisch, Beyond Constitutionalism: The Pluralist Structure of Post-National Law*, 11 INT'L J. OF CONSTITUTIONAL L. 491, 493 (2013).

73. *See generally* Sabel & Gerstenberg, *supra* note 56, at 546.

74. The ICJ (1946) was established under the UN Charter as the successor of the Permanent Court of International Justice (1922–1946). The ICJ Statute, which is appended to the Charter of the U.N., contains procedures for its revision but has never been amended. The procedure is the same as that for amending the UN Charter. Under Article 108 of the Charter,

weight and, for some, are presumed to be authoritative. Here we examine aspects of the ICJ's case law on GPLs. We argue that the Court has changed its disposition on principles, at first subtly, and then more assertively. By treating GPLs in more evolutive, open-textured ways, the Court has sought to strengthen its capacity to participate in exchanges, both direct and implicit, with judges on other courts. The latter, to put it bluntly, have generated a far more sophisticated jurisprudence on principles than has the ICJ (Part V). We do not want to be misunderstood on these points. Compared to other powerful international courts and tribunals, the ICJ approach to GPLs has long been narrowly constructed, rendering it incapable of producing expansive juris-generative effects. In the past two decades, this situation has begun to change, and decisively so. This section charts and evaluates the main features of these developments.

After an overview of the ICJ Statute (A), we examine the Court's move away from what we call "restrictive formalism" (B) and to their application to key issues of international law (C).

A. General Principles and the ICJ Statute

Reproducing provisions governing the operation of the Permanent Court of International Justice (PCIJ, 1920–1946), Article 38 of the Statute of the ICJ stipulates that it "shall apply" treaty law, customary international law, and "the general principles of law recognized by civilized nations" as direct sources of international law.[75] GPLs are not optional: Article 38(1)(c) places the ICJ under an unambiguous legal duty to apply GPLs in its "function" of resolving legal disputes "in accordance with international law."[76] As Christian Tomuschat puts it: Failure to take account of GPLs material to the resolution of a case being adjudicated "would breach" this duty, and "an essential rule of interpretation."[77] Moreover, Article 38 does not authorize the judge to "read down" the terms of a GPL. For their part, scholars have

amendments must be adopted by two thirds of the members of the General Assembly and ratified by two thirds of the members of the United Nations, including all the permanent members of the Security Council. The Charter has itself only been amended five times since its adoption in 1945.

75. Statute of the International Court of Justice, *supra* note 9, art. 38(1)(c).

76. *Id.* *See also* Andenas & Chiussi, *supra* note 47, at 178 (relying on, among others, Hersch Lauterpacht, *Some Observations on the Prohibition of 'Non Liquet' and the Completeness of the Law*, *in* SYMBOLAE VERZJIL, PRESÉNTÉS AU PROFESSEUR J.H.W. VERZIJL À L'OCCASION DE SON LXX ANNIVERSAIRE (J.H. Verzjil & F.M. van Asbeck eds., 1958)).

77. Christian Tomuschat, *Obligations Arising for States Without or Against their Will*, 241 RECUEIL DES COURS 209, 314 (1993).

extensively debated the question of whether the ICJ ought to treat GPLs as less significant or potent than the other major sources (treaties and customary international law). One could argue for the recognition of a *de facto* hierarchy of sources that would privilege conventions and treaties, on the grounds of explicit state consent. With respect to customary international law, scholars could point to the fact that the PCIJ and the ICJ have produced a richer jurisprudence than it has on GPLs.[78] Indeed, the world court has pointedly avoided direct discussions of methodology questions—including addressing the problem of how the Court should go about identifying a GPL—which had complicated the ILC's present work in palpable ways.[79]

At the same time, in the twentieth century, the PCIJ and the ICJ deployed GPLs routinely. In some important cases, they have even relied on multiple principles to resolve a single case. An early example is the well-known judgments of the PCIJ in *Chorzów*.[80] In *Chorzów*, the PCIJ applied a series of GPLs to clarify and develop the effectiveness of the international law on state responsibility, reparations, and the assessment of damages. The judgments also applied GPLs to determine the effects of multiple and parallel proceedings, and allegations of abusive corporate maneuvers.[81] The *Chorzów* rulings are frequently cited by other international courts and tribunals (and in recent decades, by arbitral tribunals in treaty-based investor-state arbitration) precisely with regard to their use of principles.[82] The ICJ's rulings in *Diallo* also made extensive use of multiple GPLs.[83] We discuss *Diallo* further in section III.(B).

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78. See the discussion on whether treaties or customary international law constitute the primary sources of international law, and then the more limited role of principles in International Law Commission: 65th session. Sir Michael Wood (Special Rapporteur), Formation and Evidence of Customary Law, U.N. Doc. A/CN.4/663 (May 17, 2013), ¶¶ 34–35.

79. *See* discussion *infra* Part IV.

80. *See* Factory at Chorzów (Ger. v. Pol.), Jurisdiction, 1927 P.C.I.J. (ser. A) No. 9 (July 26) [hereinafter Chorzów, Jurisdiction]; Factory at Chorzów (Ger. v. Pol.), Interim Measures of Protection, 1927 P.C.I.J. (ser. A) No. 12 (Nov. 21); Factory at Chorzów (Ger. v Pol.), Merits, 1928 P.C.I.J. (ser. A) No. 17 (Sept. 13).

81. *See* Chester Brown, *Factory at Chorzów (Germany v Poland) (1927–28)*, *in* LANDMARK CASES IN PUBLIC INTERNATIONAL LAW 61, 61 (Eirik Bjorge & Cameron Miles eds., 2017) (summing up the contribution made by *Chorzów* by listing these points).

82. Chester Brown counts the *Chorzów* citations in the leading texts. *See id.* at 61 n.1. Stone Sweet and Grisel point to *Chorzów* as one of "the most prominent cases" that investment treaty arbitration tribunals cite to in "international jurisprudence to identify a principle of law for use in [investor state arbitration]." STONE SWEET & GRISEL, *supra* note 52, at 156.

83. *See* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Preliminary Objection, 2007 I.C.J. 582 (May 24); *see also* Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo),

The ICJ has clearly established that general principles of international law may constitute "general principles of law" under Article 38(1)(c). In *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, [84] it explained the origins and character of the Genocide Convention,[85] stressing that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation."[86] As Giorgio Gaja notes, the ICJ clarified:

> [T]he basis for the existence of a principle in the recognition by States, noting that such recognition was expressed in resolution 96(I) of the General Assembly, which marked 'the intention of the United Nations to condemn and punish genocide as a crime under international law.' . . . [T]he existence of a principle may rest on its 'recognition' by States and does not necessarily consist in the presence of parallel principles in municipal laws.[87]

B. The Move Away from "Restrictive Formalism"

Until the turn of the twenty-first century, the ICJ's standard approach to principles was what we here label one of *restrictive formalism*. As Andenas has detailed, the Court typically limited itself to declaring the applicability of a GPL without engaging in the kind of

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Merits, 2010 I.C.J. 639 (Nov. 30); Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo), Compensation, 2012 I.C.J. 322 (June 19).

84. *See* Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15 (May 28).

85. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

86. Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, supra* note 84, at 23.

87. Giorgio Gaja, *General Principles in the Jurisprudence of the ICJ*, *in* GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 35, 40 (Mads Andenas et al. eds., 2019). Professor Gaja was a judge of the International Court of Justice. Abdulqawi A. Yusuf, writing as the President of the ICJ, lent clear support to this view. *See* Abdulqawi A. Yusuf, *Concluding Remarks*, *in* GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 448, 457. Yusuf largely bases his dissent in *Jurisdictional Immunities of the State* on an application of GPLs. *See generally* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 291 (Feb. 3) (Yusuf, J., dissenting). In the same case, Judge Cançado Trindade's dissent is also based on an analysis of GPLs. *See generally* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 179 (Feb. 3) (Cançado Trindade, J., dissenting).

reflections that would spur further questioning and innovation.[88] Even in *Chorzów*, the ICJ's pronouncements on principles are declared as terse, bald assertions.[89] The indicators of this approach are easily observed. The ICJ chose not to address Article 38(1)(c), for instance, and the principles invoked are not justified or theorized in any meaningful sense. This *restrictive* approach is also *formalist*, seemingly tailored to deny any hint of law-making creativity. Instead, the PCIJ and the ICJ treated GPLs to be used as if they comprised pre-existing norms to be taken—fully formed—off the shelf and applied. The approach started and ended without a stage devoted to the principle's construction.

Restrictive formalism had consequences for the courts' role in, and engagement with, the greater international legal order. The ICJ deliberately avoided invoking treaties[90] unless they had been ratified by both parties to a dispute and were material to the case at hand (the weakest form of systemic integration, and involving no outside court). Neither the PCIJ nor the ICJ had use for subsidiary sources, such as decisions by other international, regional or domestic courts and tribunals. Gilbert Guillaume, then President of the ICJ, positively celebrated the Court's isolation as if it were a virtue: we have "always abstained . . . from the smallest reference to the rationales employed by the regional jurisdictions."[91] The Registrar of the ICJ long advised judges on the Court to resist citation to any other court in its judgments.[92] Indeed, prior to 2004, the ICJ even refused to cite the rulings of the UN Human Rights Committee (HRC), any other UN treaty

88. *See generally* Mads Andenas, *Reassertion and Transformation: From Fragmentation to Convergence in International Law*, 46 GEO. J. INT'L L. 685 (2015).

89. The clean hands doctrine is set out in the *Chorzów* judgment:

> It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

Chorzów, Jurisdiction, *supra* note 80, at 31.

90. Campbell McLachlan, *The Principles of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54(2) INT'L & COMP. L. Q. 279, 279 (citing a "'general reluctance' to refer").

91. Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2 J. INT'L DISP. SETTLEMENT 5, 19–20 (2011).

92. *See* Mads Andenas, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo) Judgment on Compensation*, 107 AM. J. INT'L L. 178, 183 n.28 (2013).

organ, or Special Rapporteur.[93] Practices that we now take for granted as basic to systematic interpretation could not develop as the ICJ would have been required to engage with arguments and decisions beyond its own.[94]

The ICJ chose restrictive formalism; it is neither required nor implied by Article 38. Yet the choice has proven to be momentous, contributing to the perception of the "fragmentation of international law" examined by the ILC and its Rapporteur (Koskenniemi).[95] As Andenas argued, and Koskenniemi intimated, the ICJ risked being marginalized as regional and specialized courts developed their own capacities for autonomous action, especially with regard to principles.[96] As international adjudication took off in these latter courts, the ICJ's case load remained relatively sparse, and the Court possessed no means of forcing the newer international courts and tribunals to accept its holdings when it did weigh in on an important topic.

In the twenty-first century, the ICJ has moved to abandon the dictates of restrictive formalism, although it did so without overt discussion or justification. In its Advisory Opinion in the *Wall Case*,[97] the ICJ cited to the jurisprudence of the HRC, noting the HRC's decisions in individual cases, its "constant practice" on extraterritorial application, and its statements on the interpretation of the International Covenant on Civil and Political Rights (ICCPR) at issue.[98] In the same opinion, the ICJ also relied on the views of the Committee on Economic, Social and Cultural Rights and the UN Special Human Rights Mandates or Rapporteurs (interpreting the 1966 UN Covenants).[99] Subsequent rulings extended the ICJ's openness to new sources and external authorities:

93. Mads Andenas, *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo) Judgement of 30 November 2010*, 60 INT'L. & COMP. L. Q. 810, 816–817 (2011).

94. *See generally* Mads Andenas & Johann Leiss, *The Systemic Relevance of "Judicial Decisions" in Article 38 of the ICJ Statute*, 77 ZEITSCHRIFT FÜR AUSL. . .NDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 907 (2018).

95. *See* discussion *supra* Section II.B.

96. *See* Andenas, *supra* note 88, at 729.

97. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9).

98. *Id.* ¶ 109–110.

99. *Id.* ¶ 112.

- In *Bosnia and Herzegovina v. Serbia and Montenegro* (2007),[100] the ICJ cited both the trial chamber of the International Criminal Tribunal for the Former Yugoslavia[101] and the International Criminal Tribunal for Rwanda.[102] While (infamously) declining to embrace the Yugoslav Tribunal's views on state responsibility, the ICJ relied on the latter court's findings of fact, as well as on *ad hoc* tribunals in that system for understandings of certain international criminal offenses.[103] (In *Croatia v. Serbia* (2015)[104] the ICJ continued the dialogue with the International Criminal Tribunal for the Former Yugoslavia.).[105]
- In *Former Yugoslav Republic of Macedonia v. Greece* (2011),[106] the ICJ took guidance from Court of Justice of the European Communities,[107] with respect to the application of GPLs, including good faith and *exceptio non adimpleti contractus* (under which one person is excused from completing a contract if the other person has not lived up to their side of the agreement).
- In *Judgment No 2867 of the Administrative Tribunal of the International Labour Organization* (2012),[108] the ICJ relied on General Comments of the HRC[109] when applying the GPLs of equal access to courts and equality of arms.

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100. Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43 (Feb. 26).

101. *Id.* ¶ 188.

102. *Id.* ¶ 198.

103. Mads Andenas, *Jurisdiction, Procedure and the Transformation of International Law: from Nottebohm to Diallo in the ICJ*, 23 EUR. BUS. L. REV. 127, 135 (2012).

104. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3, ¶ 129 (Feb. 3).

105. *Id.*

106. Application of the Interim Accord of 13 September 1995 (Former Yugoslav Republic of Maced. v. Greece), Judgment, 2011 I.C.J. 644 (Dec. 5).

107. *See id.* ¶ 109.

108. Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization Upon a Complaint Filed Against the International Fund for Agricultural Development, Advisory Opinion, 2012 I.C.J. 10 (Feb. 1).

109. *See id.* ¶ 39.

- In *Belgium v. Senegal* (2012),[110] the ICJ cited to, and followed, the decisions of the UN Committee against Torture,[111] and it cited to the case law of ECOWAS Court of Justice.[112]
- In *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (2012),[113] the ICJ referred to "customary international law reflected in the case law of this Court, the International Tribunal for the Law of the Sea (ITLOS) and international arbitral courts and tribunals".[114]
- In *Croatia v. Serbia* (2015),[115] the ICJ sustained its dialogue with the International Criminal Tribunal for the Former Yugoslavia, broadening its use of sources even further.[116]
- In *Jurisdictional Immunities of the State (Germany v. Italy)* (2012),[117] the ICJ made use of domestic sources, including the jurisprudence of national courts, to determine rules of customary international law.[118] (On the other hand, the ICJ took a relatively conservative position on "access to justice" issues, as pointed out by dissenters.[119]) The ICJ majority also relied on decisions of the Grand Chamber of the European Court of Human Rights (ECHR), which had applied the "widely held view of international law such that the grant of immunity could be regarded as compatible with the [ECHR]," in particular, WWII war crime victims' right of access to justice.[120] Thus, the ICJ, a general court of public

110. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20).

111. *See id.* ¶ 101–02.

112. *See id.* ¶ 35. ECOWAS is the Economic Community of West African States. It is not clear if the ICJ took any account of the jurisprudence of the ECOWAS Court.

113. Territorial and Maritime Dispute (Nicar. v. Colom.), Judgment, 2012 I.C.J. 624 (Nov. 19).

114. *Id.* ¶ 114. The ICJ notes that the parties agree to this as "applicable law."

115. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, 2015 I.C.J. 3 (Feb. 3).

116. *Id.* ¶ 129.

117. Jurisdictional Immunities of the State (Ger. v. It., *Greece Intervening*), 2012 I.C.J. 99 (Feb. 3).

118. *Id.* ¶ 72.

119. *Id.* ¶¶ 130–55 (Cançado Trindade, J., dissenting).

120. *Id.* ¶¶ 72–73.

> international law, applied the ruling of a court of human rights on the issue of how to resolve potential conflicts between the immunity of states and the rights of individuals.

Perhaps the best illustration of the ICJ's change of strategy is *Diallo*, a case involving unlawful detention and expulsion.[121] In *Diallo*, the Court expressly relied on the jurisprudence of the HRC.[122] In the follow-up judgment on compensation, the ICJ took into account the case law of other international courts, tribunals and commissions in the application of a long list of principles governing liability and compensation for the harms at issue. The ICJ referenced decisions of the International Tribunal for the Law of the Sea (ITLOS), the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR), the Iran-United States Claims Tribunal, the Eritrea-Ethiopia Claims Commission, and the United Nations Compensation Commission.[123] In his separate opinion, Judge Cançado Trindade underlined the significance of the *Diallo* rulings, noting that "the ICJ has rightly taken into account the experience of other contemporary international tribunals in the matter of reparations for damages."[124] Judge Greenwood, in his separate opinion, reiterated the point,[125] emphasizing that that there was very little in its own jurisprudence on which the ICJ could draw. It was, he concluded, "entirely appropriate that the ICJ made a thorough examination of the practice of other international courts and tribunals, especially the main human rights jurisdictions, which have extensive experience assessing damages in cases with facts similar to those of the present case."[126]

Specialized and regional courts and tribunals may invoke their own versions of "restrictive formalism." Among the two leading European courts the ECTHR has extensively cited national and international courts; but the Court of Justice of the European Union (CJEU)

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121. *See generally* Case Concerning Ahmadou Sadio Diallo (Papua N.G./Dem. Rep. Congo), Judgment, 2010 I.C.J. 639 (Nov. 30); *see* Mads Andenas, *Reassertion and Transformation: From Fragmentation to Convergence in International Law*, 46 GEO. J. INT'L L. 685 (2015).

122. *See id.* ¶ 66.

123. Case Concerning Ahmadou Sadio Diallo (Papua N.G. v. Dem. Rep. Congo), Judgment, 2012 I.C.J. 324, ¶ 13 (June 19).

124. Case Concerning Ahmadou Sadio Diallo (Papua N.G. v. Dem. Rep. Congo), Judgment, 2012 I.C.J. 347, ¶ 1 (June 19) (Cançado Trindade, J., separate opinion).

125. Case Concerning Ahmadou Sadio Diallo (Papua N.G. v. Dem. Rep. Congo), Judgment, 2012 I.C.J. 391, ¶ 8 (June 19) (Greenwood, J., declaration).

126. Judge Greenwood would, nonetheless, have granted lower compensation for Diallo's non-material injuries. *Id.* ¶ 11.

has done so only on a few occasions (although Advocate Generals of the CJEU are freer to do so in their opinions).[127] In the recent rule of law judgments against Poland, the CJEU extensively cited and expressly relied on the ECTHR.[128] The HRC has gradually moved away from its own version of a restrictive formalism, providing another opening. While the HRC was once loathe to cite to the case law of the regional human rights courts,[129] it now does so extensively in its General Comments on the interpretation of individual articles of the ICCPR.[130]

C. Looking Forward

We have argued that the ICJ has strengthened its capacity to (i) participate in the development of GPLs, and (ii) engage in more expansive systemic integration, including through direct dialogues with regional and specialized courts. Still, in comparison to the latter courts, the ICJ's postures remain relatively narrow and cautious. We now briefly explore three major challenges to the ICJ's bid to become more salient to the greater international legal system: (i) the right to

127. Concerning public international law and art. 340 of the Treaty on the Functioning of the European Union (formerly art. 215 of the Treaty establishing the European Economic Community) on the application of the "general principles common to the laws of the Member States" in the case of non-contractual liability, see Joined Cases 46/93 & 48/93, Brasserie du Pêcheur SA v. Bundesrepublik Deutschland, The Queen v. Sec'y of State for Transp., Opinion of Advoc. Gen. Tesauro, 1996 E.C.R. I-01029, 1101 (Mar. 5).

128. *See* Joined Cases 585/18, 624/18 & 625/18, A. K. v. Sąd Najwyższy, C. P. v. Sąd Najwyższy, D.O. v. Sąd Najwyższy, ECLI:EU:C:2019:982, ¶¶ 126–130, 133, 137, 145 (Nov. 19, 2019).

129. *See* Sandholtz, *supra* note 64, at 455.

130. *See* the Human Rights Comm., General Cmt. No. 37 on Art. 21 (the right of peaceful assembly), U.N. Doc. CCPR/C/GC/37 (Sept. 17, 2020); *see also* Human Rights Comm., General Cmt. No. 36 on Art. 6 (the right to life), U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018) (in which the HRC cites the Inter-American Commission, the Inter-American Court, the African Commission on Human and Peoples' Rights and the European Court of Human Rights); Human Rights Comm., General Cmt. No. 35 on Art. 9 (liberty and security of person), U.N. Doc. CCPR/C/GC/35 (Dec. 16, 2014) (the HRC did not cite any of the regional human rights mechanisms, the ICJ (which had relevant case law), or any other UN body. In their views on individual complaints, the HRC still does not rely explicitly on the interpretation of the ICCPR by any other court or tribunal.); Human Rights Comm., *Yevdokimov and Rezanov v. Russian Fed'n*, U.N. Doc. CCPR/C/101/D/1410/2005 (Mar. 21, 2011), 9 (where two dissenters, Krister Thelin and Michael O'Flaherty, criticize the majority for applying "some form of extended proportionality test, as might be inferred from the European Court of Human Rights in the case *Hirst v. United Kingdom* and which seemingly has inspired the majority").

compensation as a remedy for breach of international law; (ii) the principle of self-determination; and (iii) the proportionality principle.

A first item involves clarifying the principles relevant to compensation, as a remedy for breach of international law, an agenda item of concern to all international courts and tribunals. In *Diallo*, the ICJ awarded damages as a remedy for a violation of international law for only the second time in its history,[131] the first being in *Corfu Channel*.[132] *Diallo* produced important knock-on effects, in particular in the realm of environmental protection.

In *Costa Rica v. Nicaragua*, the Court ordered Nicaragua to pay compensation to Costa Rica for environmental damage caused by the construction of a transboundary road,[133] while also holding that Costa Rica had not met its obligation under general international law to carry out an environmental impact assessment.[134] To establish that there was a right to compensation for environmental harm, the Court built on its holding in *Diallo*, arguing from analogy and deploying the evidentiary rule it had developed in *Diallo*,[135] which relaxed the burden of proof on the claimant in a human rights case (arbitrary detention), in the field of environmental protection. It did so while intensively discussing the question of harms, in particular, to nature's capacity to provide goods and services, and the cost of environmental restoration.[136] For present purposes, what is most important is that the analytical approach taken in *Diallo* and *Costa Rica v. Nicaragua* required the ICJ to move up and down the ladder of abstraction on a regular basis—from an abstract principle of law to its concrete application in the case—while taking account of the case law of other courts.

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131. *See* Case Concerning Ahmadou Sadio Diallo (Papua N.G. v. Dem. Rep. Congo), Judgment, 2012 I.C.J. 324 (June 19).

132. The Corfu Channel (U.K. v. Alb.), Assessment of Amount of Compensation, 1949 I.C.J. 244 (Dec. 15). *Corfu Channel* involved an inter-state conflict, whereas *Diallo* concerned damages awarded to an individual for a human rights violation.

133. Certain Activities Carried Out by Nicar. in the Border Area (Costa Rica v. Nicar.), Judgment, 2018 I.C.J. 15, 18 (Feb. 2); Construction of a Road in Costa Rica along the San Juan River (Nicar. v. Costa Rica), Judgment, 2015 I.C.J. 665, 669 (Dec. 16).

134. Nicar. v. Costa Rica, 2015 I.C.J. ¶ 163.

135. Costa Rica v. Nicar., 2018 I.C.J. ¶¶ 30–35, 154; see in particular, *supra* note 122 and note 123.

136. Costa Rica v. Nicar., 2018 I.C.J. ¶ 52. With respect to valuation methods that are "sometimes used for environmental damage valuation in the practice of national and international bodies," *id.*, the ICJ even cited to the U.S. Supreme Court. *Id.* ¶ 35 (citing Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 556 (1931)).

In March 2023, the UN General Assembly requested an advisory opinion from the ICJ on the obligations of States in respect to climate change, including remedies for breach of obligations under international law.[137] Litra (b) of the request asked: "What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment?"[138] The request included reasoning extracted from *Costa Rica v. Nicaragua*, and provided the Court with a targeted opportunity to further develop the law on environmental damage and remedies. Climate change is the most pressing international challenge, and the role of law, courts and legal principles remain highly disputed.

A second challenge concerns the principle of self-determination. In *Chagos Islanders*, the ICJ announced that the right of self-determination as one of the "basic principles of international law."[139] The Court held that "the decolonization of Mauritius was not conducted in a manner consistent with the right of peoples to self-determination [and], it follow[ed], that the United Kingdom's continued administration of the Chagos Archipelago constitute[d] a wrongful act entailing . . . international responsibility."[140] The Court then ordered the UK to end its administration of the Chagos Archipelago as rapidly as possible.[141] Further, it declared that all Member States must cooperate with the United Nations to complete the decolonization of Mauritius.[142] The *Chagos Islanders* judgment will heavily condition future applications of the self-determination principle, including some of the most controversial disputes pending at international law.[143] Further, a UN General Assembly request for an advisory opinion on international law on climate change, also involves the principle of self-

137. Int'l Ct. of Just., Rep. on the Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change, U.N. Doc. A/77/L.58 (Mar. 1, 2023).

138. *Id.* at 3.

139. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. 95, ¶ 155 (Feb. 25).

140. *Id.* ¶ 177.

141. *Id.* ¶ 178.

142. *Id.* ¶ 180.

143. Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Request for Advisory Opinion, 2017 I.C.J. 2, 3 (June 23). Thirty-one Member States of the United Nations and the African Union had filed written statements, and ten States and the African Union filed written comments on the written statements. Ten States and the African Union subsequently presented written comments on these written statements. Twenty-one States and the African Union participated in the oral proceedings in 2018.

determination. The self-determination of Small Island Developing States such as Vanuatu and many indigenous peoples is particularly at risk (Vanuatu, an island archipelago in the South Pacific, tabled the resolution requesting an advisory opinion, and collected widespread support for it, leading to its adoption in 2023).[144]

A third issue is the fate of proportionality. In the ICJ's case law, the proportionality principle remains relatively inchoate. The Court has referred to the principle in certain areas, most often with reference to maritime boundary disputes,[145] the use of force,[146] or the legality of peaceful countermeasures.[147] Meanwhile, every other powerful international court has worked to codify the principle (as an analytical framework consisting of a sequence of distinctive stages or tests) for much wider purposes, most importantly, to adjudicate the limitation clauses of the qualified rights in human rights treaties, and the derogation clauses in economic law.[148] If the ICJ is to become more relevant to the international legal order, it cannot afford to ignore

144. See the campaign website by Vanuatu. VANUATU ICJ INITIATIVE, https://www.vanuatuicj.com/ (last visited Oct. 17, 2023) [https://perma.cc/4NV2-BCAS].

145. A key issue has been whether there should be a relationship between the relative length of a state's coastline and whether the amount of shelf awarded to that State should be proportional to their coastline. In *North Sea Continental Shelf* cases, the ICJ considered "the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines." North Sea Continental Shelf Cases (Ger. v. Den.; Ger./Neth.), Judgement, 1969 I.C.J. 3, ¶ 98 (Feb. 20); *see also* Continental Shelf (Libya v. Malta), Judgement, 1985 I.C.J. 13, ¶ 11 (June 3); Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.), Judgement, 1984 I.C.J. 246, ¶ 13 (Oct. 12).

146. Here proportionality "is not strictly used as an 'ends-means' balancing test between competing interests over a single asset but rather as a means of limiting harm against others in situations of armed conflict." Emily Crawford, *Proportionality*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2012)*; see* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 41 (July 8) (in *Nuclear Weapons* the ICJ stated that "the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary international law"); *see also* Military and Paramilitary Activities in and against Nicar. (Nicar. V. U.S.), Judgment, 1986 I.C.J. 14, ¶ 194 (June 27); Oil Platforms (Iran v. U.S.), Judgment, 2003 I.C.J. 161, ¶ 74 (Nov. 6); Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. 168, ¶ 147 (Dec. 19) (affirming the customary status of proportionality in self-defense).

147. Gabčíkovo-Nagymaros Project (Hung./Slovk.), Judgment, 1997 I.C.J. 7, ¶ 85 (Sept. 25) ("the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.").

148. *See generally* Stone Sweet & Brunell, *supra* note 28; *see* discussion *infra* Section V.B.

this case law, now an imposing, inter-locking edifice. As Judge Yusuf, writing as President of the ICJ, stated in 2019:

> What is clear is that general principles will only increase in significance in the future, especially as courts encounter new challenges on which specific legal rules may not yet exist or which call for the articulation of fundamental values recognised by the international community as a whole in the form of legal rules or principles to be applied in specific circumstances in the relations among States.[149]

IV. THE INTERNATIONAL LAW COMMISSION

We now turn to the ILC's examination of GPLs, a project that remains ongoing.[150] The issues raised in Part II of the paper (judicialization; fragmentation; inter-jurisdictional dialogue) hover over the ILC's work and are at times explicitly addressed by the Special Rapporteur, Marcelo Vázquez-Bermúdez.[151] The Rapporteur focused his attention on three technical legal issues: (i) the methodology governing the identification of GPLs; (ii) the major "functions"—that is, the underlying purposes—of GPLs; and (iii) the relationship between GPLs and other sources of international law, including *lex specialis*.[152] By its Third Report, the ILC had broadened its approach, taking bolder positions on the systemic issues at the heart of this paper. Thus, the ILC more clearly recognized an overlap between GPLs and certain

149. Abdulqawi A. Yusuf, *Concluding Remarks*, *in* GENERAL PRINCIPLES AND THE COHERENCE OF INTERNATIONAL LAW 448, 457 (Mads Andenas et al. eds., 2019).

150. Statute of the International Int'l Law Comm'n art. 2, § 1. The ILC. was established by the Statute in 1947 (as amended in 1950, 1955, and 1981), which was attached to U.N. General Assembly Resolution 174. G.A. Res. 174 (II) (Nov. 21, 1947). It now contains thirty-four members of "recognized competence in international law." Statute of the International Int'l Law Comm'n art. 2, § 1. The ILC has two roles: to aid in international law's (i) "codification" and (ii) "progressive elaboration, in particular domains." *Id.* art. 1, § 1. The General Assembly retains full powers to alter the Statute of the ILC and to determine the ILC's agenda. *Id.* art. 16.

151. The ILC, which possesses the power to set the "plan of work," selects a "Rapporteur" to guide its deliberations and to draft Reports. States may submit to the Rapporteur their comments and recommendations on the topic and its discussion in the ILC. *Id.* art. 16, § a–b. After approval, the ILC "shall request the Secretary-General to issue [the draft Report] as a Commission document," which is then submitted to the UN General Assembly for final approval. *Id.* arts. 16–17. In addition, the Sixth Committee (Legal) typically reviews the draft Report and make its own comments and recommendations. *Id.* art. 22.

152. Second Report—ILC, *supra* note 5, ¶¶ 6–7.

fundamental norms of customary international law and treaty law, and it embraced the view that GPLs can function as a positive force for building the effectiveness of treaty regimes and for mitigating the "fragmentation" of international law.

A. The First Report

The ILC's First Report is primarily devoted to setting the Commission's deliberative agenda and for establishing common views on certain first-order questions, where possible. Thus, the ILC treated Article 38 of the ICJ Statute as providing an authoritative analytical framework for discussion of the major issues to be considered. Among important positions taken was the displacement of the term "civilized nations" in Article 38(1)(c), which was widely considered to be "anachronistic,"[153] by the phrase, "community of nations," or simply "States." The ILC adopted Draft Conclusion 2:

"For a general principle of law to exist, it must be generally recognized by States."[154]

With respect to GPLs originating in domestic legal orders, the ILC agreed to a standard formulation, which established a two-step "methodology," each comprising a "necessary condition": (i) "recognition" (identification of the principle); and (ii) "transposition" (application within the international legal system).[155] Without stipulating precise numerical thresholds, the GPL must exist in a sufficient number of states, across a variety of "principal legal systems" around the globe.[156] And transposition would only take place insofar as the principle was determined to be "consistent with"—and capable of "appropriate" adaption to—the dictates of international law.[157]

The First Report also revealed important differences within the ILC, which we examine in light of decisions taken during subsequent sessions of the ILC (as reported in the Second Report and the Third Report). It is important to view the three reports in sequence, as they overlap and build on one another in virtually all important respects. To take one example, the First Report discussed intensive debate, and a lack of consensus within the ILC, on whether principles "formed" within the international legal system should be considered GPLs in

153. First Report—ILC, *supra* note 4, ¶ 19.

154. *Id.* ¶¶ 186–87.

155. *Id.* ¶¶ 30, 163–75, 225–30.

156. *Id.* ¶ 223.

157. *Id.* ¶¶ 226–27.

their own right under Article 38(1)(c). Looking forward to the Second Report, the Rapporteur indicated that some delegates had proposed that the ILC take no "clear position" on this issue.[158] The Rapporteur resisted this suggestion on the grounds that Article 38 did "not exclude the existence of [GPLs] that arise from the international legal system,"[159] and that their function of "gap-filling"[160] was virtually identical to that of GPLs derived from municipal systems.

The Rapporteur also stressed that "gap-filling" was a "generally accepted," basic "function" of GPLs,[161] a topic mainly discussed in terms of (what we have called) levels of abstraction, including the role of *lex specialis*. Citing back to the ILC's Fragmentation Report, a "rule may be seen as a specific application of a principle," with the "general or earlier principle articulat[ing] a rationale or a purpose to the specific (or later) rule."[162] Certain standard techniques of "conflict resolution"—such as those embodied in the notions of *lex posterior derogate legi priori* and *lex specialis derogat legi generali*—are declared to be established GPLs in their own right.[163]

We would emphasize the fact that any *lex specialis* rule is likely to contain gaps that will be filled by, or interpreted with reference to, higher order principles. The ILC debated this view extensively, but inconclusively, in the First Report.[164] It finally took a firm position in its Third Report.[165] Accordingly, the Third Report firmly rejected the view that rules of *lex specialis* constitute carve outs from GPLs, or instances wherein states may "contract out" of the reach of GPLs.[166] On this point, the Fragmentation Report and the Third Report are in accord: Both stipulate that a rule of *lex specialis* "does not

158. Second Report—ILC, *supra* note 5, ¶ 115.

159. First Report—ILC, *supra* note 4, ¶ 232.

160. *Id.* ¶¶ 66, 232.

161. *Id.* ¶ 162.

162. *Id.* ¶ 67. The Rapporteur also notes that:

> The Study Group [on Fragmentation] also considered the distinction between 'rules' and 'principles' . . . [which] 'captures one set of typical relationships, namely those between norms of a lower and higher degree of abstraction. A 'rule' may thus sometimes be seen as a specific application of a 'principle' and understood as *lex specialis* or *lex posterior* in regard to it, and become applicable in its stead.

Id.

163. *Id.* ¶ 61.

164. *Id.* ¶ 66.

165. Third Report—ILC, *supra* note 6, ¶¶ 95–107.

166. *Id.*

normally extinguish" the existence or relevance of related principles.[167] As the Third Report put it:

> The conclusions of the work of the Study Group on fragmentation are clear in this regard:
>
> . . . "[Relevant GPLs] remain valid and applicable and will, in accordance with the principle of harmonization . . . , continue to give direction for the interpretation and application of the relevant special law and will become fully applicable in situations not provided for by the latter."
>
> . . . [E]ven if a general principle of law is *lex generalis* and other rules of international law take precedence, depending on the particular circumstances of the case, the former may not be completely set aside by the latter and the general principle may continue to play an interpretative or complementary role with regard to the "special" treaty or customary rule, especially in situations not fully regulated by the latter.[168]

That point made, the Third Report took pains to emphasize that such latter rules deserve full respect, not least in that they "better reflect the intent of the [States]."[169]

In his First Report, the Rapporteur stressed that GPLs "inform or underlie the international legal system," and "serve to reinforce its systemic nature" (citing to aspects of the "triple-function" formulation of Andenas and Chiussi).[170] Although brief, these indications pointed to the broader approach to GPLs which would be developed in the later reports. The First Report quoted at length—albeit with no commentary—from Judge Cançado Trindade's dissenting opinion in *Pulp Mills*:

> "Every legal system has fundamental principles, which inspire, inform and conform to their norms. It is the principles . . . that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law (*prima principia*) which confer to the legal order

167. *Id.* ¶ 106 (quoting the Study Group on fragmentation).

168. *Id.* ¶¶ 106–107.

169. *Id.* ¶ 104 (quoting the Study Group on fragmentation).

170. First Report—ILC, *supra* note 4, ¶ 26; *see also* Andenas & Chiussi, *supra* note 47, Section 11.C.

> (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves."[171]

In any event, the First Report restates the point,[172] before announcing Draft Conclusion 3: "General principles of law comprise those: (a) derived from national legal systems; (b) formed within the international legal system."[173]

B. The Second Report

In the First Report, the issue of judicial lawmaking was only obliquely analyzed, which is understandable given the sensitivity of the topic and the diversity of the views in the ILC.[174] In the Second Report, the Rapporteur warned that:

> the criteria for determining the existence of a general principle of law must be strict and the criteria must not be used as an easy shortcut to identifying norms of international law. At the same time, those criteria must be flexible enough that the identification of general principles is not regarded as an impossible task. Finding a suitable balance will be key to the success of the Commission's work on the present topic.[175]

As discussed, the First Report provided relatively detailed analysis of the "methodology" underpinning the development of GPLs issuing from domestic legal orders, which is refined in the Second

171. First Report—ILC, *supra* note 4, ¶ 148 (quoting Pulp Mills on the River Uru (Arg. v. Uru.), Judgment, 2010 I.C.J. 135, ¶ 201 (Apr. 20) (separate opinion by Cançado Trindade, J.)); *see also* Arg. v. Uru., 2010 I.C.J. 152, ¶ 41 ("It is in the light of [general principles of law] that the whole *corpus* of the *droit des gens* is to be interpreted and applied.") (separate opinion by Cançado Trindade, J.).

172. According to the First Report, art. 38(1)(c) of the Statute of the ICJ "makes reference to norms that have a 'general' and 'fundamental' character. They are 'general' in the sense that their content has a certain degree of abstraction, and 'fundamental' in the sense that they underlie specific rules or embody important values." First Report—ILC, *supra* note 4, ¶ 153.

173. *Id.* ¶ 253.

174. *See id.* ¶ 99.

175. Second Report—ILC, *supra* note 5, ¶ 15.

Report, [176] and amplified in Draft Conclusions 4,[177] 5,[178] and 6.[179] The Second Report delved deeper into the analytical process for constructing GPLs within the international system, the Rapporteur insisting that "the criteria for the identification" of such GPLs must be "sufficiently stringent," since they "must not be regarded as an easy way to invoke rules of international law."[180]

The Second Report acknowledged that a host of criteria could enable the development of a principle of the second type. Such a principle: (i) "may be widely recognized in treaties and other international instruments'; or (ii) it "may underlie general rules of [treaty] or customary international law"; or (iii) it "may be inherent in the basic features and fundamental requirements of the international legal system." Moreover, "these forms of recognition . . . may coexist."[181] In his First

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176. *See generally id.* ¶¶ 21–22.

177. Draft Conclusion 4 is described as:

> *Draft conclusion 4*
>
> *Identification of general principles of law derived from national legal systems*
>
> To determine the existence and content of a general principle of law derived from national legal systems, it is necessary to ascertain:
>
> (a) the existence of a principle common to the principal legal systems of the world; and
>
> (b) its transposition to the international legal system.

Id. ¶ 112.

178. Draft Conclusion 5 is described as:

> *Draft conclusion 5*
>
> *Determination of the existence of a principle common to the principal legal systems of the world*
>
> 1. To determine the existence of a principle common to the principal legal systems of the world, a comparative analysis of national legal systems is required.
>
> 2. The comparative analysis must be wide and representative, including different legal families and regions of the world.
>
> 3. The comparative analysis includes an assessment of national legislations and decisions of national courts.

Id.

179. Draft conclusion 6 is described as:

> *Draft conclusion 6*
>
> *Ascertainment of transposition to the international legal system*
>
> A principle common to the principal legal systems of the world is transposed to the international legal system if:
>
> (a) it is compatible with fundamental principles of international law; and
>
> (b) the conditions exist for its adequate application in the international legal system.

Id.

180. *Id.* ¶ 120.

181. *Id.* ¶ 121. These requirements are adopted in Draft Conclusion 7. *Id.* ¶ 171.

Report, the Rapporteur had already recognized that GPLs, customary international law, and treaty law[182] could share virtually identical principals. He also noted the view that a GPL could become part of customary international law, if transposed often enough[183]; and he observed that GPLs could also "serve as bases for preemptory norms of general international law (*jus cogens*)."[184] In the Second Report, the criteria just listed forcefully assert that such overlaps have no effect on the status of a principle as a GPL in its own right under Article 38(1)(c). The First Report, after all, mentioned several examples of overlap, including the principles of *pacta sunt servanda*, good faith, and legitimate expectations.[185] For its part, the Third Report adopted two clear positions on these issues, in the form of Draft Conclusion 10: "General principles of law are not in a hierarchical relationship with treaties and customary international law"; and Draft Conclusion 11: "General principles of law may exist in parallel with treaty and customary rules with identical or analogous content."[186]

The empirical analysis focused on the rulings of a wide range of courts and tribunals,[187] an emphasis that demonstrates that judges evolve GPLs as means of enhancing effectiveness and the rule of law within their respective regimes. Echoing Article 38 Statute of the ICJ, Draft Conclusions 8 and 9[188] treat judicial rulings and scholarly work as "subsidiary means for the determination" of GPLs, but it is clear from the illustrations presented that judicial decisions do most of the work.[189] Indeed, judicial decisions routinely "play . . . a substantive role" in the "formation" of GPLs.[190]

C. The Third Report

In the Third Report, the Rapporteur dealt with controversies spurred by conclusions taken in the first two reports, in particular, on GPLs that had evolved within the international legal system itself. Some members of the ILC denied the very existence of this second

182. First Report—ILC, *supra* note 4, ¶¶ 67, 133–37.

183. *Id.* ¶ 71.

184. *Id.* ¶ 75.

185. *Id.* ¶¶ 63, 71, 135, 160.

186. Third Report—ILC, *supra* note 6, ¶ 147.

187. *See generally* Second Report—ILC, *supra* note 5, ¶¶ 121–158.

188. *Id.* ¶ 181.

189. *See generally id.* ¶¶ 172–181.

190. First Report—ILC, *supra* note 4, ¶ 32.

type of GPL; others worried that the Rapporteur had engaged in too much "progressive development of the law" under the guise of "codifying" existing international law; and still others begged for a clearer "methodology" for the recognition of this corpus of GPLs.[191] "Various States and Commission members," wrote the Rapporteur, had "indicated that the criteria set out . . . for the identification of this category of general principles were not sufficiently strict, which would make them too easy to invoke."[192] Controversy centered on Draft Conclusion 7, which had been announced in the Second Report:

> *Identification of general principles of law formed within the international legal system*
>
> To determine the existence and content of a general principle of law formed within the international legal system, it is necessary to ascertain that:
>
> (a) a principle is widely recognized in treaties and other international instruments;
>
> (b) a principle underlies general rules of conventional or customary international law; or
>
> (c) a principle is inherent in the basic features and fundamental requirements of the international legal system.[193]

"The view was expressed," admitted the Rapporteur, "that the draft conclusion needed further consideration since its formulation and . . . methodology proposed . . . would be too vague and unclear, and could lead to subjective interpretations."[194] The Rapporteur acknowledged the difficulty, given that:

> States and international courts and tribunals sometimes invoke or apply principles without explaining what their precise source is, which makes it challenging to identify relevant practice to establish the methodology for the identification of the second category of general principles of law.[195]

He then proposed the following clarification, which we doubt would satisfy conservative skeptics:

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191. Third Report—ILC, *supra* note 6, ¶¶ 19–20.

192. *Id.* ¶ 20.

193. Second Report—ILC, *supra* note 5, ¶ 171.

194. Third Report—ILC, *supra* note 6, ¶ 22.

195. *Id.* ¶ 25.

> In this process, it must be ascertained whether the principle in question has been recognized by the community of nations as a norm of general application, having an independent status from a particular treaty regime or customary rules, that is, as a general legal principle that can operate independently in international law. Evidence of such recognition should be analysed on a case-by-case basis, within the particular context, considering the attitude of the community of nations to being bound by that principle.[196]

In the end, the Rapporteur brushed aside these and other complaints. He insisted on the full status, autonomy, and "applicability" of GPLs developed in the international realm,[197] denied that he was engaged in the "progressive" construction of international law,[198] and refused to alter earlier conclusions.

Perhaps most audaciously, the Special Rapporteur explicitly embraced the "triple function" approach to GPLs taken by Andenas and Chiussi—reproducing, directly and in its entirety, the paragraph we quoted in Section II.B.[199] This move acknowledges the central role of GPLs in improving intra-systemic "convergence," "avoiding or reducing fragmentation," and in "bridging the gap between international law and domestic legal systems."[200] These roles go far beyond the capacity of GPLs to "fill gaps" to avoid situations of *non liquet*. The Third Report recognized that judges have been essential in building the infrastructure of the international legal system as a whole, reflecting positive aspects of the factors discussed in Part II (judicialization, inter-court dialogue, and the challenges raised by fragmentation).

In summary, the Third Report strongly endorsed the following propositions:

> (i) that, under Article 38(1)(c), GPLs comprise a fully autonomous source of law, even if overlapping extant principles of customary international law and treaty law (provisions and interpretations);

196. *Id.* ¶ 32.

197. *Id.* ¶¶ 83–85.

198. "The intention of the Special Rapporteur is not to engage in an exercise of progressive development [of the law on GPLs], and even less so to attempt to create a new source of international law." *Id.* ¶ 26.

199. Andenas & Chiussi, *supra* note 47, at 1.

200. *Id.* at 10.

> (ii) that Article 38(1)(c) covers GPLs that evolve within the international legal order, and not only principles deriving from municipal legal systems; and
>
> (iii) that the basic "functions" GPLs go beyond the filling or gaps and the avoidance of situations of no liquet. They express the fundamental norms of the international legal order, and are developed by judges to maximize the coherence and unity of international law across treaty regimes, through systemic interpretation.[201]

These positions comprise significant achievements, given the prevalence of contrary perspectives and forces favoring inertia. In our view, had the process resulted in the rejection of any one of these three propositions, alone or in tandem, it would have done serious damage to its status and reputation for years, even decades, to come. As it is, the adoption of the three propositions (just listed) not only destroyed three core "traditionalist" stances; they also destroyed certain

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201. The Third Report—ILC proposes the following Draft Conclusions:

> *Draft conclusion 10*
>
> *Absence of hierarchy between the sources of international law*
>
> General principles of law are not in a hierarchical relationship with treaties and customary international law.
>
> *Draft conclusion 11*
>
> *Parallel existence*
>
> General principles of law may exist in parallel with treaty and customary rules with identical or analogous content.
>
> *Draft conclusion 12*
>
> *Lex specialis principle*
>
> The relationship of general principles of law with rules of the other sources of international law addressing the same subject matter is governed by the lex specialis principle.
>
> *Draft conclusion 13*
>
> *Gap-filling*
>
> The essential function of general principles of law is to fill gaps that may exist in treaties and customary international law.
>
> *Draft conclusion 14*
>
> *Specific functions of general principles of law*
>
> General principles of law may serve, inter alia:
>
> (a) as an independent basis for rights and obligations;
>
> (b) to interpret and complement other rules of international law;
>
> (c) to ensure the coherence of the international legal system.

Third Report—ILC, *supra* note 6, ¶ 147.

prominent, deeply conservative scholarly approaches to the development of GPLs in specific legal regimes.[202]

In its Report on its Seventy-Third Session, which concluding in August 2022, the ILC reported[203] that, among other procedures, it had:

> (i) "provisionally adopted" Draft Conclusions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11; and
>
> (ii) referred Draft Conclusions 10, 11, 12, 13, and 14 to its Drafting Committee "taking into account the comments made in plenary" (Decision of July 12, 2022).[204]

The discussion rehearsed certain "differing views" within the ILC, their names omitted and the nuances of their arguments left unanalyzed.[205] Certain members "expressed doubts" that GPLs comprised a source of law, arguing that Article 38(1)(c) Statute of the ICJ applied to the ICJ, but not to international law as a whole.[206] Some protested the lack of emphasis on explicit state consent in favor of "a perceived overreliance in the third report on judicial decisions and individual commentators rather than on State practice."[207] And some contended that the ILC should not have taken positions on "the relationship between sources" in Draft Conclusions 10 ("absence of hierarchy"), 11 ("parallel existence"), and 12 ("*lex specialis* principle"). With respect to Draft Conclusion 13 ("gap-filling" as an "essential function" of GPLs), certain members considered that the Third Report had "overestimated" the role of GPLs in filling gaps; some "suggested that the

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202. *Contra* Ole Kristian Fauchald, *The Legal Reasoning of ICSID Tribunals—An Empirical Analysis*, 19 EUR. J. INT'L L. 301 (2008). Fauchald denies that arbitrators are developing GPLs, even when arbitrators explicitly state that they are doing so, as is the case of "legitimate expectations" (LE)—an unwritten, judge-made GPL. Fauchald sums up:

> Tribunals based their arguments concerning the existence and content of the principles only on general references to a principle in three decisions, references to a previous ICSID tribunal in three decisions, and broader assessments of the existence and content of the principles in three decisions. Hence, there was no discussion of the existence or content of the principle in most cases.

Id. at 312. This view and the empirical summary are incorrect. In fact, LE claims represent the largest category of pleadings of claimants, and comprise the most analyzed class of actions in the published awards on the merits of investment tribunals. *See* discussion *infra* Section V.C. below; STONE SWEET & GRISEL, *supra* note 52, at 171–217.

203. Report of the International Law Commission, Seventy-Third Session, UN Doc. A/77/10, ¶ 96.

204. Id. ¶¶ 18, 90–96.

205. *Id.* ¶¶ 107, 98–147.

206. *Id.* ¶¶ 106–07.

207. *Id.* ¶ 108.

existence of a gap should not be a prerequisite to the application" of GPLs, "since they performed other important functions in the international legal system."[208] Finally, concerning Draft Conclusion 14 ("specific functions" of GPLs):

> [S]everal members supported … Draft Conclusion 14 on the function of [GPLs] to ensure the coherence of the international legal system, while others stated that [GPLs] did not fulfil such function, since the notion of international law being a systematic and coherent system was not accurate. More corroboration regarding this function was called for.[209]

We infer that a majority of members supported most, if not all of the Draft Conclusions, given that the Rapporteur defended them while acknowledging divergent views within the ILC. At this point, the Report leaves members unnamed, and does not include a tally of votes of other assessments or sentiment that might have occurred.[210]

It noted some of the main disagreements among states concerning the substance of Draft Conclusions, as described above. This draft's conclusions on general principles on first reading with commentaries has been submitted to States for consultation, with a view to the ILC's final adoption in 2024.

V. REGIONAL AND SPECIALIZED INTERNATIONAL COURTS AND TRIBUNALS

As we have seen in Parts III and IV, the ICJ and ILC have moved to update their respective positions on the development and application of GPLs but remain far behind those of the most powerful regional and specialized courts. In its recent Reports of GPLs, the ILC recognized the existence of GPLs "with a regional scope of application,"[211] as well as "regional custom."[212] The Rapporteur also extensively analyzed elements of the case law developed in the regional and specialized courts and tribunals, precisely in order to highlight how

208. *Id.* ¶ 123.

209. *Id.* ¶ 128.

210. In any event, as already mentioned, the ILC provisionally "provisionally adopted" Draft Conclusions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11; and referred Draft Conclusions 10, 11, 12, 13, and 14 to its Drafting Committee "taking into account the comments made in plenary" (Decision of July 12, 2022). *See id.* ¶¶ 18, 90–96.

211. First Report—ILC, *supra* note 4, ¶ 137.

212. Third Report—ILC, *supra* note 6, ¶ 66.

international judges have "formed" and "transposed" GPLs. At the same time, the ILC stressed that GPLs, in the context of Article 38(1)(c) Statute of the ICJ, "are usually" taken to mean "norms of general or universal application."[213] From this perspective, a "regional GPL" may appear to be an oxymoron. For its part, the ICJ has never expressly transposed the principles developed in regional and specialized regimes.

Meanwhile, over many decades, regional specialized courts have aggressively developed GPLs, which they typically institutionalize as doctrinal frameworks that animate and integrate diverse bodies of case law. We do not attempt to survey these developments in any comprehensive way here, a task that would lie far beyond the scope of this paper. Instead, this section selectively examines how GPLs have evolved, focusing on certain structural issues. These include: the so-called "constitutionalization" of (some) treaty-based systems; the diffusion of GPLs across jurisdictional boundaries; the capacity of principles to alter adjudication in a regime; and the turn to adopting principles derived from public law. In the conclusion, we discuss the "dilemma of effectiveness" as it pertains to political backlash and attempts to curb judicial power.

A. Constitutionalization

The notion that international law in general, or that treaty regimes in particular, may display or evolve constitutional properties is today commonplace.[214] A simple, largely deductive version views a form of constitutionalization in the development of norms associated with reciprocity among states (which are clearly expressed in the principles of *pacta sunt servanda* and good faith) or stable secondary rules (the rules governing the production and enforcement of all other rules) in the Hartian sense.[215] Others begin from the standpoint of a "higher

213. *Id.* ¶ 101.

214. *See, e.g.*, JEFFREY DUNOFF & JOEL TRACHTMAN, RULING THE WORLD?: CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE (2009); JAN KLABBERS, ANNE PETERS, & GEIR ULFSTEIN, THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW (2009); Alec Stone Sweet, *The Structure of Constitutional Pluralism*, 11 INT'L J. CONST. L. 491 (2013); Mattias Kumm, *The Legitimacy of International Law: A Constitutionalist Framework of Analysis*, 15 EUR. J. INT'L L. 907 (2004); Joel Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623 (2006); Neil Walker, *Taking Constitutionalism beyond the State*, 56 POLITICAL STUDIES 519 (2008); Erica de Wet, *The International Constitutional Order,* 55 INT'L & COMP. L. Q. 51 (2006).

215. *See, e.g.*, Alec Stone Sweet, *Constitutionalism, Legal Pluralism, and International Regimes,* 16 IND. J. OF GLOB. LEGAL STUD. 621 (2009); DEBORAH Z. CASS, THE CONSTITUTIONALIZATION OF THE WORLD TRADE ORGANIZATION: LEGITIMACY, DEMOCRACY,

law" set of specific norms, typically *jus cogens*, dignity, absolute or the core of human rights, and access to justice and the basics of due process.[216] In this view, a shared, overarching "constitution" is enforced by a plurality of courts, domestic and international.[217] And still others look to the jurisprudence of the regimes' courts, especially the various ways that "evolutive" treaty interpretation (that is, judicial lawmaking) has authoritatively altered the system's operation, while integrating the (international/transnational/supranational) regime and "national" legal orders of member states into a multi-level system of governance. We cannot stress the following point enough: Each of these views is virtually entirely dependent upon the prior existence of a jurisprudence of GPLs authored by one or more courts.

The EU combines all of these constitutional perspectives in complex, multi-faceted ways. This topic is well-worn, scarcely needing elaboration here. As the single most prominent narrative of EU law has it, the treaty system was "constitutionalized" by leading rulings of the CJEU, which laid down the foundational principles of the "direct effect," "supremacy," and preemptive effects of EU law, as well as other doctrines (1960s and 1970s).[218] These principles were later supplemented by additional "constitutional" judgments, such as those on state liability for failures to implement EU law, in the 1990s. These rulings, which initiated a variegated (and often conflictual) process of implementation within the legal orders of the member states, ultimately served to integrate the supranational and national levels into a multi-level, quasi-federal, legal system.[219] The CJEU explicitly justified each of these decisions with reference to the principle of effectiveness, and to a related principle: the "autonomy" of the EU legal

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AND COMMUNITY IN THE INTERNATIONAL TRADING SYSTEM 177 (2005); THOMAS SCHULTZ, TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION 119 (2014).

216. STONE SWEET & RYAN, *supra* note 55, at 82–85, 230–45.

217. For a cogent (and passionate) expression of this view by Judge Paulo Pinto de Albuquerque Pinto, see *Al-Dulimi v. Switzerland*, App. No. 5809/08, at 112 (June 21, 2016) https://hudoc.echr.coe.int/#{%22fulltext%22:[%22al-dulimi%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-164515%22]} [https://perma.cc/BWS3-2GDY]; *see also* JUDGE PINTO DE ALBUQUERQUE AND THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL HUMAN RIGHTS LAW 188 (Triestino Mariniello ed., 2021).

218. *See, e.g.*, Eric Stein, *Lawyers, Judges, and the Making of a Transnational Constitution*, 75 AM. J. INT'L L. 1, 4 (1981); G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595, 603 (1989); Joseph H. H. Weiler, The Transformation of Europe, 100 YALE L.J. 2403, 2413–19 (1991).

219. *See, e.g.*, ALEC STONE SWEET, THE JUDICIAL CONSTRUCTION OF EUROPE 45–108 (2004); DANIEL KELEMEN, EUROLEGALISM: THE TRANSFORMATION OF LAW AND REGULATION IN THE EUROPEAN UNION 54 (2011).

order.[220] All of these GPLs are secondary rules (e.g., rules of adjudication and criteria of validity) in the Hartian sense.

The five regional human rights courts—of Europe (the ECTHR), the Americas (the I-ACTHR), and Africa (the courts of the African Union, the Economic Community of West African States, and the East African Community)—have also developed constitutional features for several reasons. First, the vast bulk of these courts' dockets originate in individual applications, involving cases that would be squarely classified as "constitutional" in nature, within the domestic context. Their decisions, quite naturally, influence the evolution of rights doctrine, at times, decisively. Second, each has used their "inherent powers" to embrace the proportionality framework for the adjudication of the qualified rights, which is the unrivalled standard of modern constitutional law.[221] Third, each (along with the U.N. Human Rights Committee) routinely dialogues with, and cross-cites to, one another in the operationalization of common meta-principles of human rights treaties such as dignity, democracy, pluralism, effectiveness, evolutive interpretation, access to domestic courts and an effective judicial remedy, subsidiarity, and others (all of which—again—function as secondary rules).[222]

More specifically, the General Principles of the ECTHR today comprises a huge, highly articulated corpus of integrated, judge-made norms.[223] The I-ACTHR has transposed many of these principles into the American Convention on Human Rights (entry into force, 1979), while evolving a supremacy stance—the doctrine of "conventional control"—requiring all national officials to review national law, as it is produced and enforced, with respect to the American Convention

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220. In recent judgments against Poland and Hungary, the CJEU reinforced its positions on 'the rule of law', and 'judicial protection' and 'loyalty' ('sincere cooperation'). *See* Joined Cases C-615/20 & C-671/20, Prokuratura Okręgowa w Warszawie v. YP, ECLI:EU:C2022:986, ¶¶ 91–93 (July 13, 2023), for its pronouncements on remedies, and *id.* ¶¶ 73, 74, 80, 81, 93, on principles of supremacy and sincere cooperation. In Hungary v. European Parliament, the Court directed its attention to Article 2 TEU:

> Article 2 TEU is not merely a statement of policy guidelines or intentions, but contains values which . . . are an integral part of the very identity of the European Union as a common legal order, values which are given concrete expression in principles containing legally binding obligations for the Member States.

C-156/21, Hungary v. European Parliament, ECLI:EU:C:2022:97, ¶ 232 (Feb. 16, 2022).

221. *See, e.g.*, STONE SWEET & MATHEWS, *supra* note 20, at 162–96; JACOB WEINRIB, DIMENSIONS OF DIGNITY: THE THEORY AND PRACTICE OF MODERN CONSTITUTIONAL LAW 215–252 (2016).

222. *See generally* Sandholtz, *supra* note 64.

223. *See generally* GERARDS, *supra* note 67.

and the case law of the Inter-American Court.[224] The African courts, which began operations only in the 21st century, quickly embraced most of the meta-principles already enshrined by the ECTHR and the I-ACHR, virtually always by citing to the older courts' authority. One notable exception is the refusal of the human rights courts outside of Europe to adopt the ECTHR's principle of the "margin of appreciation," which the ECTHR deploys, at times, as a stand-alone deference doctrine; the I-ACTHR and the African courts refuse to do so,[225] not least on the grounds that a margin of appreciation doctrine would weaken the effectiveness[226] of human rights.[227]

B. Diffusion: the Case of Proportionality

The proportionality principle is enforced as an analytical framework—a distinctive sequence of tests—for evaluating state measures that restrict rights and other entitlements. It was developed in Germany, through philosophical discourse in the 18th century, then in Prussian administrative courts in the 19th century, before being recognized as a master "principle of constitutional law" in the Federal Republic in the 1950s and 1960s.[228] Today, proportionality analysis

224. Ariel Dulitzky, *An Inter-American Constitutional Court? The Invention of the Conventionality Control by the Inter-American Court of Human Rights*, 50 TEX. INT'L L.J. 45 (2015).

225. So does the United Nations Human Rights Committee, the other U.N. human rights treaty bodies and special procedures. They too would refuse to do so on the grounds that a margin of appreciation doctrine would weaken the effectiveness of human rights. The ECTHR's principle of the "margin of appreciation" has evolved in the context of judicial cooperation, and today would mostly apply to the application of the ECHR and the ECTHR case law when this is seen to be applied loyally by national supreme courts. *See generally* Andenas & Bjorge, *supra* note 69, at 181.

226. Despite its stance on the "margin of appreciation," the ECTHR treats effectiveness as a main principle of the ECHR; GERARDS, *supra* note 67, at 3–5, 160–97.

227. STONE SWEET & MATHEWS, *supra* note 20, at 175–77, 179, 186. For a defense of a more robust development of the subsidiarity principle and the margin of appreciation, see generally Andreas Føllesdal, *Subsidiarity and International Human Rights Courts: Respecting Self-Governance or Protecting Human Rights—or Neither?*, 79 L. & CONTEMP. PROBS. 147 (2016); Dominic McGoldrick, *A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee*, 65 INT'L & COMP. L.Q. 21 (2016); Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 L. & CONTEMP. PROBS. 123 (2016).

228. Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 98–111 (2008). The Bundesverfassungsgericht [BVerfG] [German Federal Constitutional Court] developed proportionality in its famous *Apothekenurteil*, June 11, 1958, 7 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 377 (Ger.); in 1963, the GFCC announced that it would deploy the proportionality

has spread to every continent on the globe and has been adopted by the judicial organs of every powerful international legal system.[229] Indeed, the proportionality principle is arguably the most important doctrinal transplant in world history, at both the domestic or international levels. Most importantly, it authoritatively grounds approaches to human rights that are "qualified" by limitation clauses in charters of rights (both national and international), as well as to the "derogation" clauses made available to states in, for example, the EU treaties[230] and the major WTO agreements.[231] While proportionality diffused widely as unwritten, judge-made law, it has increasingly been codified in subsequent constitutions and treaty instruments (e.g., in Article 52 of the EU Charter of Rights [entry into force in 2009]).

The diffusion of a principle as a doctrinal transplant is not, of course, a robotic process. Its appearance and consolidation as a GPL involved the purposeful decisions of numerous identifiable officials, mostly judicial. The process through which proportionality migrated from German law to the EU, the ECHR, the WTO, and investor-state arbitration has been recounted elsewhere and will not be repeated in detail here.[232] Three general points, however, deserve emphasis. First, these officials explicitly sought to enhance the effectiveness of the EU, the ECHR, and the WTO, most notably, by restricting the use of explicit derogation clauses to situations in which states could show the "necessity" of deploying state measures in pursuit of important public policies that would otherwise be unlawful under the treaties.[233] Second, the adoption of proportionality has led to the further diffusion of proportionality in domestic orders. The CJEU and the ECTHR, for example, required national courts to adopt proportionality analysis

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principle in all cases in which qualified rights are restricted (*Lumbar Puncture,* June 10, 1963, 16 BVERFGE 194); and, in 1965, it declared (Wencker, Dec. 15, 1965, 19 BVERFGE 342), with no supporting citations that the principle of proportionality possessed constitutional status.

229. *See* STONE SWEET & MATHEWS, *supra* note 20, at 30–85, 162–196; *see also* AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 175–210 (2012).

230. STONE SWEET, *supra* note 219, at 119; *see also* Koen Lenaerts, Speech at ECB Legal Conference 2021, *Proportionality as a Matrix Principle Promoting the Effectiveness of EU Law and the Legitimacy of EU Action* (Nov. 25, 2021).

231. *See, e.g.*, Stone Sweet & Brunell, *supra* note 28, at 69; Mads Andenas & Stephan Zleptnig, *Proportionality: WTO Law: In Comparative Perspective*, 42 TEX. INT'L L.J. 371, 381 (2007).

232. *See, e.g.*, Alec Stone Sweet & Giacinto della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to José Alvarez*, 46 NYU J. INT'L L. & POL. 911, 916–24 (2014).

233. Stone Sweet & Brunell, *supra* note 28, at 69.

whenever they reviewed the lawfulness of domestic measures falling within the purview of the EU treaties and the ECHR. Third, the diffusion of proportionality created the conditions for constructive dialogues between courts—in the form of a shared normative framework of legal analysis—even when such interactions had begun as far more conflictual than cooperative.

Two well-known examples involving Germany and the European courts illustrate well the latter point. The first took place in the context of significant "constitutional pluralism" within Germany, as evidenced by the fact that the GFCC is not always able to control the constitutional interpretations of judges sitting on the other specialized courts,[234] who may expressly use the preliminary reference procedure to undermine the GFCC's case law that they do not like.[235] The episode updates a long-standing conflict that first erupted in the 1950s when, in the famous GFCC ruling in *Lüth* (1958), the GFCC repudiated the Federal Labor Court's assertions that the labor courts possessed an autonomous, constitutional authority to interpret and apply rights directly.[236] As EU anti-discrimination law developed, not least through the construction of expansive GPLs by the CJEU, some of the GFCC's positions were revealed as relatively less rights-protective. As noted, the GFCC applied a full proportionality test to the qualified rights, but made exceptions with regard to Article 3 of the Basic Law (equality in the law) and discrimination in the workplace. For decades, the GFCC had used a "reasonable" test in such cases, a significantly weaker form of protection than that provided by the far more searching scrutiny under proportionality. The labor courts had long opposed this exception. In 2005, the CJEU issued its landmark *Mangold* ruling, which held that these elements of GFCC's case law violated the general principle of equality that all member state courts must protect. Indeed, the general principles of EU law (again) were held to possess the status of "constitutional" treaty-based norms, and thus are covered be the doctrine of supremacy and direct effect of the EU treaties. A few months later, the German Federal Labor Court adopted the CJEU's

234. This aspect of the German situation is ubiquitous in Europe, where constitutional courts share the authority to interpret European law, including rights, with supreme courts. *See* Lech Garlicki, *Constitutional Courts versus Supreme Courts*, 5 INT'L J. OF CONST. L. 44, 50–54 (2007).

235. The cases are analyzed in detail in Alec Stone Sweet & Kathleen Stranz, *Rights Adjudication and Constitutional Pluralism in Germany and Europe*, 19 J. EUR. PUB. POL'Y 92, 92–108 (2012).

236. *See* JUD MATHEWS, EXTENDING RIGHTS' REACH: CONSTITUTIONS, PRIVATE LAW, AND JUDICIAL POWER 46, 57 (2018); *see also* Peter Quint, *Free Speech and Private Law in German Constitutional Theory*, 48 MD. L. REV. 247, 260 (1989).

ruling, in its *Honeywell* judgment (2006).[237] Despite a "storm of protests,"[238] the GFCC finally overturned its jurisprudence in 2010. It did so after refusing to declare the CJEU's decisions *ultra vires* acts,[239] which it had been explicitly invited to do, for example, in a constitutional complaint brought by the *Honeywell* corporation.[240]

A second set of cases[241] involves the review, under the European Convention, of the "preventive detention" of certain classes of dangerous criminals, mainly perpetrators of sexual assaults, beyond the terms of their prison sentences. In a series of rulings,[242] the ECTHR had pointedly criticized the GFCC for its failure to apply a more robust proportionality analysis to these decisions, a stance that German authorities had defended as "necessary" to prevent future crimes. At the same time, elements with the Federal *Gerichtshof* (the German Supreme Court for civil and criminal law) seemingly opposed the impugned practices (and probably supported the posture of the ECTHR),[243] which had been imposed on them through recent legislation. The dispute culminated in a finding of violation by the ECTHR, in its judgment in *M. v. Germany* (2009).[244] In reaction, the GFCC (*Preventive Detention,* 2011) overturned its jurisprudence on the grounds that the Strasbourg's court's case law had constituted a significant "change in the legal situation." The Court then declared the Basic Law's "openness" to the Convention through Article 1(2) of the Basic Law (which recognizes human rights as foundational principles). In consequence, all organs of the state are under a duty "not only to take into account" the ECHR in their decisions, but "to avoid conflict

237. Bundesarbeitsgericht [BAG] [Federal Labor Court] Apr. 26, 2006, 118 ENTSCHEIDUNGEN DES BUNDESARBEITSGERICHTS [BAGE] 76 (2006) (Ger.).

238. Stone Sweet & Stranz, *supra* note 235, at 102.

239. In GFCC, Oct. 12, 1993, 2 BvR 2134/92, 2 BvR 2159/92, the GFCC had announced that it would invalidate any EU act having the effect of depriving German legislative organs of their control over legal norms created at the EU level. Private parties thereby possessed the right to plead the *ultra vires* nature of Community acts before all German judges, and to bring constitutional complaints alleging the same to the GFCC.

240. GFCC, Jul. 6, 2010, 2 BvR 2661/06.

241. The episode is analyzed in detail in Mads Andenas & Eirik Bjorge, *"Preventive Detention." No. 2 BvR 2365/09*, 105 AM. J. INT'L L. 768, 768–74 (2011); *see also* Alec Stone Sweet, *A Cosmopolitan Legal Order: Constitutional Pluralism and Rights Adjudication in Europe*, 1 GLOBAL CONSTITUTIONALISM 53, 170–71 (2012).

242. Schummer v. Germany, App. Nos. 27360/04 & 42225/07, ¶ 56 (Jan. 13, 2011); Mautes v. Germany, App. No. 20008/07, ¶¶ 43–45 (Jan. 13, 2011); Kallweit v. Germany, App. No. 17792/07, ¶ 57 (Jan. 13, 2011).

243. Andenas & Bjorge, *supra* note 241, at 770.

244. M. v. Germany*,* App. No. 19359/04, ¶ 100 (Dec. 17, 2009).

between it and national law."[245] The "openness . . . of the Basic Law," the GFCC stated, "express[es] an understanding of sovereignty" that not only does not oppose international and supranational integration, it "presumes and expects" integration.[246]

Barely two months later, the European Court responded favorably, finding no violation in a related case, *Mork v. Germany* (2011).[247] The Court noted: "In its [*Preventive* Detention] judgment, the GFCC stressed that the fact that the [German] Constitution stood above the Convention in the domestic hierarchy of norms [but] was not an obstacle to . . . dialogue between the courts," and that "in its reasoning, [the GFCC] relied on the interpretation . . . of the Convention made by this Court in its judgment in the case of *M. v. Germany*."[248]

Such outcomes highlight a basic mechanism—dialogue among autonomous courts about shared GPLs—through which constitutional pluralism (decentralized sovereignty) can increase the effectiveness of the protection of human rights in a "multi-level" legal system such as that constituted by the ECHR.[249]

C. Doctrinal Transformation: "Legitimate Expectations" in Foreign Investment Arbitration

The development of constitutional understandings of the nature and status of certain treaty-based regimes, and the broad diffusion of the constitutional principle of proportionality, both reflect and catalyze their further transformation. The same is true with regard to the construction of the "Fair and Equitable Treatment" (FET) standard in the domain of foreign investment arbitration. Arbitral process has institutionalized the FET—which was left completely undefined in the vast majority of investment treaties—as an overarching, "constitutional" principle, in Krager's terms.[250] Despite the absence of a formal doctrine of *stare decisis*, and the fact that awards are produced by *ad hoc* tribunals composed of a kaleidoscope of different arbitrators, stable notions of precedent have emerged.[251] It is today settled case law that

245. GFCC, *Preventive Detention* No. 2, BvR 2365/09 (May 4, 2011), ¶¶ 61, 89 (Translation by Alec Stone Sweet, in Stone Sweet, *supra* note 241, at 171).

246. *Id.*

247. Mork v. Germany, App. Nos. 31047/04 & 43386/08, ¶ 56 (Sep. 9, 2011).

248. *Id.* ¶ 31.

249. Andenas & Bjorge, *supra* note 241, at 774.

250. ROLAND KRAGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 308–16 (2011).

251. STONE SWEET & GRISEL, *supra* note 52, at 119–20.

the "dominant element" of the FET[252] is an expansive GPL—"legitimate expectations" (LE)—which is itself derived from an even broader principle, that of good faith. LE contains, among other sub-principles: non-discrimination; regulatory transparency; non-arbitrariness, reasonableness, and proportionality; and a long list of due process standards.

Arbitrators also produced, within FET-LE analysis, the state's "right to regulate" (a version of a state's "police powers" prerogatives), which weighs heavily in determinations of whether investors' expectations are found to be "legitimate." The right to regulate made it clear that investors could not expect the FET to function as a "stabilization clause,"[253] capable of freezing the regulatory framework to which their investment is subject, over the life of an investment.[254] Indeed, states presumptively possess the authority, and in times of crisis the positive

252. Saluka Investments B.V. v. Czech Republic, UNCITRAL, Partial Award, ¶¶ 302–03 (Mar. 17, 2006).

253. The preamble to the USA–Argentina Bi-Lateral Investment Treaty [hereinafter BIT] (Nov. 14, 1991) states that "fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment." (available at https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bit/162/argentina—-united-states-of-america-bit-1991 [https://perma.cc/5HQR-3W22]). Partly for this reason, the early approaches taken by three tribunals (*CMS* Gas Transmission Company v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 274-75, 331 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf; Enron Corporation v. Argentine Republic, ICSID Case No. ARB/01/3, Award, ¶¶ 268, 313 (May 22, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf; Sempra Energy International v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 304, 346 (Sept. 28, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf; all were chaired by the same arbitrator) to the BIT, FET, and the principle of state "necessity" favored investors; these approaches were "eviscerated" by the annulment process and the relatively consistent positions taken by subsequent tribunals. Alec Stone Sweet & Giacinto della Cananea, *Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez,* 46 N.Y.U. J. INT'L L. & POL. 911, 926–32 (2014).

254. The seminal ruling is *Saluka v. Czech Republic*, UNCITRAL, ¶ 302. On the construction and application of the FET and LE, *see* STONE SWEET & GRISEL, *supra* note 52, at 195.

duty,[255] to alter the law and regulations applicable to an investment on the basis of *bona fide* reasons of public policy.[256]

The principle of LE first emerged in *Tecmed v. Mexico* (2003), the tribunal in that case invoking the ECTHR's jurisprudence as authority. *Tecmed* is the most cited award in the history of international investment arbitration, primarily for the proposition that the LE comprises a GPL which is itself tied to "good faith."[257] Thereafter, certain arbitrators anxious to strengthen the coherence of investment law began to devote themselves to the dogmatic construction of the LE. They traced its evolution in both domestic and international jurisdictions, in a clear effort to standardize its content and scope, and to legitimize its transposition into investment law. Within five years, a series of prominent opinions were on the books. Written by renowned jurists and former judges, the dissent in *Thunderbird* (2006) and the awards in *Saluka* (2006), *Parkerings* (2007); *Total* (2010) and *El Paso* (2011) share common traits.[258] Each is an effort to rationalize FET-LE doctrine, given the potential of inconsistent application. Read together, they signal consensus on the basic materials for parties and arbitrators to easily assemble into a general framework for FET-LE analysis. This

255. The *Continental Casualty* tribunal opined that,

> . . . it would be unconscionable for a country to promise not to change its legislation as time and needs change, or even more to tie its hands by such a kind of stipulation in case a crisis of any type or origin arose. Such an implication as to stability in the BIT's Preamble would be contrary to an effective interpretation of the Treaty; reliance on such an implication by a foreign investor would be misplaced and, indeed, unreasonable.

Continental Casualty Co. v. Argentine Republic, ICSID Case No. ARB/03/9, Award, ¶ 258, (Sept. 5, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0228.pdf. In *El Paso*, the tribunal stated that the FET does not "ensure the immutability of the legal order, the economic world and the social universe," nor does it "play the role assumed by stabilization clauses specifically granted to foreign investors with whom the State has signed investment agreements." El Paso Energy Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 368 (Oct. 31, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf.

256. LE is thus related to principles related to the "police powers" prerogatives in customary international law.

257. Técnicas Medioambientales Tecmed S.A. v. United Mexican States, ICSID Case No. ARB(AF)/00/2, Award, ¶¶ 153–55 (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

258. Including International Thunderbird Gaming Corporation v. United Mexican States, UNCITRAL, Separate Opinion of Thomas Walde, ¶ 6 (Dec. 1, 2005); *Saluka v. Czech Republic*, UNCITRAL, ¶¶ 302–03; Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award, ¶ 333 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf; *Continental Casualty Co. v Argentine Republic*, ICSID Case No. ARB/03/9, ¶¶ 257–58; *El Paso Energy Company v Argentine Republic*, ICSID Case No. ARB/03/15, ¶ 368.

same period saw a stream of scholarly articles designed to synthesize the case law, including Vandevelde's treatise-like reconstruction portentously entitled, "A Unified Theory of Fair and Equitable Treatment" (2010).[259]

The result: arbitrators produced a relatively stable balancing framework, enabling tribunals confronting cases to assess virtually every aspect of the relationship between the investor and the host state. It is important to emphasize that tribunals read into the FET (which is at once a treaty provision, a norm of customary international law, and a GPL) the principles most often balanced against one another: (i) "legitimate expectations" and (ii) the state's "right to regulate." They did not camouflage their lawmaking, but instead, adopted the mantle of judges of general principles. Where tribunals have interpreted the FET-LE in light of customary international law, they typically arrive at the same conclusions as tribunals that base their analysis on GPLs. This disposition networks treaties and tribunals, while creating a dynamic through which FET, GPL and CIL evolve synergistically.[260] The result has transformed the substance of pleadings and awards in investor-state arbitration. Today, the FET-LE is by far the most frequent cause of action arbitrated by investment tribunals, compared to any other heading of investment treaties (e.g., claims of indirect expropriation and violation of contract (through "umbrella clauses")).[261]

D. Deriving General Principles from Public Law

Before World War II, states had never provided for an international court of compulsory jurisdiction,[262] let alone a court with the authority to review individual actions against state measures that allegedly violated obligations of an international treaty. Since the 1950s, states have produced a patchwork of such arrangements, varying as to their territorial scope and function. The explosion of international judicial review courts created the potential for the "fragmentation" of

259. Kenneth Vandevelde, *A Unified Theory of Fair and Equitable Treatment*, 43 N.Y.U. J. OF INT'L L. & POL. 43, 57 (2010); *see also* Rudolf Dolzer, *Fair and Equitable Treatment: Today's Contours*, 12 SANTA CLARA J. INT'L L. 7, 10 (2014).

260. STONE SWEET & GRISEL, *supra* note 52, at 193–210.

261. Alec Stone Sweet, Michael Yunsuck Chung & Adam Saltzman, *Arbitral Lawmaking and State Power: An Empirical Analysis of Investor–State Arbitration*, 8 JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 579, 593 (2017).

262. Neither the ICJ's predecessor under the League of Nations (the Permanent Court of Justice) nor the ICJ are courts of general compulsory jurisdiction. It should be no surprise that the courts with compulsory jurisdiction in their respective fields have played the major role in developing GPLs, as just shown.

international law to threaten the "unity" of international law; as Koskenniemi put it in the ILC report he oversaw, each regime and court may evolve "its own principles, its own form of expertise, and its own 'ethos.'"[263]

But it has also had another effect: the rapid development of general principles of a "public law" nature. Prior to the 1950s, the corpus of extant GPLs was dominated by a list of (relatively stable) norms drawn from the "private law," that is, the domains of contract and tort law. Indeed, Lauterpacht's *Private Law Sources and Analogies of International Law with Special Reference to Arbitration* (1927),[264] arguably the preeminent scholarly authority of its time, remains influential today. A treaty is a contract among states that is governed by principles of performance, negligence, enforcement, restitution, and so on, that were assumed to be universal and common to both domestic and international law. Today, the principles of "public law" play a fundamental role in organizing international regimes. In particular, these principles affect the secondary rules that specify the competences of the regime's organizations (including the court), the duties of member state officials (including judges), and the due process standards owed to individuals and firms, as main beneficiaries of judicially-enforceable rights and other entitlements.

In the EU, the doctrines of direct effect, supremacy, human rights, state liability, and others fall into this category of "public law" principles, in that they serve to delineate the powers and duties of institutions and officials, both internationally and domestically.[265] In the arbitral regime, the FET is a general principle (as well as a treaty provision) that lays down the standards of national treatment owed to foreign investors. In establishing new legal systems, states virtually never develop "rules of the court," or the details of due process, leaving it to the courts to do it on their own, through a jurisprudence of GPLs and codification of judicial procedures.[266] Human rights courts routinely evolve doctrines of positive state duties, remedies that they directly connect to higher order principles.[267] The CJEU, the human rights courts, and the judicial organs of international economic regimes have adopted the principle of proportionality as a positive criteria of legality that binds all public officials. We could go on, but the point has been

263. Fragmentation Report, *supra* note 32, ¶ 15.

264. Republished by The Lawbook Exchange (2002).

265. *See* STONE SWEET, *supra* note 219, at 65–81, 87–91; *see generally* TRIDIMAS, *supra* note 16.

266. DELLA CANANEA, *supra* note 53, at 189.

267. GERARDS, *supra* note 67, at 108–135.

made. The inherent powers of international courts to build a jurisprudence of GPLs displays constitutional characteristics.

CONCLUSION

This paper argues for the centrality of general principles as a primary source of international law. Most important, international judges construct principles in order to enhance the effectiveness, responsiveness, and perceived legitimacy of their own respective legal orders. Indeed, GPLs constitute basic building blocks of systemic coherence, both internally and in relations between regimes (Part I). As important, the law and politics of principles have cast a very bright light on judicial lawmaking and inter-court dialogue, two processes that remain central to antagonism between "traditionalist" and "progressive" perspectives (Part II). The courts and tribunals of regional and specialized treaty regimes have not held one another back. Many have, instead, created fertile ground for cross-pollination; and they have constructed an autonomous domain of inter-locking principles that have transcended jurisdictional boundaries (Part V). Comparative lawyers have long argued that the increased use of comparative law, and the emergence of the CJEU and the regional human rights courts, have had a deep and lasting impact on the decision-making of the superior domestic courts.[268] To their credit, the International Court of Justice (Part III) and the International Law Commission (Part IV) have joined in the process or recognizing, and contributing to, the development of principles of the international legal system.

Viewed from the perspective of state consent and ongoing control, it is obvious that our account of GPLs poses an intractable dilemma. No international court can succeed in building the effectiveness of the legal order it manages without the support of member state officials. After all, State Parties to treaties have the authority to curb or even abolish the courts that they have created. Yet in evolving principles—virtually all of which serve to render more transparent and enforceable the rights and duties of states (and all other legal persons recognized by the regime)—the judges risk undermining their own support, to the extent that member state officials will oppose new constraints on their activities. While far beyond the scope of the present paper, the member states of the most important international regimes have, at times, sought to limit the powers of international courts. Many

268. Mads Andenas & Duncan Fairgrieve, *Courts and Comparative Law: In Search of a Common Language for Open Legal Systems*, *in* COURTS AND COMPARATIVE LAW 1, 5 (Mads Andenas & Duncan Fairgrieve eds., 2015).

of these efforts have failed,[269] as state support for the court's jurisprudence of effectiveness has manifested itself;[270] others have been successful, exposing an absence of state support for expansive judicial power.[271] Rather than a sign of pathology, the dilemma comprises an important indicator of international law's growing maturity.

269. Alec Stone Sweet & Wayne Sandholtz, *The Law and Politics of Transnational Rights Protection: Trusteeship, Effectiveness, De-delegation*, 36 GOVERNANCE (Special Issue) 105, 115 (2022); Alec Stone Sweet & Thomas Brunell, *The European Court of Justice, State Non-Compliance, and the Politics of Override*, 106 AMERICAN POLITICAL SCIENCE REVIEW 204, 212–13 (2012).

270. *See generally* Alec Stone Sweet, Wayne Sandholtz & Mads Andenas, *The Failure to Destroy the Authority of the European Court of Human Rights: 2010–2018,* 21 JOURNAL OF THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND INTERNATIONAL TRIBUNALS, 244 (2022); Alec Stone Sweet, Wayne Sandholtz & Mads Andenas, *Dissenting Opinions and Rights Protection in the European Court: A Reply to Laurence Helfer and Erik Voeten*, 32 EUR. J. INT'L L. 897 (2021).

271. Mark Pollack, *International Court Curbing in Geneva: Lessons from the Paralysis of the WTO Appellate Body,* 36 GOVERNANCE (Special Issue) 23, 33 (2023).