International and Comparative Law Quarterly (2026), **75**, 405–441
doi:10.1017/S0020589326101602

British Institute of International and Comparative Law

ARTICLE

General Principles of Law and the Persistent Objector Rule: A Theoretical and Practical Incompatibility

Renatus Otto Franz Derler

Doctoral Candidate, Department of Land Economy, University of Cambridge, Cambridge, UK
Email: rofd2@cam.ac.uk

Abstract

Legal scholarship has not addressed whether the persistent objector rule applies to general principles of law (GPLs). This article is the first to examine both theoretical and practical incompatibilities between the persistent objector rule and GPLs. It traces the brief history of the persistent objector rule and how it was raised in the International Law Commission (ILC) and the United Nations Sixth Committee (Legal), sparking debate over its applicability. Following the ILC's omission of a Draft Conclusion on the persistent objector rule in its work on GPLs, this article examines its theoretical and practical implications, noting its incompatibility with: (i) GPLs derived from domestic legal systems; (ii) internationally-derived GPLs; and (iii) regional or subregional GPLs applied beyond the region in which they originate. The analysis combines theoretical, conceptual and practical reasoning supported by evidence from State practice, jurisprudence and scholarship. It concludes that the persistent objector rule is incompatible with GPLs emerging from domestic or international legal systems. Furthermore, it argues that States' objections to the application of regional or subregional GPLs within subject-specific legal orders or autonomous regional or subregional legal systems do not pertain to the persistent objector rule as such. Rather, they concern the appropriateness of incorporating these norms into another regional or subregional legal system.

Keywords: public international law; sources of international law; general principles of law; persistent objector rule; State consent

1. Introduction

The persistent objector rule is well established in the context of customary international law, where it allows a State to avoid being bound by an emerging customary norm if it has consistently and clearly objected during the formation of that norm.[1] Such objection

[1] J Crawford, *Brownlie's Principles of Public International Law* (9th edn, OUP 2019) 26.

© The Author(s), 2026. Published by Cambridge University Press on behalf of British Institute of International and Comparative Law. This is an Open Access article, distributed under the terms of the Creative Commons Attribution licence (http://creativecommons.org/licenses/by/4.0), which permits unrestricted re-use, distribution and reproduction, provided the original article is properly cited.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

must be persistent, unambiguous and timely,[2] and the rationale for the rule lies in preserving State consent, given that silence is generally treated as acquiescence.[3] In this sense, the rule operates as a mechanism that preserves a voluntaristic foundation of custom, while it also functions in practice as a bargaining tool through which States may resist, influence or shape emerging norms. However, continued reliance upon the rule has become more contested in light of the growing importance of communitarian norms in international law, which are norms owed to the international legal community as a whole, in respect of which all States may have standing to invoke compliance.[4] This development may, in practice, limit the space for persistent objection.[5]

Despite its doctrinal prominence, the persistent objector rule has only received sustained scholarly attention in the last 60 years, and its very existence as a principle of international law remains debated.[6] As Green notes, the term itself only entered international legal discourse in the 1960s through Ian Brownlie's *Principles of Public International Law*.[7] While earlier writings from the seventeenth and eighteenth centuries describe certain forms of State objection that resemble aspects of the modern doctrine, they do not fully reflect the current structure or requirements.[8] Bradley and Gulati argue that, although something akin to the rule existed before 1945, its systematic linkage to customary international law emerged only after 1945, and more clearly from the 1970s onwards.[9]

This historical evolution suggests that the persistent objector rule is best understood as a manifestation of a broader voluntarist approach to international law,[10] allowing States to opt out of developing legal obligations. Importantly, however, it also raises a conceptual question that has received little attention in the literature, namely, whether the rule is inherently tied to customary international law, or whether it might, in principle, extend to other sources of unwritten international law, in particular general principles of law (GPLs).

This question has recently emerged in the work of the International Law Commission (ILC) on GPLs, but it has not been the subject of sustained doctrinal analysis. Existing scholarship has largely assumed the rule's confinement to custom, without systematically examining its applicability to GPLs.[11] This article addresses that gap.

[2] J Green, *The Persistent Objector Rule in International Law* (OUP 2016) chs 3–6.

[3] ibid 33.

[4] J Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' in U Fasthenrath et al (eds), *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (OUP 2011) 224, 226–28.

[5] Crawford (n 1) 26. See also Section 3.3.1.

[6] Green (n 2) 22. See also how certain States doubt the existence of the persistent objector rule in UNGA Sixth Committee, 'Summary Record of the 23rd Meeting' (14 November 2018) UN Doc A/C.6/73/SR.23, paras 45–46 (Cyprus).

[7] Green (n 2) 23.

[8] ibid 25–30, 32.

[9] CA Bradley and M Gulati, 'Withdrawing from International Custom' (2010) 120 YaleLJ 202, 233–34.

[10] See UNGA Sixth Committee, 'Summary Record of the 24th Meeting' (29 November 2016) UN Doc A/C.6/71/SR.24, para 11 (Indonesia).

[11] Major public international law dictionaries and scholarship do not analyse the relationship between the persistent objector rule and general principles of law, instead addressing only its connection with custom: H

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

Before doing so, it is necessary to clarify certain misconceptions in the literature. Some authors have suggested that the United States (US) played a central role in developing or even consolidating the doctrine of the persistent objector. For instance, Dumberry argues that 'although the concept of persistent objector can be traced back to more than 50 years ago, it only truly emerged as a coherent theory some 20 years ago when it was embraced by the United States'.[12] This statement may be misleading for several reasons.

First, as explained above, the rule has a much longer history. While the doctrine may be relatively 'new', elements of a coherent doctrine can be traced back more than 20 years, albeit not in a fully developed form before 1945. Second, although it may be true that the US has invoked the rule before international courts and tribunals[13] more than other States, making it the biggest 'user' and arguably 'abuser' of the rule, it is inaccurate to suggest that the US created the rule. As this article will show, it is indeed the US that has initiated calls to extend the persistent objector rule to GPLs. However, the statement implies that the persistent objector rule was somehow established by the US and is a uniquely American doctrine. This is not entirely correct, as numerous other States have invoked the rule since the establishment of the United Nations (UN).[14]

Against this background, the article argues that although the historical development of the persistent objector rule leaves open the theoretical possibility of extending it beyond customary international law, such an extension is ultimately neither conceptually coherent nor functionally appropriate in the context of GPLs. The core argument is that the persistent objector rule is grounded in a framework of consent-based norm formation, whereas GPLs do not operate on the same consensual logic. As a result, the rule does not translate into the architecture of GPLs. To substantiate this claim, the article tests the applicability of the persistent objector rule across three case studies: domestic, international and regional GPLs. Regional GPLs in this context encompass also subregional GPLs, such as those formed within the European Union (EU) as a regional organisation, and the Andean Community as a subregional organisation. Bilateral GPLs are not examined.

The article proceeds as follows. Section 2 outlines the definition and formation of GPLs (Section 2.1), before tracing the emergence of the persistent objector rule in the ILC's work and examining how it was discussed by the Commission's members (Section 2.2) as well as the relevant debates in the UN Sixth Committee (Legal) (Section 2.3). Section 3 then addresses the central research question: whether the persistent objector doctrine applies to GPLs. It first develops a conceptual account of

Mosler, 'The International Society as a Legal Community' (1974) 140 RdC 4, 131–32; A Verdross and B Simma, *Universelles Völkerrecht* (3rd edn, Duncker & Humblot 1984) paras 558, 567, 1223; J Salmon, *Dictionnaire de Droit International Public* (Bruylant 2001) 762; C Parry and J Grant, *Parry & Grant Encyclopaedic Dictionary of International Law* (3rd edn, OUP 2009) 462–63; Editorial Committee of Public International Law, *Public International Law* (3rd edn, Higher Education Press 2022) 55; [国际公法学编写组,《国际公法学 (第三版)》, 高等教育出版社, 2022 年版, 第55页].

[12] P Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 ICLQ 779, 779 (emphasis added).

[13] See, e.g. Counter-Memorial of Respondent United States of America in *Grand River Enterprises Six Nations, Ltd v United States of America* (UNCITRAL, 22 December 2008) 128–29.

[14] Green (n 2) 229.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

GPLs and the limited role State consent plays in their establishment (Section 3.1), before examining whether the persistent objector rule could operate in relation to domestic GPLs (Section 3.2), international GPLs (Section 3.3), and/or regional GPLs (Section 3.4). Section 3.5 offers a more conceptual reflection on compatibility and utility, drawing on Green's analytical framework. Section 4 concludes that the persistent objector rule does not apply to GPLs, whether domestic, international or regional, and that attempts to extend it to this domain are conceptually and functionally misplaced.

2. GPLs and the persistent objector rule

The question of whether the persistent objector rule applies to GPLs has only been raised recently. Before examining the views of ILC members and the comments made by States in the UN Sixth Committee (Legal) on this issue, it is first necessary to establish what GPLs are.

2.1. Defining GPLs

According to Article 38 of the Statute of the International Court of Justice (ICJ Statute), GPLs constitute the third formal source of international law after treaties and customary international law.[15] Like custom, they are an unwritten source of law.

In order to consider whether GPLs are susceptible to persistent objection, it is first necessary to analyse how this source is generated. Draft Conclusion 3 of the ILC work on GPLs provides that they may be derived from national legal systems (paragraph (a)), also referred to as the first category of GPLs or general principles *in foro domestico*, or they may be formed within the international legal system (paragraph (b)), known as the second category of GPLs.[16] For the former, the identification process is set out in Draft Conclusions 4–6. Draft Conclusion 4 requires the identification of a principle as common to the various legal systems of the world (further elaborated in Draft Conclusion 5), while Draft Conclusion 6 provides that such a common principle may be transposed into the international legal system if it fulfils a regulatory purpose and is compatible with international law.[17]

Under this framework, Draft Conclusion 5 requires a comparative analysis of different legal systems across regions, ensuring that the identified principle is sufficiently representative.[18] Domestic legal principles thus serve as the substratum of general principles *in foro domestico*. Once a principle can be identified across various

[15] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, art 38(1)(c).

[16] See ILC, 'Draft Conclusions on General Principles of Law Adopted by the Commission on First Reading' (2023) UN Doc A/78/10, Draft Conclusion 3 and Commentary, 1–3 (GPL Draft Conclusions on First Reading). There are several GPLs formed within the international legal system, including, e.g. common but differentiated responsibilities and respective capabilities as well as intergenerational equity: see ROF Derler and M Andenas, 'The International Climate Change Regime and General Principles of Law' (2026) 35 RECIEL 1. Other principles falling within this second category include those relating to independence, naval warfare, State sovereignty etc: see E Bjorge, 'General Principles of Law Formed within the International Legal System' (2023) 72 ICLQ 845.

[17] GPL Draft Conclusions on First Reading (n 16) Draft Conclusion 4 and Commentary, 1–7.

[18] ibid Draft Conclusion 5 and Commentary, 2–3.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

legal systems, whether in case law, legislation or domestic custom, it is said that it is recognised within those systems. It is sufficient that a principle be found across several regions of the world; exhaustive surveys of every individual State are not required.[19]

Under Draft Conclusion 6, a commonly recognised principle may be transposed into the international legal system where it serves a regulatory function and is compatible with existing international law.[20] In this sense, the recognition element is implicit, meaning that it is assumed to have been transposed. This transposition may be established where the principle is used in international law, for example, in pleadings, diplomatic correspondence and reports of intergovernmental or international organisations, although such transposition may be rebutted.[21]

For principles formed within the international legal system, identification depends on their intrinsic character within that system.[22] This 'intrinsic' element may be understood as referring to principles essential to the operation of the international legal order, such as the rule that municipal law does not prevail over international law,[23] and is evidenced deductively and inductively through all available evidence, treaties, resolutions, systemic reasoning, judicial and institutional practice.

A third category of GPLs[24] may be those formed within regional or subregional legal systems, which the ILC described in Draft Conclusion 12 as having a limited scope of application ratione personae.[25] Accordingly, GPLs may arise from domestic, international and regional or subregional legal systems. All three categories will be assessed against the persistent objector rule in Section 3.

These formation methods also highlight a key distinction between custom and GPLs: the former requires State practice and opinio juris, whereas the latter require only the 'recognition' of a principle by the community of nations, either through domestic legal systems or within the international legal system itself.[26] The 'recognition by the community of nations' is key for GPLs. Thus, GPLs require only positive 'recognition' of a principle in order to exist, rather than 'acceptance' of a 'general practice as law'. By contrast, the *Military and Paramilitary Activities in and against Nicaragua* judgment stated that 'the mere fact that States declare their *recognition* of certain rules is not sufficient for the Court to consider these as being part of customary international law'.[27] This suggests that mere recognition may be sufficient to indicate the existence of a GPL, but not of a rule of customary international law. Hence, arguably GPLs have a lower threshold to be identified than custom.

[19] ibid Draft Conclusion 5 and Commentary, 4.
[20] ibid Draft Conclusion 6 and Commentary, 1–4.
[21] ibid Draft Conclusion 6 and Commentary, 7.
[22] ibid Draft Conclusion 7 and Commentary, 1–4.
[23] Bjorge (n 16) 861–62.
[24] See n 160.
[25] ILC, 'Texts and Titles of the Draft Conclusions Adopted by the Drafting Committee on Second Reading' (20 May 2025) UN Doc A/CN.4/L.1018, Draft Conclusion 12 (GPL Draft Conclusions on Second Reading).
[26] ibid Draft Conclusion 2.
[27] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14, 97–98, para 184, (emphasis added).

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

The purpose of GPLs is to reflect the systemic importance of protecting community interests, underpinning rules[28] and addressing specific gaps in the international legal system.[29] In other words, they serve to complete the law, facilitate legal reasoning,[30] promote coherence[31] and, in some instances, provide a basis for primary obligations.[32] In practice their purpose is mainly as subsidiary sources to interpret treaties and custom, which arguably explains their lower threshold for identification.[33]

Relatedly, GPLs are a formal source of international law,[34] comparable to treaties and customary international law. All three sources possess legal authority. The conceptual approach adopted in this article does not reduce them to material or interpretative sources of international law, as this would place them on a par with the subsidiary means listed in Article 38(1)(d) ICJ Statute, such as the writings of leading scholars and judicial decisions. Scholarly writings and judicial decisions are material sources through which the law may be identified, but they do not themselves confer legal authority. Rather, material sources serve evidentiary and interpretative functions in relation to formal sources of international law. Accordingly, this article disagrees with Weil, who concluded that GPLs constitute only material sources and not formal sources of international law.[35]

Regarding their nature, there was a historically a schism during the deliberations of the Advisory Committee of Jurists in 1920 between competing conceptions of GPLs: Elihu Root's positivist approach and Baron Descamps' natural law approach.[36] The current formulation of Article 38(1)(c) ICJ Statute represents a compromise between these two perspectives. As a result, the foundation of GPLs lies at the boundary between positivism and natural law, precisely because they were designed to enable the legal system to reach beyond existing rules when those rules prove insufficient.

The natural law dimension of GPLs has at times been criticised as overly open-ended and susceptible to judicial activism.[37] While this article acknowledges those concerns, it argues that the delicate balance embodied in Article 38(1)(c) should not be displaced. The relative weight of positivist and natural law elements depends on the type of GPL under consideration. Some principles, particularly those that are newly formed, may be more firmly grounded in positive law if actively created by the community of nations, whereas others, especially those inherent in the very concept of law, may reflect a stronger natural law foundation.[38]

[28] S Besson, 'Community Interests in International Law' in E Benvenisti and G Nolte (eds), *Community Interests across International Law* (OUP 2018) 50, 56–57.

[29] GPL Draft Conclusion on Second Reading (n 25) Draft Conclusion 10(2).

[30] A Pellet and D Müller, 'Article 38' in A Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 819, para 251.

[31] GPL Draft Conclusion on Second Reading (n 25) Draft Conclusion 10(1).

[32] ibid Draft Conclusion 10(1)(a).

[33] Pellet and Müller (n 30) para 297.

[34] ibid paras 110–111. See also H Thirlway, *The Sources of International Law* (OUP 2019) ch 1.

[35] P Weil, 'Le Droit International en Quête de son Identité' (1992) 237 RdC 13, 148–49.

[36] P Haggenmacher, 'An Archaeological Look at "International Custom as Evidence of a General Practice Accepted as Law" and Article 38 of the World Court's Statute' (2021) 34 LJIL 801, 810.

[37] I Saunders, *General Principles as a Source of International Law: Art 38(1)(c) of the Statute of the International Court of Justice* (Hart Publishing 2020) 6–9, ch 2.

[38] ibid 173.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

2.2. ILC discussion on the persistent objector rule in relation to GPLs

The debate on whether the persistent objector rule can be applied to GPLs started with the comments and observations submitted to the ILC in early 2025, where the US argued that 'the Commission should also consider that a State might maintain a persistent objection to the recognition of a general principle of law similar to the way it might do so with respect to a rule of customary international law'.[39] The US attempted to interpret the 'recognition' criterion for the existence of GPLs under Article 38(1)(c) ICJ Statute as equivalent to the 'acceptance' necessary for the establishment of customary international law. In other words, this would raise the threshold for the formation of GPLs. Given the US' long-standing scepticism towards GPLs,[40] such a position is unsurprising.

As a result of these comments by the US, the Special Rapporteur on General Principles of Law, Marcelo Vázquez-Bermúdez, addressed the issue of persistent objection in his Fourth Report, which was discussed during the ILC's seventy-sixth session in May 2025.[41] The Fourth Report sought to address governments' comments and observations on the Draft Conclusions and Commentaries, adopted at the first reading at the seventy-fourth session in 2023, by proposing responses and amendments to the Draft Conclusions.[42] He noted that there is neither State practice nor scholarly literature to support the proposition that the persistent objector rule applies to GPLs.[43] He further observed that the formation of GPLs is more diffuse than that of custom, making it difficult for a State to maintain a persistent objection.[44] He emphasised that, with respect to domestic GPLs transposed onto the international plane, the process of transposition itself acts as a strong filter, rendering the application of a persistent objector rule unnecessary.[45] In this context, the filtering mechanism refers to the requirement that principles must not conflict with existing international law in order to be transposed, meaning that only compatible principles may become part of international law. Curiously, however, the Report did not specifically address GPLs formed within the international legal system itself, the reason for which remains unclear.

In light of the State comments and the Special Rapporteur's engagement with them in the Fourth Report, the issue emerged as a point of discussion in both the Plenary and the Drafting Committee at the ILC's seventy-sixth session in May 2025. Two distinct camps could be identified in the plenary session. The first camp comprised five members who supported further consideration of whether the persistent objector rule applies to GPLs. Patel (India) argued that the topic warranted deeper analysis in relation to GPLs formed within the international lbegal system. He referred to the ILC's

[39] ILC, 'Comments and Observations received from Governments' (28 January 2025) UN Doc A/CN.4/779, 10 (US).

[40] US, 'Statement at the Sixth Committee – 73rd Session' (31 October 2018) 10 <https://www.un.org/en/ga/sixth/73/pdfs/statements/ilc/us.pdf>, voicing some concern about the ILC taking up the topic of GPLs.

[41] ILC, 'Fourth Report on General Principles of Law by Marcelo Vázquez-Bermúdez, Special Rapporteur' (18 February 2025) UN Doc A/CN.4/785, paras 44, 65–67 (Fourth Report of the Special Rapporteur).

[42] ibid paras 4–9.

[43] ibid paras 65–67.

[44] ibid para 67.

[45] ibid.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

work on Immunities of Foreign State Officials in Criminal Jurisdictions,[46] where the 'principle' of universal jurisdiction, though not framed as a 'general principle', was contested by States in the Sixth Committee (Legal). Citing the *Arrest Warrant* case, in which Judges Higgins, Kooijmans and Buergenthal highlighted the divisions over universal jurisdiction,[47] Patel contended that the matter has 'real practical importance'.[48] He also referenced the United Kingdom's (UK) statement noting a 'lack of international consensus' on universal jurisdiction,[49] which again conflates custom with GPLs and treats GPLs as purely voluntary.[50]

Zagaynov (Russia) characterised the issue as 'unresolved', given the absence of practice or doctrine.[51] He recalled Fernandes' remarks at the Permanent Court of International Justice (PCIJ) Advisory Committee of Jurists that principles applied when 'before the dispute, [they] were not rejected by the legal traditions of one of the States concerned'.[52] While he wondered whether this implied a form of persistent objection,[53] it may be better to interpret Fernandes' statement as indicating that principles play a residual role when treaties and custom are silent. Zagaynov also offered a hypothetical scenario: if the principle of the common heritage of mankind (a GPL of the second category, recently embedded in the Agreement under the United Nations Convention on the Law of the Sea on the Conservation and Sustainable Use of Marine Biological Diversity of Areas beyond National Jurisdiction (BBNJ Agreement)) were to crystallise into custom, a State objecting to the customary rule might nonetheless be bound by the GPL.[54] This, he suggested, would create a tension between sources, but he conceded that such concerns remain largely theoretical.

Akande (UK) also supported applying the persistent objector rule to GPLs, particularly those of the second category. He invoked the principle of State consent as a foundational GPL of the international legal system and argued that States should be

[46] For the most recent report on Immunity of State officials from foreign criminal jurisdiction, see ILC, 'Report of the Law International Law Commission on the Work of Its 76th Session' (28 April–30 May 2025) UN Doc A/80/10, ch V.

[47] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3 (Separate Opinion of Judges Higgins, Kooijmans and Buergenthal) 79, para 53, citing *Oppenheim's International Law* (9th edn, Longman 1996) 998 'no general rule of positive international law [could] as yet be asserted' and that 'the only clear example of an agreed exercise of universal jurisdiction was in respect of piracy'.

[48] ILC, 'Provisional Summary Record of the 3708th Meeting' (10 June 2025) UN Doc A/CN.4/SR.3708, 5–6 (Mr Patel).

[49] See UN Meetings Coverage and Press Releases, 'Concluding Debate on Universal Jurisdiction Principle, Sixth Committee Speakers Wrestle with Challenging Balance between State Sovereignty, Fighting Impunity' (22 October 2021) UN Doc GA/L/3642 <https://press.un.org/en/2021/gal3642.doc.htm>.

[50] Provisional Summary Record of the 3708th Meeting (n 48) 6 (Mr Patel) (emphasis added).

[51] ILC, 'Provisional Summary Record of the 3711th Meeting' (11 June 2025) UN Doc A/CN.4/SR.3711, 11 (Mr Zagaynov).

[52] ibid, citing PCIJ/Advisory Committee of Jurists, 'Procès-Verbaux of the Proceedings of the Committee, June 16th–July 24th, 1920, with Annexes' (1920) 346. See also G Gaja, 'General Principles of Law' in *Max Planck Encyclopaedia of Public International Law* (online, April 2020) para 3 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1410>.

[53] Provisional Summary Record of the 3711th Meeting (n 51) 11 (Mr Zagaynov).

[54] ibid.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

able to withhold consent to the recognition of such principles.[55] In his view, the persistent objector rule would therefore apply to GPLs of the second category, but not to domestic GPLs, which are already being filtered out during their transposition to the international level.[56]

Paparinskis (Latvia) focused on international investment law. He referred to the principle of proportionality, sometimes characterised as a 'regional' GPL, particularly in the European context, and its incorporation into *Occidental v Ecuador (II)* under the fair and equitable treatment standard.[57] In that case, the tribunal noted proportionality's origins but did not confront any State objections.[58] Paparinskis further observed that the US has repeatedly resisted the incorporation of proportionality into fair and equitable treatment in Investor-State Dispute Settlement (ISDS) cases, such as *Adel A Hamadi Al Tamimi v Oman*, where it argued that State practice and opinio juris do not support such an obligation.[59] This opposition, however, appears to be directed at a proposed interpretation of a treaty or customary international law, rather than at a GPL itself.[60]

Asada (Japan) noted the difficulty of envisioning a situation in which the persistent objector rule would not apply to GPLs but would apply once the same principle crystallised into custom.[61] He therefore suggested that the persistent objector rule could also apply to GPLs.

The second camp comprised other members of the Commission who disagreed with the inclusion of the persistent objector rule in relation to GPLs in the draft conclusions. Galindo (Brazil) stressed the absence of any supporting practice.[62] Ridings (New Zealand) considered the rule applicable only to the formation of customary international law and thus irrelevant to GPLs.[63] Grossman Guilloff (Chile) argued that the matter should be addressed in the commentaries rather than the draft conclusions themselves. Oyarzábal (Argentina) raised a query regarding the relationship between GPLs and customary international law, noting that certain concepts were applicable to both, yet the persistent objector rule appears not to encompass GPLs.[64]

As these debates reveal, there remains division within the ILC on this issue. Notably, members from powerful States have been most active in advocating for the extension of

[55] ibid 13 (Mr Akande).

[56] ibid.

[57] ibid 22 (Mr Paparinskis).

[58] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v Republic of Ecuador*, ICSID Case No ARB/06/11, Award (5 October 2012) paras 403–404.

[59] See, e.g. *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33 (22 September 2014) US Article 10.19(2) Submission, para 9.

[60] Parallel US objections to proportionality in the WTO lost gradually in the Appellate Body: see M Andenas and S Zleptnig, 'Proportionality: WTO Law In Comparative Perspective' (2007) 42 TexILJ 371; M Andenas and S Zleptnig, 'Proportionality and Balancing in WTO Law: A Comparative Perspective' (2007) 20 Cambridge Review of International Affairs 71; A Stone Sweet and J Mathews, *Proportionality, Balancing and Constitutional Governance: A Comparative and Global Approach* (OUP 2019).

[61] Provisional Summary Record of the 3708th Meeting (n 48) 15 (Mr Asada).

[62] ibid 3 (Mr Galindo).

[63] ILC, 'Provisional Summary Record of the 3709th Meeting' (11 June 2025) UN Doc A/CN.4/SR.3709, 5 (Ms Ridings).

[64] Provisional Summary Record of the 3708th Meeting (n 48) 8 (Mr Oyarzábal).

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

the persistent objector rule to GPLs, a move that risks distorting the delicate balance between the sources of international law. A possible explanation for this point, viewed from a realist perspective, is that powerful States seek to preserve maximum control over the legal obligations by which they are bound, which the persistent objector rule provides for.

2.3. UN Sixth Committee consideration

In the most recent eightieth session of the UN Sixth Committee (Legal) in October 2025, only a limited number of States commented on the ILC's decision not to include a conclusion on the persistent objector rule in the work on GPLs. Some States agreed with the Commission's approach,[65] others disagreed[66] and some requested clarification as to what happens when a State opposes the formation of a GPL.[67] It is thus clear that the ILC and States are divided on this issue. The following sections will therefore examine more closely whether the persistent objector rule can, or should, apply to GPLs, and will seek to offer some tentative answers to this unresolved question.

3. Can the persistent objector rule apply to GPLs?

The central question apparent from the discussions within the ILC is whether the persistent objector rule is applicable to GPLs. To examine this issue, the analysis is divided into five sections. Section 3.1 highlights that the role of consent in the formation and application of GPLs may be limited. The aim of this section is to provide the conceptual and theoretical foundation on which this article is built. The article then tests the main research question through three case studies. Section 3.2 argues that the persistent objector rule is inapplicable to GPLs derived from domestic legal systems, emphasising that they will not emerge without broad recognition across various legal systems. Section 3.3 similarly contends that the persistent objector rule does not apply to GPLs formed within the international legal system and advances four arguments in support of this conclusion. Section 3.4 further argues that, in relation to the ILC's new category of GPLs with a limited scope of application, i.e. regional or subregional GPLs under Draft Conclusion 12, the persistent objector rule is irrelevant. These principles already exist when they are applied in another regional legal system; the issue is therefore one of the reception of foreign legal principles rather than of persistent objection. Following these case studies, Section 3.5 turns to practical considerations,

[65] Brazil, 'Statement at the Sixth Committee – 80th Session' (29 October 2025) 6 <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/28mtg_brazil_1.pdf>; Chile, 'Statement at the Sixth Committee – 80th Session' (27–31 October 2025) <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/27mtg_chile_1.pdf>; Cyprus, 'Statement at the Sixth Committee – 80th Session' (29 October 2025) <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/29mtg_cyprus_1.pdf>.

[66] US, 'Statement at the Sixth Committee – 80th Session' (28 October 2025) <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/27mtg_us_1.pdf>; Russia, 'Statement at the Sixth Committee – 80th Session' <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/27mtg_russia_1.pdf>.

[67] Italy, 'Statement at the Sixth Committee – 80th Session' (29 October 2025) <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/28mtg_italy_1.pdf>; Japan, 'Statement at the Sixth Committee – 80th Session' (27 October–31 October 2025) <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/30mtg_japan_1.pdf>.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

using Green's analytical framework to assess whether the rule has any utility with respect to GPLs. It concludes that the rule, which safeguards positive law—namely custom—is of limited practical use in this context. It is incapable of influencing the formation or application of GPLs, and there is no evidence to support its application to them.

3.1. The role of State consent may be limited

Before turning to the three case studies that test the applicability of the persistent objector rule, this section first introduces the author's conceptual and theoretical framework. It argues that State consent plays only a limited role in relation to GPLs, which occupy a position at the intersection of positive and natural law. Because of this hybrid nature, GPLs are difficult to reconcile with the persistent objector rule, which was developed to safeguard a source of international law—custom—that is grounded in a more strongly voluntarist conception of State consent. This section is divided into two parts: first, it examines the argument that unanimity or near-unanimity leaves no room for objection; second, it addresses more specifically the relationship between State consent and GPLs.

3.1.1. Requirement of unanimity or near-unanimity leaves no room for objection

From a historical perspective, GPLs were thought to require unanimous or quasi-unanimous support, thus leaving no scope for objection. The procès-verbaux of the PCIJ Advisory Committee of Jurists indicates that the committee members discussed the view expressed by de Lapradelle, who noted that 'the only generally recognised principles which exist, however, are those which have obtained *unanimous or quasi-unanimous* support'.[68] The underlying logic for accepting quasi-unanimous support is that, otherwise, a tiny handful of States (or even a single State) could veto the emergence of a GPL. Given the diversity of domestic legal systems, it would be nearly impossible to find the exact same GPL in every single jurisdiction. This would make the recognition of GPLs derived from domestic legal systems extremely restrictive. Similarly, in its Advisory Opinion on *Reservations to the Genocide Convention*, the International Court of Justice (ICJ), referring to the plural language of Article 38(1)(c) ICJ Statute, stated that the Genocide Convention contained 'principles which are recognised *by civilised nations* as binding on States, even without any conventional obligation',[69] not 'a civilised nation' in the singular. The emphasis, therefore, is on recognition by a plurality of nations rather than by a single State.

This is also acknowledged by the ILC in Commentary 4 to Draft Conclusion 5, which states that GPLs must be 'sufficiently' widespread but need not be universal.[70] A restrictive approach, where a GPL would only be recognised if it were unanimous, has been criticised, notably by Jain, who highlighted that judges at the International Criminal Tribunal for the former Yugoslavia (ICTY) struggled to identify principles

[68] Procès-Verbaux (n 52) 335 (emphasis added).

[69] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23 (emphasis added).

[70] GPL Draft Conclusions on First Reading (n 16) Draft Conclusion 5, Commentary 4.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

universally recognised by States.[71] For example, the ICTY faced difficulties determining the defence of duress and whether sexual oral penetration constituted rape or sexual assault, as each domestic legal system had its own approach.

3.1.2. The limited role of State consent in GPL formation

As noted in Section 1, the persistent objector rule exists in part to preserve voluntarism and the consensual framework of customary international law. Interestingly, at the eightieth session of the UN Sixth Committee (Legal), several States called on the ILC to ensure that GPLs are grounded in State consent.[72] This raises the question whether GPLs are consensual in nature, which is yet another question unresolved by the ILC. This section aims to answer it. If GPLs are consensual, the persistent objector rule may apply; if they are not, then the rule cannot apply. As the title of this section suggests, it is argued that GPLs are not dependent on States' consent for their formation.

Three possible submissions might be advanced in relation to consent and GPLs. First, the voluntarist theory that rules are binding only if States have agreed to them is flawed, and GPLs create binding law without express consent.[73] Second, GPLs are only a material or interpretive source of law and therefore do not require consent, being equivalent to the sources in Article 38(1)(d). Third, the voluntarist theory is correct and GPLs create law, meaning that consent is required and therefore either the persistent objector rule must apply or GPLs can only be created unanimously.

This section argues that the first option is the correct one, namely, that GPLs can create binding law without the express consent of States, and that the other two options must therefore be rejected. The eminent judge Cançado Trindade supports the first proposition, arguing that consent is not needed for GPLs as they are 'guarantors of the legal order itself, of its unity, integrity and cohesion'.[74] It is also clear that the second proposition is incorrect because GPLs are not merely material or interpretative tools

[71] See N Jain, 'Judicial Law-Making and General Principles of Law in International Criminal Law' (2016) 57 HarvILJ 111, 121–26. See also E Gaillard, 'Use of General Principles of International Law in International Long-Term Contracts' (1999) 27 IntlBusLaw 214, 216, who agrees that a restrictive approach is not within the spirit of art 38(1)(c) ICJ Statute.

[72] Belarus, 'Statement at the Sixth Committee – 80th Session' (27–31 October 2025) 4–5 <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/28mtg_belarus_1.pdf>; India, 'Statement at the Sixth Committee – 80th Session' (28 October 2025) para 16 <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/27mtg_india_1.pdf>; Japan, 'Statement at the Sixth Committee – 80th Session' (27–31 October 2025) 6–7 <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/30mtg_japan_1.pdf>; Mongolia, 'Statement at the Sixth Committee – 80th Session' (30 October 2025) 2 <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/30mtg_mongolia_1.pdf>; United Arab Emirates, 'Statement at the Sixth Committee – 80th Session' (27–20 October 2025) 2 <https://www.un.org/en/ga/sixth/80/pdfs/statements/ilc/31mtg_uae_1.pdf>; US, 'Statement at the Sixth Committee – 80th Session' (n 66) 2.

[73] e.g. argued by A Verdross, *Die Quellen des universellen Völkerrechts* (Rombach & Co GmbH 1973) 128; C Voigt, 'The Role of General Principles in International Law and their Relationship to Treaty Law' (2008) 31 Retfærd: Nordic Journal of Law and Justice 3, 6. See also JR Leiss, 'The Juridical Nature of General Principles' in M Andenas et al (eds), *General Principles and the Coherence of International Law* (Brill 2019) 79–99, where he outlines the limits of the application of State consent in relation to GPLs and emphasises their communitarian nature.

[74] *Juridical Condition and Rights of Undocumented Migrants* (Advisory Opinion OC-18/03) IACtHR Ser A No 18 (17 September 2003) para 58.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

but, rather, 'a source of international law', as stated in Draft Conclusion 1.[75] Draft Conclusion 10(1)(a) further clarifies that GPLs may serve as the basis of primary rights and obligations.[76] The third proposition clearly does not reflect reality, as GPLs are not consent-based, and do not require unanimity, as Section 3.1.1 has clarified, noting that near-unanimity suffices. There is support among scholars for this approach. Heller posited that:

> Like all law, international law is the product of a community of culture and interests … it depends on the intensity of this community whether it succeeds at all in objectifying … fundamental legal principles, and whether … the fundamental legal principles prove to be sufficiently effective to be positivized by states' act of will into rules of international law.[77]

He goes on to state that 'the only thing standing above the sovereign unit of will is, necessarily, fundamental legal principles',[78] suggesting that certain principles may exist independently of State consent. Arguably, he also implies that principles may crystalise into rules. O'Connell and Day similarly assert that GPLs transcend State will, because their nature is not fully voluntaristic.[79] Shao submits that recognition in the GPL sense is implied consent, asking 'what States may have intended'.[80] Whether 'implied consent' involves actual consent is, however, controversial. It may be possible to identify the point at which a State acknowledges a principle, but this could be said of virtually any form of State conduct and is therefore not particularly persuasive. Describing recognition as 'implied consent' may stretch the concept too far, particularly since scholars generally characterise custom as being based on 'implied consent'.[81] Employing the same concept for GPLs as for custom would blur the distinction between these sources of law and still suggest an element of actual consent. A more convincing view is that recognition denotes some form of acquiescence to GPLs or that the mere articulation of a principle by States, as members of the international legal community, is sufficient to shape their understanding of the contours of that principle. This supports the view that GPLs contain both natural and positive elements.

This view that GPLs—whether extrapolated from domestic or international legal systems—constitute a mixture of positive and natural law was articulated by Judge Tanaka in his dissenting opinion in the *South West African (Second Phase)* case. He argued forcefully that GPLs extend beyond State consent:

> *States which do not recognize this principle or even deny its validity are nevertheless subject to its rule.* From this kind of source international law could have the foundation of its validity

[75] GPL Draft Conclusions on First Reading (n 16) Draft Conclusion 1.

[76] ibid Draft Conclusion 10(1)(a).

[77] H Heller, *Sovereignty: A Contribution to the Theory of Public and International Law* (D Dyzenhaus ed, OUP 2019) 146.

[78] ibid 148.

[79] ME O'Connell and C Day, 'Sources and the Legality and Validity of International Law: Natural Law as Source of Extra-Positive Norms' in S Besson and J d'Aspremont (eds), *The Oxford Handbook of the Sources of International Law* (OUP 2017) 562, 562–580.

[80] For the implied consent argument, see X Shao, 'What We Talk about When We Talk about General Principles of Law' (2021) 20 ChineseJIL 219, 233. On presuming State consent, see Leiss (n 73) 84.

[81] Saunders (n 37) 10; C Farhang, 'The Notion of Consent in Part One of the Draft Articles on State Responsibility' (2014) 27 LJIL 55, 60.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

> extended beyond the will of States, that is to say, into the sphere of natural law and assume an aspect of its supra-national and supra- positive character.[82]

Using this approach, Alston and Simma have argued that human rights and GPLs 'conform more closely than the concept of custom to the situation where a norm invested with strong inherent authority is widely accepted even though widely violated', thereby echoing Judge Tanaka's position.[83]

In the end, it may be concluded that, because of their hybrid nature at the intersection of natural and positive law, GPLs do not require State consent in the strict sense. Accordingly, State consent plays only a limited role in the existence and formation of GPLs.

3.2. The persistent objector rule is inapplicable to GPLs derived from domestic legal systems

This section addresses the first case study, namely whether the persistent objector rule is applicable to GPLs derived *in foro domestico*. The central issue concerns the critical number of States that must recognise a principle before it can qualify as a GPL. GPLs will not arise in the absence of broad recognition, thus a principle must be common to a sufficient number of States in order to qualify as a GPL.[84] The analysis demonstrates that the persistent objector rule has no meaningful role to play, because there is no temporal space in which it can operate. As a preliminary point, the persistent objector rule applies only during the formation of a norm. Once the norm has crystallised, the rule no longer applies. At that stage, a State's refusal to accept the norm amounts not to an objection to its formation but, rather, to a denial of a preexisting legal norm.

The discussion begins by setting out several basic propositions. It then examines two scenarios in order to test the applicability of the persistent objector rule, drawing comparisons with custom where appropriate to highlight the distinctions between these two sources of law.

Several preliminary propositions should be restated. Most obviously, if a principle is only recognised in one State, it cannot be a GPL, as a single State cannot create a GPL that is binding on all States.[85] The same is true for custom. However, the absence of a principle in the municipal law of a State does not necessarily indicate that the State objects to it; they may simply see no need for the particular rule, either because a different principle applies or because the legal issue has not arisen.[86] Thus, a principle

[82] *South West Africa (Liberia v South Africa; Ethiopia v South Africa) (Second Phase)* (Judgement) [1966] ICJ Rep 6 (Dissenting Opinion of Judge Tanaka) 298 (emphasis added).

[83] B Simma and P Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles' (1988–1989) AustYBIL 82, 102.

[84] M Akehurst, 'Equity and General Principles of Law' (1976) 25 ICLQ 801, 820.

[85] *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)* (Judgment) [1970] ICJ Rep 3, para 50; H Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (Longman, Green and Co 1927) 29. See also *Klöckner Industrie-Anlagen GmbH v Cameroon and Société Camerounaise des Engrais*, ICSID Case No ARB/81/2, Decision on Annulment (3 May 1985) para 72, where the tribunal questioned whether a single legal system could generate a GPL.

[86] Akehurst (n 84) 816; C Kotuby and L Sobota, *General Principles of Law International Due Process* (OUP 2017) 22, where they argue that outliers are normal.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

does not need to exist in every legal system for it to become a GPL.[87] This holds true in adjudication where judges do not require principles to exist in every domestic legal system to consider them GPLs.[88]

Having set out some basic propositions concerning the creation of GPLs *in foro domestico*, scenario 1 illustrates that where a principle is recognised in many States but absent from many others, it cannot be regarded as a GPL.[89] This point equally applies to custom: the formation of custom does not require every State to engage in the relevant practice or to express opinio juris in its favour, but once the rule emerges it binds all States, subject only to the persistent objector rule. However, it is not deemed persistent objection if a large number of States reject an emerging custom: it will simply not become a rule of customary law. By way of example, if civil law does not accept a principle that common law does, then it cannot qualify as a GPL (though it may be regional) because of lack of recognition of the principle, rather than any persistent objection.[90]

In scenario 2, where a GPL is recognised by many States but absent in a few, the situation becomes more complex. For instance, in his dissenting opinion in the *Mexico City Bombardment* claims commission—which addressed damage claims caused by the Felicistas Rebels in 1913—Sir John Percival noted that certain maxims were neither part of English nor US law, implicitly suggesting that principles applied by other States cannot qualify as GPLs.[91] However, if only a minimal number of States are indifferent to a particular rule, a GPL may still be established. It is contextual. The key is to return to the nature of GPLs: they are abstract legal principles derived from the basic structures of legal systems, not specific State conduct. Because GPLs function as structural norms of the international legal order, rather than optional behavioural norms as customary rules do, the persistent objector rule has no application.

As these two scenarios demonstrate, the absence of a principle in domestic legal systems should not be equated with a rejection of that principle. Some scholars may arguably conflate the two. For example, Akehurst suggests that a State may reject a GPL domestically and, as a result, not be bound by it.[92] He does not explain this assertion. As a counterargument, it is important to underscore that a State cannot reject a principle in its domestic legal system in the same way that it may object to an emerging rule of custom. A principle is either present in the domestic legal system, whether in legislation, case law or local custom, or it is absent. Moreover, it is difficult to see how a State could object domestically to a GPL when it may not know that the principle will, or even might, be transposed to the international level. This is one of the features that renders

[87] G Ripert, 'Les règles du droit civil applicables aux rapports internationaux (Contribution à l'étude des principes généraux du droit visés au Statut de la Cour permanente de Justice internationale)' (1933) 44 RdC 569, 579: 'La méconnaissance des principes par un Etat ne suffit pas à en compromettre la valeur; c'est l'opinion générale des nations civilisées qui permet de reconnaître l'existence des principes'.

[88] CW Jenks, *The Prospects of International Adjudication* (Stevens and Sons 1964) 303–04.

[89] Akehurst (n 84) 820.

[90] P Dumberry, *A Guide to General Principles of Law in International Investment Arbitration* (OUP 2020) 117; C McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 361, 395–96.

[91] *Mexico City Bombardment Claims (Great Britain) v United Mexican State* (British-Mexican Claims Commission, 15 February 1930) 5 RIAA 76, 83.

[92] Akehurst (n 84) 822.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

the persistent objector rule incompatible with domestic GPLs. Presumably, a principle reaches a critical threshold at which it becomes a GPL. Before that point, there is no GPL to which a State could object; after that point, all States are bound by it. Accordingly, there is only a single moment at which a State's position toward the principle can affect its development, namely, at the point at which the threshold is reached. Objection cannot therefore be persistent in the sense of an ongoing and continuous opposition.

A further question arises: to what extent should States' negative positions, including all situations in which a State does not actively recognise a GPL, be taken into account in the formation of GPLs? Three brief points may be mentioned. First, GPLs are not dependant on State consent; the negation or absence of a principle in a particular State does not preclude its recognition, since the inquiry seeks to identify principles objectively across legal systems. The same is true of custom. Second, although GPLs are not dependant on State consent, States' views may influence whether international courts and tribunals are willing to identify them, and pursuant to Draft Conclusion 8 recognition of a principle by international courts and tribunals can play a crucial role in their recognition as a GPL. A good example is provided by the precautionary principle, one of the most controversial environmental law principles. The divergence of State views has left the ICJ unwilling to define its nature, referring to it as both a 'precautionary principle' and an 'approach', without clarifying its precise legal character.[93] In short, recognition in adjudication can help to determine the existence of a GPL under Draft Conclusion 8. Where courts are unable to do so as a result of States arguing against the principle, this may undermine the establishment of a GPL. Third, a lack of commonality can undermine the empirical basis for recognition as suggested. On this point, Akehurst observes that even a few statements by States may suggest that principles not universally applied do not qualify as GPLs.[94]

A recent example of how negation of a principle by States may impact recognition of a GPL may be seen in the ICJ Advisory Opinion on the *Obligations of States in respect of Climate Change* (*Climate Change* AO), where the US objected to three GPLs: the principle of common but differentiated responsibilities (CBDR), the precautionary principle and the polluter-pays principle.[95] These three were among the most invoked principles in the proceedings. The US argued that the polluter-pays principle does not constitute an international GPL but, rather, an emerging concept applicable at the national and sub-national levels.[96] Its main contention was that the principle is economic in nature rather than legal and, therefore, does not satisfy the criterion of being a principle 'of law'. Nevertheless, it acknowledged that the principle is reflected in numerous environmental treaties as well as in the Rio Declaration.[97] The US explicitly stated that there is no 'indication that States have recognized that such a concept has

[93] *Obligations of States in respect of Climate Change* (Advisory Opinion) (General List No 187, 2025) para 158. See also criticisms in the Separate Opinion of Judge Yusuf (paras 49–50) and the Separate Opinion of Judge Charlesworth (paras 2–7).

[94] Akehurst (n 84) 820.

[95] Written Comments by the US (15 August 2025) ch IV <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240815-wri-09-00-en.pdf>.

[96] ibid paras 4.30–4.32. See also Written Statement of the French Republic (22 March 2024) paras 245–50 <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-29-00-en.pdf>.

[97] US (n 95) paras 4.30–4.32.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

been transposed to the international legal system as a general principle of law'.[98] This was the only instance in which the US addressed the method of emergence of a GPL. By implication, since no such objection was raised by the US with respect to CBDR or the precautionary principle, it suggests that those two principles may be regarded as GPLs formed within the international legal system. Upholding the US assertion that the polluter-pays principle is not a GPL, the ICJ held that it did not form part of the applicable law, even though it has been implemented at the national level.[99] The main point is that the ICJ did not deny that the polluter-pays principle is widely recognised, as it states that it is reflected in 'certain sector-specific treaties and various types of national legislation'.[100] Hence, the requirement under Draft Conclusion 5 has been fulfilled. However, the polluter-pays principle fails to satisfy Draft Conclusion 6, namely the transposition of the principle into general international law. The Court noted that the principle is absent from climate change treaties and does not apply 'directly in the relations between States without having been specified in a treaty',[101] even citing the *Rhine Chlorides* case relied upon by the US.[102] This was not an example of the Court endorsing the persistent objector rule. Rather, it concluded that there was insufficient evidence to recognise the polluter-pays principle as a GPL that has been transposed onto the international level, thus arguably confining it to a regional, rather than universal, principle. Thus, State positions, including the negation of a principle, are not formally determinative of the existence of a GPL and are therefore not relevant to the operation of the persistent objector rule. The case merely showed that a principle which exists in specialised fields raises questions about the appropriateness or compatibility of its application between States at the universal level. However, in practice, widespread or strong opposition by States can undermine claims of 'generality' in the sense of reflecting principles recognised across legal systems, or it may discourage international courts or tribunals from endorsing them. Thus, while negation is not decisive, it remains influential in practice.

This section has shown that, for a domestically-derived GPL, the persistent objector rule does not apply. It demonstrated this through two scenarios: in scenario 1, if a GPL is recognised in many States but also absent in many others, it cannot be considered to exist as a GPL. In scenario 2, where a GPL is recognised by many States but absent in a few, the GPL will exist. This is because of the key requirement that recognition must be sufficiently widespread. The analysis further showed that there is a critical point at which a principle becomes a GPL, and before that point it cannot be objected to, since it is not yet known whether it will crystallise as a GPL on the international plane. Lastly, the example involving the US does not reflect a persistent objection to the polluter-pays principle, given that the principle is already established. Rather, it concerns objections to its appropriateness for transposition into general international law.

[98] ibid para 4.33.

[99] A Boyle, 'Polluter Pays' in *Max Planck Encyclopaedia of Public International Law* (online, March 2009) para 6 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1602>.

[100] *Climate Change* AO (n 93) para 160.

[101] ibid.

[102] US (n 95) para 4.33.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

3.3. The persistent objector rule is inapplicable to GPLs formed within the international legal system

All of the points made in relation to domestically-derived GPLs apply equally to GPLs derived from the international legal order. However, it must be recalled that, according to Draft Conclusion 7 of the ILC's work on GPLs, such principles must be intrinsic to the international legal system as such, which is more communitarian in nature than those emerging at the domestic level. Unlike domestic GPLs, the comparativist method operates differently:[103] to determine whether a principle is intrinsic to the international legal system, all available evidence must be assessed, including principles underlying treaties, resolutions or declarations. As such, the formation process is more homogenous, rather than a patchwork of development across various States.

The following four main arguments are advanced to show that the persistent objector rule does not apply to international GPLs. First, the analysis considers the ILC's previous work on sources of international law, in particular its work on the Identification of Customary International Law[104] and on Peremptory Norms of General International Law,[105] both of which explicitly addressed the persistent objector rule in separate draft conclusions.[106] In this context, the treatment of the rule in relation to customary international law is relatively uncontroversial,[107] as it has long been recognised in State practice and invoked in pleadings before the ICJ.[108] Draft Conclusion 15(1) on the Identification of Customary International Law[109] explicitly mentions the persistent objector rule and sets out the criteria for its invocation.[110] Given the settled nature of the rule in the context of custom, the analysis focuses primarily on the ILC's work on peremptory norms, whose communitarian character closely resembles that of GPLs and, therefore, offers a more relevant point of comparison (Section 3.3.1). Second, it argues that there can be no derogation from fundamental norms, as this would contradict their intrinsic nature within the formation process

[103] See GPL Draft Conclusions on Second Reading (n 25) Draft Conclusions 4–6 on domestic legal principles being transposed into the international legal system.

[104] ILC, 'Draft Conclusions on the Identification of Customary International Law, with Commentaries', UNYBILC vol II, Part Two (2018) UN Doc A/73/10, 89–113.

[105] ILC, 'Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (jus cogens), with Commentaries' (2022) UN Doc A/77/10.

[106] M Wood and O Sender, *Identification of Customary International Law* (OUP 2024) 282.

[107] ibid 281.

[108] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v Colombia)* (Verbatim Record CR 2022/25) 23–24, 53–55.

[109] Draft Conclusions on the Identification of Custom (n 104) Draft Conclusion 15(1) ('[w]here a State has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the State concerned for so long as it maintains its objection').

[110] Although there is scholarship suggesting that the persistent objector rule is not applicable to customary norms with erga omnes effect, this issue will not be discussed further in this article. See, e.g. W Graf Vitzthum, 'Begriff, Geschichte und Rechtsquellen des Völkerrechts' in W Graf Vitzthum and A Proelß (eds), *Völkerrecht* (8th edn, De Gruyter Studium) 61, citing A Paulus, *Die internationale Gemeinschaft im Völkerrecht. Eine Untersuchung zur Entwicklung des Völkerrechts im Zeitalter der Globalisierung* (Beck 2001) 9ff, 385ff; C Tomuschat, 'Die internationale Gemeinschaft' (1995) 33(1/2) Archiv des Völkerrechts 1, 8ff.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

(Section 3.3.2). Third, it submits that the application of the persistent objector rule to international GPLs would undermine the international legal system as a whole (Section 3.3.3). Finally, it notes that only the US has arguably invoked the persistent objector rule, which it did in its pleadings in the *Climate Change* AO, an argument with which the ICJ did not engage (Section 3.3.4).

3.3.1. Similarity to jus cogens as communitarian norms?

As touched upon above, GPLs are communitarian in nature, which suggests a similarity with the ILC's work on peremptory norms, a communitarian category of norms recognised by the international community from which no derogation is permitted. The ILC stated explicitly in Draft Conclusion 14(3) that 'the *persistent objector rule does not* apply to peremptory norms of general international law (*jus cogens*)'.[111] The reason for this approach is straightforward as the status of a peremptory norm 'flows from both the universal application and hierarchical superiority', leaving no room for the persistent objector rule.[112] Therefore, one might argue that because both GPLs and jus cogens are communitarian in nature, they should be treated in the same way with respect to the persistent objector rule. Jus cogens norms possess a higher normative force and therefore override persistent objection.[113] Although it has been argued that France was an '*objecteur persistant*' in the 1960s with respect to jus cogens norms, based on its comments at the 1968–1969 Vienna Conference on the Law of Treaties,[114] this view is misleading. France was not objecting to the existence of jus cogens norms but, rather, to the lack of a clear process for determining them. It indicated that it would have no objection to the ILC's approach in its work on the law of treaties, including the limited examples provided, which recognise that treaties conflicting with jus cogens are void.[115] However, France did object to the way in which jus cogens was reflected in

[111] Draft Conclusions on Jus Cogens with Commentaries (n 105) Draft Conclusion 14(3) (emphasis added); ILC, 'Third Report on Peremptory Norms of General International Law (jus cogens) by Dire Tladi, Special Rapporteur' (12 February 2018) UN Doc A/CN.4/714, para 145 (emphasis added), where the Special Rapporteur confirmed that the persistent objector rule does not apply to jus cogens norms. Support for the non-applicability of persistent objection to jus cogens norms is also found in scholarship: Graf Vitzthum (n 110) 30–31, 58; see also H Hensel, *The Legitimate Use of Military Force* (Ashgate 2008) 175. There have been some discussions distinguishing between the inapplicability of the persistent objector rule to an existing jus cogens norm and to one in formation. However, the latter raises a logical difficulty, as the jus cogens norm has not yet crystallised and the objection would instead be directed at an emerging rule of customary international law; for this, see Russia, 'Comments by the Russian Federation on the Topic "Peremptory Norms of General International Law (jus cogens)"' <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_russia.pdf>.

[112] Draft Conclusions on Jus Cogens with Commentaries (n 105) 58–59, Draft Conclusion 14, Commentary 10; see also D Tladi, *The International Law Commission's Draft Conclusions on Peremptory Norms* (OUP 2024) 148–51.

[113] Emphasising that jus cogens transcends State will: *Siderman De Blake v Republic of Argentina* 965 F2d 699, 715 (US Court of Appeals for the Ninth Circuit).

[114] G Guillaume, 'Avis d'amicus curiae (article R 625-3 du Code de justice administrative)' (2012) 1 Revue française de droit administrative 19, 19–20, citing Cour de cassation, civile, Chambre civile 1, 9 mars 2011, 09-14.743 which only notes jus cogens but does not engage with it or the persistent objector rule.

[115] ILC, 'Report of the International Law Commission on the Work of its Eighteenth Session', UNYBILC vol II, Part Two (1966) UN Doc A/CN.4/SER.A/1966/Add.l, 248, art 50, Commentary 3.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

Article 53 of the Vienna Convention on the Law of Treaties (VCLT),[116] which defines jus cogens and sets out a method for the identification and formation of such norms. In particular, France feared that jus cogens norms could be created without State consent, for example, through treaties or UN General Assembly resolutions.[117] Greater weight should, therefore, be afforded to France's contemporary position, which does not object to jus cogens.[118] Furthermore, from a natural law perspective, jus cogens are also value-based in an ethical sense. By contrast, GPLs are not hierarchically superior in the way jus cogens norms are and they are not inherently value-based (at least not in an ethical sense). Hence, the argument that GPLs share communitarian features with jus cogens and, therefore, the persistent objector rule should automatically not apply to them, may be too much of a stretch. Nonetheless, this similarity does indicate that norms recognised within the community of nations have a more diffuse character, meaning that the persistent objector rule cannot apply. Such norms are not based on the consent or conduct of any State, or even a particular group of States, but are instead rooted in a recognised legal conviction of the international community as a whole. They possess a collective foundation that cannot be traced to the practice or agreement of any particular State. International GPLs emerge through a broad and decentralised process of recognition across the international community. Their legal authority is, therefore, diffuse in the sense that it is dispersed throughout the legal order rather than concentrated in the express consent of individual States. For this reason, the persistent objector rule is inapplicable to international GPLs.

3.3.2. No derogation from fundamental principles?

A second argument that may be advanced is that there are statements made by States asserting that the persistent objector rule cannot apply to fundamental principles of law or general principles of international law—that is, GPLs formed within the international legal system. For instance, in 2016 Greece stated in the UN Sixth Committee (Legal), when discussing custom, that its delegation doubted the applicability of the persistent objector rule not only to jus cogens 'but also to the broader category of the *general principles of international law* whose applicability did not seem to depend on States' consent'.[119] Elaborating further on the non-applicability

[116] This position was explained by the French head of delegation, who did not wish to open the floodgates to the creation of jus cogens norms based on UNGA resolutions or multilateral treaties: O Deleau 'Les positions françaises à la Conférence de Vienne sur le droit des traités' (1969) 15 Annuaire Français du Droit International 7, 16–17. See Deleau's statement in the UN Sixth Committee (Legal): UNGA Sixth Committee, 'Summary Record of the 849th Meeting' (13 October 1965) UN Doc A/C.6/SR.849, para 21.

[117] Deleau (n 116) 16–17.

[118] UNGA Sixth Committee, 'Summary Record of the 20th Meeting' (11 November 2016) UN Doc A/C.6/71/SR.20, para 78 (France); France, 'Commentaires et observations de la republique française relatifs aux projets de conclusion de la commission du droit international sur 'les normes imperatives du droit international general (*jus cogens*)', para 84 <https://legal.un.org/ilc/sessions/73/pdfs/french/jc_france.pdf>.

[119] UNGA, 'Summary Record of the 22nd Meeting' (22 November 2016) UN Doc A/C.6/71/SR.22, para 10 (Greece) (emphasis added); UNGA Sixth Committee, 'Summary Record of the 21st Meeting' (26 November 2018) UN Doc A/C.6/73/SR.21, para 66 (Greece). See also ILC, 'Fifth Report on Identification of Customary International Law by Michael Wood, Special Rapporteur' (14 March 2018) UN Doc A/CN.4/717, para 107.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

of the persistent objector rule to internationally-derived GPLs in 2018, the delegation stated:

> The specific character of those general principles justified their exclusion from the scope of application of the persistent objector rule, as it would indeed be odd to argue that a State would not be bound by rules having a fundamental character for the international community; there appeared to be no evidence of such an extended application of that rule even in the decisions of international courts. It was hard to imagine how a State could qualify as a persistent objector to such uncontested general principles of international law as the right of innocent passage, the objective legal personality of international organizations or the principle of sustainable development, even if those rules did not qualify as *jus cogens*.[120]

This position has also been endorsed by other States in the UN Sixth Committee (Legal). For instance, in 2016 Cyprus, referring to the ILC topic on custom, argued that the persistent objector rule would be inapplicable to 'other types of rules of fundamental importance',[121] which could be read to mean internationally-derived GPLs.

These statements by States that the persistent objector rule does not apply to fundamental principles of law also find support in judicial pleadings before the ICJ. For example, the UK's pleadings in the Anglo-Norwegian *Fisheries* case took the position that the persistent objector rule cannot apply 'where a fundamental principle is concerned', adding that 'the international community does not recognize the right of any state to isolate itself from the impact of the principle'[122] (in that case, the principle of the freedom of the high seas[123] and the right to coastal waters[124]). Certain international GPLs may indeed have this fundamental character—for instance, the principle of State consent referred to by Akande—such that no objection could be made against them. Yet, it must be noted that the ICJ in its judgment referred to the norm to which Norway was found to have persistently objected as 'general international law', a term that encompasses both customary international law and GPLs.[125] Importantly, the ICJ was not specifically addressing GPLs as distinct from customary international law.

[120] UNGA Sixth Committee, 'Summary Record of the 21st Meeting' (n 119) para 66 (Greece). See also an earlier statement made by Greece in 2016: UNGA Sixth Committee, 'Summary Record of the 22nd Meeting' (n 119) paras 10–11. On the principle of sustainable development, see *Climate Change* AO (n 93) para 147, where the ICJ states that the principle is 'uncontested'.

[121] UNGA, 'Summary Record of the 22nd Meeting' (n 119) para 54 (Cyprus).

[122] *Fisheries Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116, 139 (Anglo-Norwegian *Fisheries*) Reply of the United Kingdom, vol II, 428–29.

[123] See the written statement from the Kingdom of Netherlands, which explicitly recognises the principle of freedom of the high seas, as a GPL formed within the international legal system: Ministerie van Buitenlandse Zaken, 'Government Response to the CAVV's Advisory Report No 46 on the ILC's Draft Conclusions on General Principles of Law' (9 January 2025) 3 (on file with author).

[124] In its judgment, the ICJ reversed this idea of one State objecting to a norm respected by others, recognising that the consistent and sufficiently long practice of a single State (Norway), without objection by other States, indicated that other States did not consider the practice to be contrary to international law: Anglo-Norwegian *Fisheries* (n 122) 139.

[125] ibid 131. This point is also noted in a well known Chinese international law textbook, which observes that the ICJ confirmed the possibility of objection to certain rules of international law, without specifying whether these are rules of custom or GPLs: W Tieya, *International Law: An Introduction* (Peking University Press 1998) 81 [王铁崖,《国际法引论》, 北京大学出版社, 1998 年版, 第 81页].

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

Rather, on the merits the Court was not terminologically precise in its discussion of the persistent objector rule, referring broadly to 'general international law' in a way that could potentially include both custom and GPLs.

As such, the above shows that there is State practice and conduct, indicating that the persistent objector rule does not apply to fundamental GPLs. State practice is here being shown not to establish custom, but rather as evidence of how States understand the nature of a GPL obligation and the non-applicability of the persistent objector rule. The relevance of practice is thus interpretative and classificatory rather than constitutive.

3.3.3. The persistent objector rule would undermine the international legal system as a whole

The third argument for why the persistent objector rule cannot apply to GPLs formed within the international legal system is that its application would undermine the international legal system itself. Under Draft Conclusion 10(2) of the ILC's draft conclusions on GPLs, such principles 'may be resorted to when other rules of international law do not address or resolve a particular issue in whole or in part'.[126] Their principal function is therefore to fill gaps in the law and to ensure the coherence and completeness of the international legal system. If States were permitted to invoke the persistent objector rule to exclude the application of such a principle as it is being developed, this gap-filling function would be compromised. Rather than resolving lacunae, the rule would create new gaps and increase the likelihood of *non liquet*. Such a result would run directly counter to the intentions of the PCIJ Advisory Committee of Jurists, which sought to ensure that international adjudicators would not be left without applicable law.[127] More broadly, it would undermine fundamental structural features of public international law and frustrate one of the core purposes of GPLs.

A hypothetical example illustrates the point. The general principle of the freedom of the high seas has, over time, been qualified and supplemented by a range of environmental principles designed to reconcile competing interests and to address gaps in the law. These principles help to ensure that the high seas are used consistently with contemporary environmental obligations and concerns. One example is the principle of common heritage of humankind as it applies to the deep seabed, which fills an important gap in the regulation of the oceans.

To illustrate the point further, even if one were to assume hypothetically that the US objected[128] to the principle of common heritage of humankind which formed within the international legal system itself,[129] this would not affect the validity of the principle as a GPL, since it only needs to meet the minimum threshold of being recognised

[126] GPL Draft Conclusion on Second Reading (n 25) Draft Conclusion 10(2).

[127] Haggenmacher (n 36) 806.

[128] LFE Goldie, 'A Note on Some Diverse Meaning of the "Common Heritage of Mankind"' (1983) 10 Syracuse Journal of International Law and Commerce 69.

[129] See the International Seabed Authority, 'Statement on the US Executive Order: Unleashing America's Offshore Critical Minerals and Resources' (30 April 2025) <https://www.isa.org.jm/wp-content/uploads/2025/05/SG_Statement-on-the-US-Executive-Order-Unleashing-the-Offshore-Critical-Minerals-and-Resources-of-America.pdf> which refers to UNCLOS as reflecting general principles of international law, namely, the second category of GPLs.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

unanimously or near-unanimously by the international community.[130] As Willaert notes, the US has not been persistent enough for the rule to apply in any case.[131] More importantly, near-universality itself suffices, implicitly accommodating States that do not share the principle or fail to recognise it. This goes back to the previous point on the nature of GPLs as they transcend the will of individual States.

Allowing States to opt out of such principles through persistent objection would weaken the legal framework governing the high seas and impair the coherence and completeness of the international legal system. Had the ILC endorsed such an approach, it would have risked serious damage to the international legal system by undermining its fundamental principles and, more generally, the literature on legal systems.[132]

This view finds some support in the Written Comments of Belarus on the identification of customary international law, emphasised that the persistent objector rule should not harm the 'international community [or] the integrity of the international legal system as a whole'.[133] This reinforces the idea that applying the persistent objector rule to international GPLs could undermine the consistency and coherence of international law, effectively allowing States to create their own patchwork of 'international law' and thereby weakening the rule of law.

For these reasons, permitting the persistent objector rule to apply to GPLs formed within the international legal system would be contrary both to the nature of GPLs and the concept of an international legal system as such.

3.3.4. The Climate Change AO as a recent example of an arguable invocation of the persistent objector rule

As noted in Section 3.3.3, the US also objected in its Written Comments in the *Climate Change* AO to the precautionary and the CBDR principles, arguing that neither constitutes customary law nor a GPL.[134] This represents one of the most recent examples where the persistent objector rule was raised in pleadings. Each principle will be discussed in turn.

The US opined in its Written Comments in the *Climate Change* AO that the precautionary principle is not a GPL,[135] reiterating its long-standing position from the World Trade Organization (WTO) case *EC–Measures Affecting the Approval and Marketing of Biotech Products*,[136] where the panel declined to engage with it as 'unsettled' law.[137] The US argued that the principle's content varies from treaty to treaty,[138] and lacks a clear, generally accepted function, preventing recognition by

[130] See also K Willaert, 'Thoughts on the Recent US Executive Order on Deep Sea Mining: Risky Bluff or Deliberate Violation?' (2025) IJMCL 1, 7–9.

[131] ibid.

[132] M Young, 'Systemic Integration of Obligations in an Era of Climate Change: Stability and Optimal Control' (2025) BYIL 1.

[133] ILC, 'Identification of Customary International Law: Comments and Observations Received from Governments' (14 February 2018) UN Doc A/CN.4/716, 51 (Belarus).

[134] US (n 95) ch IV.

[135] ibid para 4.27.

[136] WTO, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products* (20 September 2006) WT/DS291/R; WT/DS292/R; WT/DS293/R, paras 4.523–4.524, 4.541–4.542, 7.89.

[137] ibid para 7.89.

[138] US (n 95) para 4.28.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

States.[139] The ICJ's position, as expressed in its *Climate Change* AO, is somewhat opaque: it consistently refers to a 'precautionary approach or principle', notes its inclusion in the UN Framework Convention on Climate Change (UNFCCC) and describes it as a guiding principle for interpreting climate change treaties,[140] functions comparable to those identified in Draft Conclusion 10 of the ILC's work on GPLs. The issue with the precautionary principle is that, given the widespread disagreement among States regarding its normative character, it cannot be said to reflect universal recognition sufficient to affirm its status as a GPL. This is evident in the ICJ's indeterminate position on whether precaution constitutes a principle or merely an approach. Therefore, it can be argued that it does not yet qualify as a GPL, notwithstanding its inclusion alongside other GPLs in the *Climate Change* AO.[141]

A similar objection was raised against CBDR,[142] another international GPL, with the US asserting that 'there is no generally accepted formulation of CBDR, much less a generally shared understanding of what it means'.[143] It pointed to variations between Principle 7 of the Rio Declaration ('states have common but differentiated responsibilities'),[144] Article 3(1) UNFCCC (CBDR with 'respective capabilities' (CBDR-RC)),[145] and Article 2(2) of the Paris Agreement ('CBDR-RC … in light of different national circumstances').[146] From this, the US concluded that the Rio Declaration states 'political' rather than legal principles. Yet, such variations may simply reflect the principle's evolution. Its core—that all States share common responsibilities, but their implementation is differentiated by national capabilities—has been widely acknowledged.[147] Being abstract, principles are capable of evolutive interpretation and function.

Strikingly, the US explicitly declared at Rio, and has continued to reiterate, that it 'does not accept any interpretation of Principle 7 that would imply a recognition or acceptance by the United States of any international obligations or liabilities, or any diminution in the responsibilities of developing countries'.[148] However, this concerns interpretation rather than recognition of the principle itself.[149] Indeed, the US-China

[139] ibid paras 4.27–4.29.

[140] *Climate Change* AO (n 93) para 161.

[141] Derler and Andenas (n 16) 13.

[142] Another international GPL confirmed by the ICJ in the *Climate Change* AO: see Derler and Andenas (n 16) 9–12.

[143] US (n 95) para 4.5.

[144] 'Rio Declaration on Environment and Development' (3–14 June 1992) UN Doc A/CONF.151/26/Rev.1 (Vol. I), principle 7.

[145] See also Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 2303 UNTS 162, art 3(1), which operationalised the principle by establishing quantified emissions limits and reduction commitments for annex I States Parties.

[146] Paris Agreement under the United Nations Framework Convention on Climate Change (adopted 12 December 2015, entered into force 4 November 2016) UNTS I-54113, art 2.2.

[147] US (n 95) para 4.13 ('[t]here is no legal basis to extrapolate from the varying formulations of CBDR a rule of customary international law or a general principle of law').

[148] ibid para 4.8.

[149] See the citations of the US objections: UN Conference on Environment and Development, 'Report of the United Nations Conference on Environment and Development' (28 September 1992) UN Doc A/CONF.151/2, ch IV.B, para 16; UN, 'Report of the World Summit on Sustainable Development' (26 August–4 September 2002) UN Doc A/CONF.199/20, 145, para 20.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

Joint Glasgow Declaration on Enhancing Climate Action in the 2020s[150] emphasised the CBDR principle in enhancing climate action as it constitutes the foundation of the international climate change regime. Impliedly, this shows US recognition of the CBDR principle. The objection, therefore, targets historical responsibilities rather than CBDR as such.[151] In any case, it cannot amount to a persistent objection: the US has not consistently opposed the principle despite using the language of 'opposition'.[152]

By contrast, the ICJ affirmed that CDBR is a 'core guiding principle for the implementation of the climate change treaties'[153] encompassing historical responsibilities and, therefore, cannot be excluded by unilateral objection.[154] Arguably, the language of the Court reflects that the CBDR is a fundamental or even intrinsic principle to the climate change regime and, therefore, cannot be objected to.[155] The Court stated that CBDR is a 'manifestation of the principle of equity'.[156] The Court's approach demonstrates that these principles reflect a common understanding at the international level.

Besides these two recent examples, as Bjorge highlighted in a previous article in this journal, the principle of res judicata is a general principle formed within the international legal system.[157] As a structural principle necessary for the functioning of international courts and tribunals, it would be illogical to accept the possibility that such objection could be made, as this would undermine legal certainty—a fundamental feature of adjudication. On a related point, Đorđeska points out that even if a State objects to an emerging customary norm, that State may still be bound by the same norm if it also exists as a GPL, because international GPLs are intrinsic to the international legal system.[158] Though this may be unlikely, it is conceptually possible. As the main criterion, Draft Conclusion 7 of the ILC work on GPLs, adopted at second reading, provides that the identification of international GPLs requires recognition by 'the community of nations' that the principle is intrinsic to the international legal system.[159] This phrasing suggests the need for a plurality that excludes the possibility of individualistic objections. The main point is that GPLs emerge from the community of nations as a whole, as demonstrated by near-universal recognition, meaning that consent is not needed from States. Thus, GPLs do not allow for opt-outs in the same way

[150] 'US-China Joint Glasgow Declaration on Enhancing Climate Action in the 2020s' (10 November 2021) para 12(a) <https://2021-2025.state.gov/u-s-china-joint-glasgow-declaration-on-enhancing-climate-action-in-the-2020s/>.

[151] US (n 95) paras 4.9–4.11.

[152] ibid para 4.20.

[153] *Climate Change* AO (n 93) para 148.

[154] ibid.

[155] Using the language of the UK's expressed position from Anglo-Norwegian *Fisheries* (n 122) and GPL Draft Conclusions on Second Reading (n 25) Draft Conclusion 7. See also *Climate Change* AO (n 93) para 161.

[156] *Climate Change* AO (n 93) para 151.

[157] Bjorge (n 16) 862–64.

[158] M Đorđeska, *General Principles of Law Recognized by Civilized Nations (1922–2018)* (Brill Nijhoff 2020) 147, 165. Concern was also raised by Israel, 'Statement at the Sixth Committee – 76th Session' (2 November 2021) 6 <https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_israel_3.pdf>.

[159] GPL Draft Conclusions on Second Reading (n 25) Draft Conclusion 7.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

as custom. Even the argument that GPLs formed within the international legal system itself are similar in nature to rules and principles of customary international law, and that the same position should, therefore, apply to them, fails to take into account the four points discussed in this section.

To conclude, this section has shown that the persistent objector rule cannot apply to GPLs formed within the international legal system. Four reasons have been given to justify this conclusion. First, there is an arguably similar character between GPLs and jus cogens, in that both have a communitarian nature. Second, and relatedly, there can be no derogation from fundamental principles, a point supported by State practice and pleadings before the ICJ. Third, the application of the persistent objector rule would undermine the international legal system as a whole. Finally, the section has analysed the pleadings of the US in the *Climate Change* AO, which may be seen as an outlier; however, the ICJ did not engage with these arguments. Taken together, these four arguments against the applicability of the rule are reinforced by the current wording of Draft Conclusion 7 on GPLs, under which the identification of international GPLs must be intrinsic to the international legal system, making the application of the persistent objector rule conceptually inconceivable.

3.4. The persistent objector rule and regional or subregional GPLs

With the ILC's introduction of Draft Conclusion 12, which recognises GPLs with a limited scope of application ratione personae, namely principles applicable at the regional, subregional, bilateral or other non-universal levels (excluding subject-specific GPLs such as those relating to international criminal law or international environmental law), the question arises whether the persistent objector rule may apply to such principles. The two preceding case studies have shown that the persistent objector rule is incompatible with universal GPLs.

From the outset, bilateral GPLs are excluded from this analysis. These principles are typically identified by comparing the legal systems of the two States involved in a dispute, either pursuant to the applicable law or after all relevant legal rules have been exhausted.

For the purposes of this article, the term 'regional GPLs' encompasses both regional and subregional GPLs. To date, this issue of regional GPLs and the persistent objector rule has not been addressed in literature. It is argued that, in the context of regional GPLs, the crucial issue arising when a State objects to their application is not whether the principle itself is invalid or objectionable. Rather, the issue is whether it is appropriate to refer to a legal principle originating in another legal system. Accordingly, such objections are qualitatively different from the type of objection contemplated by the persistent objector doctrine properly so-called.

As this author has argued elsewhere, there is a distinction between the origins or extrapolation processes of regional GPLs.[160] Broadly, three pathways can be identified,

[160] See ROF Derler, 'The Existence of Regional General Principles of Law' in M Andenas et al (eds), *General Principles as a Source of International Law* (OUP 2027 (forthcoming)). For a preprint version, see ROF Derler, 'The Existence of Regional General Principles of Law' (*SSRN*, 2025) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5335932>.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

and the analysis in this section will be divided along the same lines: (i) extrapolation from domestic legal systems of Member States; (ii) extrapolation from international law; and (iii) development within the regional system itself.

3.4.1. GPLs extrapolated from domestic and international legal systems

Similarly to domestic and internationally-derived GPLs, regional courts use a 'majority approach' to establish the existence of a GPL, a process that does not permit individual Member States to raise objections.[161] In relation to general principles of EU law, Akehurst has argued that regional GPLs extrapolated from domestic legal systems do not require recognition by all Member States in order to be recognised and applied by the Court of Justice of the EU.[162] Instead, it is sufficient that a large majority of States adopt or recognise the principle, with this so-called majority approach justifying recognition as a general principle of EU law.[163] Even those States that remain silent or are in the minority are bound by such principles.[164]

This position has support in scholarship, with several commentators pointing out that Article 38(1)(c) ICJ Statute does not require recognition by all States but only that the principle should be found in most legal systems.[165] By analogy, this majority approach can also apply to GPLs extrapolated at the international level, whether from domestic legal systems or from international law.[166] Thus, the same logic may be extended to situations in which a regional legal system adopts principles borrowed from the international legal system. Since these principles are already universally or near-universally recognised, the persistent objector rule has no application within the regional legal system.

3.4.2. GPLs originating from a regional legal system

Thus far, this article has argued that the persistent objector rule is not applicable in relation to GPLs. However, this assertion may need to be qualified in relation to principles which emerge within a regional legal system (for instance, the EU), insofar as these principles possess a special character confined to that particular regime. Problems could arise if such principles are invoked in other regional or international settings, without bearing in mind their specific limited scope of application. For instance, if the East African Court of Justice attempted to apply a principle unique to EU law, a party could object on the basis that it is culturally and legally inappropriate to

[161] M Akehurst, 'The Application of General Principles of Law by the Court of Justice of the European Communities' (1981) 52 BYIL 29, 43–44. See also the use of a majority approach by the European Court of Human Rights in *Marckx v Belgium* App No 6833/74 (ECtHR, 13 June 1979) para 41, where arts 8 and 14 of the European Convention of Human Rights were interpreted according to the 'domestic law of the great majority of the member States of the Council of Europe'.

[162] Akehurst (n 161) 37.

[163] ibid. Also undertaken in the Caribbean Court of Justice: *Trinidad Cement Limited and Arawak Cement Limited v State of Barbados* [2018] CCJ 1 (OJ) 1 (17 July 2018) para 25: 'it is not necessary for the principles to be expressed identically in all Member States; it is sufficient if they are widely accepted'.

[164] Akehurst (n 84) 821.

[165] FA Mann, 'Reflections on a Commercial Law of Nations' (1957) 33 BYIL 20, 38–39; W Lorenz, 'General Principles of Law: Their Elaboration in the Court of Justice of the European Communities' (1964) 13 AJCL 1, 7.

[166] Lorenz (n 165) 7–12.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

transplant a principle from one regional order into another. This hypothetical scenario, however, does not concern the application of the persistent objector rule stricto sensu but, rather, objections that arise in relation to the appropriateness of transposing legal principles from one regional legal system to another.

The main question is thus whether a GPL that exists in one regional legal order can exist in another legal order (either as a general principle of international law or as a particular general principle of that regional order). This point was discussed by Paparinskis at the seventy-sixth session of the ILC, where he referred to ISDS cases in which the US objected to the application of the principle of proportionality on the basis that it originated in European legal traditions and thus had only a limited scope of application.[167]

The principle of proportionality, developed in Germany and France and later incorporated into EU law, is considered a cornerstone of European legal reasoning.[168] It has also been applied by the European Court of Human Rights,[169] various national courts[170] and in other regimes such as the law of armed conflict,[171] WTO law[172] and in ICJ jurisprudence.[173] While the US has objected to its application in ISDS cases, this objection does not seem to challenge the existence of proportionality as a principle but, rather, its scope and the way tribunals have expanded obligations on States within the ISDS regime.[174] Indeed, even US domestic law exhibits traces of proportionality reasoning, thereby weakening the claim that the US has persistently rejected the principle outright or that its statements in ISDS proceedings definitely exclude it, as suggested by Paparinskis.[175]

Critiques of the case relied upon by Paparinskis, *Occidental v Ecuador (II)*, do not mention that the US invoked the persistent objector rule. Rather, they criticise the tribunal for imposing proportionality-based obligations on States despite the absence of any explicit reference to such obligations in the underlying bilateral investment treaties.[176] This shifts the focus to a comparative inquiry concerning the appropriateness of relying on external legal sources, rather than to a claim of

[167] See Provisional Summary Record of the 3711th Meeting (n 51) 22 (Mr Paparinskis).

[168] T Tridimas, 'The Principle of Proportionality' in R Schütze and T Tridimas (eds), *Oxford Principles of European Union Law* (OUP 2018) vol 1, 218. E Crawford, 'Proportionality' in *Max Planck Encyclopaedia of Public International Law* (online, April 2020) paras 1–7 <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1459>: in light of the historical evolution of proportionality and its limited recognition in international law, it can be considered a regional GPL of the EU.

[169] Crawford (n 168) para 13.

[170] Tridimas (n 168) 245.

[171] Crawford (n 168) para 19.

[172] ibid paras 14–16.

[173] ibid paras 9–12.

[174] ICTY, 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia' (2000) 39 ILM 1257, paras 48–50.

[175] See, e.g. E Engle, 'The History of the General Principle of Proportionality: An Overview' (2012) 10 Dartmouth Law Journal 1, 7–8.

[176] See, e.g. L Wallach and B Beachy, 'Occidental v Ecuador Award Spotlights Perils of Investor-State System: Tribunal Fabricated a Proportionality Test to Further Extend the FET Obligation and Used "Egregious" Damages Logic to Hit Ecuador with $2.4 Billion Penalty in Largest Ever ICSID Award' (*Public Citizen*, 2012) <https://www.citizen.org/wp-content/uploads/oxy-v-ecuador-memo.pdf>.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

persistent objection. As discussed in Section 1, the persistent objector rule operates in the context of emerging norms, not once a rule has already crystallised. This is distinction was critical in *Occidental v Ecuador (II)*: the issue was not the emergence of new GPL, but whether proportionality, often characterised as a predominantly European principle, could appropriately be applied in the ISDS context. Similarly, in *Denis Yevdokimov and Artiom Rezanov v Russian Federation*, two European members of the UN Human Rights Committee (Thelin and O'Flaherty) rejected reliance on the proportionality principle under the European Convention on Human Rights, not because they denied its existence, but because they deemed it inappropriate in that specific human rights context.[177] These cases illustrate the distinction between objection to an existing norm and objecting to the development of a norm, which the persistent objector doctrine is designed to address.

In sum, it can be clearly stated that the persistent objector rule is not applicable to regional GPLs when they are invoked in other regional legal orders and a State objects to their application or a court ultimately rejects that objection. Moreover, there is no evidence that regional GPLs have been rejected wholesale by another regional legal order. At most, regional or specialised judicial bodies may decline to apply a principle originating in another system on grounds of incompatibility or interpret their own regional principles as lex specialis, prevailing over those from elsewhere. This suggests that the issue is better understood as one of the reception of external regional principles, rather than one of persistent objection. Accordingly, there is neither judicial nor State practice to support the claim advanced by Paparinskis in Section 2.2 that the US objected to the principle of proportionality in a manner capable of establishing the applicability of the persistent objector rule to GPLs, including regional GPLs. At best, this argument is indirect. The available examples demonstrate judicial sensitivity to the regional origins of certain principles, but they fall well short of establishing the kind of clear, formal and consistent objection required by the persistent objector doctrine. For the time being, the more persuasive view is that the persistent objector rule remains inapplicable to GPLs, whether universal or regional.

3.5. General observations

Beyond the conceptual and theoretical analysis, some general observations can be made about whether the persistent objector rule has any practical utility when applied to GPLs. Using Green's analytical framework on the practical utility of the persistent objector rule, four points can be identified:[178] (i) the theoretical misconceptions of GPLs; (ii) the limited practical utility of the persistent objector rule against GPLs; (iii) the inability of the persistent objector rule to influence the development of GPLs; and (iv) the lack of compelling evidence supporting the application of the rule to GPLs.

[177] *Denis Yevdokimov and Artiom Rezanov v Russian Federation* Communication No 1410/2005 (2011) UN Doc CCPR/C/101/D/1410/2005, appendix, Individual Dissenting Opinion by Committee Members Mr Krister Thelin and Mr Michael O'Flaherty.

[178] Green (n 2) ch 9, explains the theoretical misconception and the practical utility from a 'safety valve' and development of international law perspective.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

3.5.1. Theoretical misconceptions of GPLs

It may be observed that there are several theoretical misconceptions: first, that GPLs are fully voluntaristic; second, that there is no communitarian element; and third, that GPLs can be subject to consent. As Green's influential work on the persistent objector rule shows, the rule is applicable to custom and is grounded in the predominant justification of preserving a voluntarist approach to international law.[179] In other words, the persistent objector rule functions to affirm voluntarism in customary international law (although some may also argue that custom is not voluntaristic). This already suggests that the persistent objector rule is inapplicable to GPLs, whose theoretical foundation is different. GPLs are not rooted exclusively in voluntarism but in a blend of natural law and positive law.[180] It must be acknowledged that there has long been disagreement over whether GPLs are positive or natural, but the majority of scholarship appears to agree that they are hybrid creatures, reflecting a mixture of positive and natural law.[181] This proposition is supported by the Judge Tanaka, who argued that the drafting of Article 38(1)(c) ICJ Statute represents a harmonisation between common law proponents of positive law and civil law proponents of natural law, i.e. the 'compromise between the two schools'.[182]

The misconception of GPLs as a voluntaristic source of law, linking them to State consent and thereby creating a form of 'custom-lite', though long-standing, has been reignited by past ILC members.[183] Although the distinction between GPLs and custom has a longer historical pedigree, as Cheng has observed, the demarcation line between them 'is not often very clear'.[184] Owing to this conceptual uncertainty surrounding GPLs, some scholars, such as Pellet, have argued that custom and GPLs are not fundamentally distinct, suggesting that both sources 'provide general guidelines which then have to be applied by the Court in the particular case'.[185] On this view, both operate as frameworks, functioning in a structurally similar manner as abstract guidelines rather than as detailed rulebooks. While this assertion that they are not fundamentally distinct may hold true in terms of legal practice, there remains a plausible theoretical argument for maintaining a fine-grained distinction between these two sources of law. Thus, the misconception that GPLs are voluntaristic in nature has been rebutted, as they occupy a middle ground between positive and natural law.

Second, there is a misconception that GPLs do not have a communitarian nature. This misconception stems from an unduly restrictive reading of Article 38(1)(c) ICJ Statute, which treats general principles merely as interpretative tools or material sources

[179] Green (n 2) 239; Wood and Sender (n 106) 283.

[180] See generally *Pulp Mills on the River Uruguay (Argentina v Uruguay)* (Judgment) [2010] ICJ Rep 14 (Separate Opinion of Judge Cançado Trindade) 135; O'Connell and Day (n 79) 562–80.

[181] Saunders (n 37) 10–12.

[182] *South West Africa* (n 82) Dissenting Opinion of Judge Tanaka, 296.

[183] M Wood, 'Customary International Law and the General Principles of Law Recognized by Civilized Nations' (2019) 21 ICLR 307, 321.

[184] B Cheng, *General Principles of Law, as applied by International Courts and Tribunals* (Stevens 1953) 23.

[185] Pellet and Müller (n 30) para 263.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

of international law.[186] This misconception of GPLs is not accurate, because it overlooks the role of the interests of the international community in their formation and because recognition of GPLs requires recognition by the 'community of nations' as stated in Draft Conclusion 2. Voigt argues that GPLs (whether derived from domestic systems or internationally) should be treated as emerging from the opinio juris communis of the international legal order,[187] thus embodying the reality of the communitarian nature of GPLs. In custom, the persistent objector rule is premised on its use as a bargaining tool by individual States during the formation of custom; this logic is not transferable to GPLs. As such, the communitarian school of thought weakens the case for the persistent objector rule. For communitarians, GPLs express the shared legal reasoning of the international community, not bargains between individual States.[188] Thus, it rebuts the premise that GPLs are not communitarian.

The third and final misconception is that GPLs cannot be explicitly 'recognised' or 'consented to' by States in the same way treaties can.[189] Although custom cannot be either, there is a sense of 'implied consent'.[190] Their nature makes such explicit expressions of consent impossible. As Greig observed, even in the limited instances where the ICJ has applied GPLs, the Court never examined whether States had 'recognised' them, nor did it look for a consent requirement.[191]

Given that the purpose of the persistent objector rule according to Green is to preserve voluntarism, the lack of the need for consent in the formation of GPLs renders it redundant in relation to them.[192] GPLs are designed to reflect the commonality of legal reasoning across States, not the will of individual States. They function as fundamental tools of legal reasoning, infused with elements of natural law,[193] with some but not all of them possessing inherent moral values similar to jus cogens norms.[194] States do not have full control over them as their formation transcends State consent. This extra-consensual nature rests on the 'good and the just'.[195] This is particularly evident in dispute settlement, where principles such as pacta sunt servanda

[186] J d'Aspremont, 'What Was Not Meant to Be: General Principles of Law as a Source of International Law' in R Pisillo Mazzeschi and P De Sena (eds), *Global Justice, Human Rights and the Modernization of International Law* (Spinger 2018) 163, 163–84.

[187] Voigt (n 73) 8. See also comments of Loder in the PCIJ Advisory Committee of Jurists, where he stated that 'principles universally recognised' would crystallise or 'ripen' into positive rules implying that principles are not positive law: Procès-Verbaux (n 52) 294. See also Fernandes' approach to GPLs in Procès-Verbaux (n 52) 346. See also Leiss (n 73) 88–90.

[188] See, e.g. on communitarianism: Green (n 2) 250–52.

[189] ibid 247.

[190] Saunders (n 37) 10.

[191] DW Greig, 'Reflections on the Role of Consent' (1988-1989) 12 AustYBIL 125, 152–53.

[192] Green (n 2) 247; See e.g. IM Lobo de Souza, 'The Role of Consent in the Customary Process' (1995) 44 ICLQ 521, 535.

[193] As discussed earlier in this section. See particularly *Pulp Mills* (n 180) Separate Opinion of Judge Cançado Trindade, para 68.

[194] R Dworkin, 'A New Philosophy for International Law' (2013) 41 Philosophy and Public Affairs 2, 4–10; S Hall, 'The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism' (2001) 12 EJIL 269, 283. E.g. pacta sunt servanda or res judicata cannot be said to be infused with moral values but are more concerned with stability and predictability.

[195] D Kennedy, 'The Sources of International Law' (1987) 2 American University Journal of International Law and Policy 1, 20.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

operate independently of States' immediate will.[196] This is partly because principles, unlike rules, are merely recognised, whereas in custom opinio juris denotes a legal conviction that they are bound by that rule, so there is already an internal thinking about a legal duty.[197] According to Draft Conclusion 2, recognition must be by the community of nations ascertained in an objective fashion, taking into account all the available evidence.[198]

In sum, these three misconceptions have been rebutted: first, GPLs are not purely voluntaristic.[199] Hence, GPLs should not be reduced to 'custom-lite',[200] as this would blur the distinction between custom and GPLs. Second, they reflect what the community of nations recognises as GPLs, leaving no room for unilateral carve-outs by powerful States. Third, they cannot be expressly consented to in the same way as treaties. Thus, it can be stated that Green's justification for the persistent objector rule is not relevant to GPLs because it rests on a theoretical misconception about their nature as voluntaristic sources of law.

3.5.2. Limited practical utility of the persistent objector rule in relation to GPLs

Green highlighted the practical role of the persistent objector rule as a 'safety valve' mitigating the risk of non-compliance with custom by allowing States to opt out of rules which they have persistently opposed.[201] This logic does not apply to GPLs, further demonstrating the rule's incompatibility with GPLs. Three reasons are offered.

First, the threshold for recognising GPLs is arguably higher than for custom: GPLs must be recognised universally or near-universally. Whereas a rule of custom can be created by the practice of a single State, as the ICJ noted in relation to Norway in the Anglo-Norwegian *Fisheries* case, this is only the case as long as it has been accepted as such by the majority of other States and the conditions for the persistent objector rule have been fulfilled. GPLs are by their nature communitarian rather than dependant on the approach of individual States. However, the same may also be said of custom, as individual States cannot simply veto the formation of customary international law, though they can prevent it from becoming binding on them via the persistent objector rule.

Second, the cost-benefit analysis[202] of objecting to abstract principles yields an unfavourable result. GPLs are often codified in treaties' texts or their preambles, resolutions, declarations, soft-law instruments, expressed in judicial reasoning or

[196] Green (n 2) 247.

[197] Draft Conclusions on the Identification of Custom with Commentaries (n 104) 138–39.

[198] GPL Draft Conclusions on First Reading (n 16) Draft Conclusion 2, Commentary 1–2; C McLachlan, 'On the Interface Between Public and Private International Law, General Course on International Law' (2025) 446 RdC 23, 292.

[199] A Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988–1989) 12 AustYBIL 22, 38; J Charney, 'Universal International Law' (1993) 87 AJIL 529, 535–36; Hall (n 194) 292–93.

[200] ILC, 'Provisional Summary Record of the 3490th Meeting' (30 September 2019) UN Doc A/CN.4/SR.3490, 5 (Sir Michael Wood), 14 (Mr Murphy); ILC, 'Provisional Summary Record of the 3489th Meeting' (25 September 2019) UN Doc A/CN.4/SR.3489, 14–15 (Mr Hmoud).

[201] Green (n 2) 260–64.

[202] See ILC, 'Third Report on Identification of Customary International Law, by Sir Michael Wood, Special Rapporteur' (27 March 2015) UN Doc A/CN.4/682, para 90.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

underpin other legal rules such as custom or fields of international law, such as international environmental, humanitarian or human rights law, but conceptually they are not 'rules' in the strict sense.[203] The main point is that the character of a GPL is more abstract and general than other sources of law.[204] Objecting to such abstract principles may be costlier and less effective than objecting to precise customary norms, where there is the possibility for a short-term adjustment rather than a need to rebut the rule as a whole. The cost is higher for States because, for example, with respect to a principle *in foro domestico*, they would need to monitor the development of principles across numerous domestic legal systems and begin objecting to them. It is difficult to imagine that any State would have the capacity to undertake such a task.[205] Also, it would be a breach of the prohibition to intervene in the domestic affairs of another State under Article 2(7) of the UN Charter.[206] The same applies to international GPLs: States would become extremely cautious about using the terms 'GPL' or 'principle'. The costliness argument may be supported from a judicial perspective by the fact that, although there is no hierarchy between sources of law,[207] the ordinary method of international courts and tribunals is to only resort to GPLs after treaties or custom.[208] It therefore appears to be of limited benefit for a State to object to an abstract principle, which, due to its general character, is more flexible and open to interpretation from the start.

Returning to the point that GPLs are not strictly 'rules', it is not suggested that GPLs are not 'binding' sources of law, they certainly are. However, some scholars have attempted to reduce them to mere interpretative or material sources of international law.[209] If this view were adopted it could be argued that the persistent objector rule does not apply because GPLs are not 'hard', binding law. This would be a dangerous approach, as it would render all established GPLs non-binding, such as the principle of equality of States, res judicata or the principle that municipal law should not prevail over international law. A further argument that GPLs may be non-binding is rebutted by the clear doctrinal analysis of Saunders, who demonstrates that the ICJ uses GPLs as a binding source of law,[210] and scholarship more broadly agrees that GPLs constitute a formal source of law.[211] Draft Conclusion 10(1)(a) likewise confirms that GPLs may

[203] See Cheng (n 184) 22–26.

[204] GPL Draft Conclusions on First Reading (n 16) Draft Conclusion 5, Commentary 3.

[205] Fourth Report of the Special Rapporteur (n 41) para 67.

[206] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

[207] GPL Draft Conclusions on First Reading (n 16) Draft Conclusion 11, Commentary 2.

[208] *Eastern Extension, Australasia and China Telegraph Co Ltd* (British–US Claims Arbitral Tribunal) (1923) VI RIAA 112, 114, which stated that '[i]nternational law … may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provisions of law, the corollaries of general principles, and so to find … the solution of the problem'. See also Cheng (n 184) 22.

[209] H Kelsen, *The Law of the United Nations: A Critical Analysis of its Fundamental Problems* (Stevens and Sons 1950) 533. J Verhoeven, *Droit International Public* (Larcier 2000) 348. See also n 35.

[210] Saunders (n 37) 136–37.

[211] ibid 8–9.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

serve as a basis for substantive obligations, have substantive effect and contribute to the coherence of international law.[212]

Third, the safety valve function is irrelevant for GPLs.[213] Similarly to custom, breaches of GPLs may entail State responsibility,[214] but unlike custom, non-compliance cannot be excused by persistent objection rendering a particular rule non-binding on a State. Nor is there any need for short-term adjustment periods,[215] as GPLs are inherently abstract, flexible and fluid,[216] capable of gradual evolution through adjudication.[217] In contrast, custom is often detailed and precise and may, therefore, require transitional opt-outs.

In sum, the persistent objector rule's main practical functions—protecting voluntarism, reducing non-compliance and facilitating adjustment—do not translate to GPLs.

3.5.3. The persistent objector rule and the development of GPLs

Finally, Green argued that the persistent objector rule can sometimes act as a 'lobbying or negotiation tool' in the formation of custom, nudging rules to develop in different directions.[218] Could the same by said of GPLs? The answer is no. GPLs, given their abstract and systemic nature, do not require such modification. Their flexibility allows them to be shaped and applied through adjudication without the need for State objections. Moreover, the dialectic process[219] underpinning the persistent objector rule in custom, where objectors signal their dissent and others respond, has no equivalent in GPLs. States may object to a principle being applied in a given dispute, but this does not constitute persistent objection in the context of its formation.[220] GPLs reflect shared legal foundations (such as pacta sunt servanda), not iterative bargaining processes among States.

3.5.4. Limited evidence of the rule's application to GPLs

The final, and by far the most compelling argument against the applicability of the persistent objector rule to GPLs is that no international court or tribunal has endorsed such a possibility. As this article has shown, certain members of the ILC and some States have expressed the view that the rule should apply to GPLs (see Sections 2.2 and 2.3). However, the relevant State practice and scholarship remain limited, and there is no evidence of any sustained attempt to invoke the rule in this context, with the recent US

[212] GPL Draft Conclusions on Second Reading (n 25) Draft Conclusion 10.

[213] Green (n 2) 262 mentions the 'safety valve logic'.

[214] See ILC, 'Articles on the Responsibility of States for Internationally Wrongful Acts, with Commentaries', UNYBILC vol II, Part Two (2001) UN Doc A/56/10, 54–55, art 12, Commentary (3); GPL Draft Conclusions on First Reading (n 16) Draft Conclusion 10(1)(b), Commentary 11.

[215] Green (n 2) 264.

[216] See, e.g. A Gianelli, 'The Notion of General Principles of International Law at the Time of its Codification' (2021) CIV(4) Rivista di Diritto Internazionale 965.

[217] See generally C McLachlan, *The Principle of Systemic Integration* (OUP 2024).

[218] Green (n 2) 265; Wood and Sender (n 106) 283.

[219] Green (n 2) 269–71; Wood and Sender (n 106) 283.

[220] See I Seidl-Hohenveldern, 'General Principles of Law as Applied by the Conciliation Commissions Established Under the Peace Treaty with Italy of 1947' (1959) 53 AJIL 853, 856–57, where France objected to the application of general principles of interpretation of contracts to peace treaties.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

example being the only possible exception. This silence is significant. In fact, it should be emphasised more strongly, as it offers a powerful response, especially for positivists, to the intuitive default to voluntarism that many might adopt in approaching this question.

3.5.5. Conclusions

In sum, from a practical perspective, three misconceptions have been rebutted, demonstrating that the persistent objector rule offers no utility: it cannot serve as a safety valve, a short-term modification tool or a mechanism for shaping the development of principles, and this is reflected in the very limited support for the rule's application to GPLs.

4. Conclusion

The article answers a question that was not addressed by the ILC at its seventy-sixth session, namely whether the persistent objector rule is applicable in relation to GPLs. This issue has previously not been addressed in legal scholarship, with only one or two scholars noting it in passing. The article has, therefore, sought to close this gap. At the outset, it demonstrates that the persistent objector rule is historically not confined to customary international law, but could prima facie apply across different sources of international law during their formation processes.

The article first sought to explore what GPLs are, noting their status as the third source of international law, as reflected in Article 38(1)(c) ICJ Statute. Two main categories of GPLs and a third, newly-conceived one were identified: (i) GPLs derived from domestic legal systems; (ii) those formed within the international legal system; and (iii) regional GPLs. These three categories were used as case studies in Sections 3.2 to 3.4. Having defined GPLs, the article then provided a brief chronological overview of how the persistent objector rule entered the ILC's discussions on GPLs, including the US proposal, and categorised the views of ILC members, noting a divided Commission.

Section 3.1 highlighted the conceptual and theoretical nature of GPLs, in particular that consent has little to do with them. GPLs occupy a position at the intersection of positive and natural law. Because of this hybrid nature, they are difficult to reconcile with the persistent objector rule, which is designed to safeguard sources of international law (custom) grounded in a stronger voluntarist conception of State consent.

In the first case study on domestically-derived GPLs, two scenarios were examined in terms of the level of State recognition required. If only some States recognise a principle while others do not, there is arguably no sufficiently widespread recognition, and a GPL cannot be formed. However, where only a few States remain silent, a GPL may still be formed. This highlights that there is nothing to which a State can meaningfully object if it does not yet know whether a principle will crystallise as a GPL. Requiring States to monitor every legal system and object to principles as they emerge in other jurisdictions would be both impractical and unduly burdensome. Even the recent argument made by the US in the *Climate Change* AO in relation to the polluter-pays principle did not fail on recognition, but on the appropriateness of transposition into international law. The principle was already established, not still in development.

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

In the second case study on GPLs formed within the international legal system, four main arguments were advanced as to why the persistent objector does not apply. First, GPLs share a communitarian nature similar to jus cogens and are more homogenous in character than custom. Second, State practice indicates that derogation from fundamental principles which define the international legal system is not permissible. Third, and relatedly, allowing the persistent objector rule to operate in relation to international GPLs would undermine the international legal system as a whole, creating a patchwork of fragmented regimes, and would contradict one of the main functions of GPLs, namely, gap-filling where treaties and custom are inapplicable. If international courts and tribunals were unable to apply certain GPLs because a State in the dispute had persistently objected, this would generate multiple lacunae in the law, leaving courts and tribunals without any way to address them. Finally, the article examined the invocation of the persistent objector rule by the US in the *Climate Change* AO in relation to the precautionary and CBDR principles, with which the ICJ did not engage.

The third case study examined whether the persistent objector rule applies to regional GPLs, a category introduced into the ILC Draft Conclusions at its seventy-sixth session. It also addressed Paparinskis' suggestion regarding whether regional GPLs, once applied in another regional legal system, could be objected to. The analysis first explained how regional GPLs emerge, showing that they may originate from Member States, international law or the regional legal system itself. However, the question of whether a regional GPL can be objected to when applied in another regional system does not concern the persistent objector rule. Rather, it concerns the appropriateness of applying a norm in a different legal system. It therefore falls outside the scope of the persistent objector doctrine.

In the final part of the article, four general observations were made. First, GPLs are not fully voluntaristic; they are communitarian in nature, and consent plays only a limited role. Second, there is little practical utility of applying the persistent objector rule in relation to GPLs. It is difficult to see why a State would object to an abstract principle, whether domestically derived or internationally formed. From a practical perspective, this would be especially burdensome for small or developing States, whose foreign ministries may lack the capacity to monitor whether domestic principles in other States may evolve into GPLs. Third, the purpose of the persistent objector rule as a tool for influencing the development of emerging customary norms does not translate well to GPLs, which are more abstract and context-dependent. Fourth and finally, although there has been some academic and ILC discussion on the relationship, no international court or tribunal has endorsed the applicability of the rule to GPLs.

Taken together, these arguments show that the persistent objector rule has no role to play in relation to GPLs. From a realist perspective, the implications of this article may attract criticism from positivist legal scholars who are reluctant to dilute the role of custom. For States, it is likely that they would argue that States should retain the full ability to withhold consent from emerging legal principles. Moreover, the article may serve as a wake-up call, making States aware that they should be cautious when referring to GPLs, and potentially leading to the more explicit formulation that they 'object to it as both custom and a GPL'. Hence, stronger strategic contestation of legal principles may be required. The effect may be the reduced acceptance of GPLs as a source of international law, especially in relation to the second category of internationally-

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press

derived GPLs, if States can be bound with no way to opt out. Judicially, States may have heightened concerns about judicial activism where GPLs are employed. Essentially, without the impression that there is a method for avoiding being bound unwittingly in the form of the persistent objector rule (even though that rule in fact cannot play a role in the formation of GPLs), States may perceive GPLs as an overly autonomous source of international law and may respond by resisting, narrowing or disregarded their application. Whether this will materialise remains to be seen.

Acknowledgements. The author serves as Assistant to the ILC Special Rapporteur on General Principles of Law, HE Ambassador Marcelo Vázquez-Bermúdez. All views expressed are the author's own. Special thanks to Professor James Green, Professor Mads Andenas KC and Professor Harro van Asselt for their valuable feedback on earlier drafts. The author would also like to thank Anna Riddell-Roberts for her feedback. All remaining errors are the author's own.

Cite this article: ROF Derler, 'General Principles of Law and the Persistent Objector Rule: A Theoretical and Practical Incompatibility' (2026) 75(2) ICLQ 405–441. https://doi.org/10.1017/S0020589326101602

https://doi.org/10.1017/S0020589326101602 Published online by Cambridge University Press